1967 / 2

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No.14 of 1964

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

RECORD OF PROCEEDINGS

VOL. III

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No. 49
Proceedings - 21st March 1961

MR. DINGLE FOOT:

My Lord, before my learned friend's address to Court I have an application to make. Your Lordship will recall at an earlier stage I applied that these proceedings should no longer be in camera. Your Lordship conceded to that application. I have since then received a communication from my learned friend, Mr. Summerfield - I don't think it necessary to go into the nature of it - I have communicated it to my client and they wish now that the proceedings should continue in camera. I hope Your Lordship will agree with the application I have made now, that the proceedings should continue as they have done before.

JUDGE:

Mr. Summerfield, do you support the application?
A. Yes.

MR. SUMMERFIELD:

May it please you, my Lord, before the adjournment last June Mr. Newbold did address your Lordship at some length on certain aspects of this case, reserving only a few other aspects for the final address. I am sitting in his shoes so therefore I do not propose to cover the ground which has already been covered by Mr. Newbold, and having regard to that address, my Lord, it appears to me, subject to anything your Lordship may say, that there remains only the following four matters on which I should address your Lordship. The first of them is the question of additional tax which can be sub-divided into three sub-heads. First of all whether the Commissioner has power to assess additional tax under Section 72, where the assessments go back more than 7 years, and the second sub-head is whether the quantum additional tax can be considered by your Lordship and if your Lordship should so uphold then what that quantum should read; and the third sub-head - it does not appear to have been clear from his opening - is whether any of the assessments are time-barred.

Now I don't know whether my learned friend can concede at this stage or whether I should address your Lordship on this.

MR. DINGLE FOOT:

I think my learned friend should argue this point.

MR. SUMMERFIELD:

That is one of the heads I think I ought to deal with. The second matter which Mr. Newbold left over for this stage is the question of Gian Singh's rents, that is to say, whether they are properly assessable. The third point is the question of whether any part of the proceeds of the sale of the Grogan Road property is assessable on the appellant tax-payer, and fourthly generally the question of whether the assessments are excessive in amplification of Mr. Newbold's address and in the light of Mr. Easterbroo's evidence, and that would include the pseudo scientific allocation of profits over the period which is thought to have been made.
Turning to the first of these, my Lord, is the question of additional tax and whether Section 72 only permits assessments going back over 7 years. ....In my submission there is no need to give it that distorted meaning at all, which words in my submission appear to contradict clearly the words in Section 40, sub-section 3, which imposes additional tax. It specifically refers to Section 72.

The second sub-head - and that is whether the quantum can be considered by your Lordship subject, of course, to the argument on Section 72 - the quantum of additional tax. My Lord I would at this stage perhaps try to make this point that additional tax was imposable, subject to the interpretation of Section 72. There can be no doubt about it at all. There can be no doubt whatever there has been at the very least gross neglect and probably almost certainly fraud. There is also the omission of the appellant, of at least neglect in the letter of the 19th June, 1958,

paragraph (?) Exhibit 2. I think your Lordship pointed out that once there is an omission that attracts a penalty it is only if the Commissioner is satisfied that there has been no wilful neglect that he can remit the whole of it.

While, my Lord, this argument must of course be subject to the finding of Section 72, if your Lordship finds that going back over the 7 year period both basic tax and additional tax may be imposed, then in my submission it has been correctly imposed here and cannot be remitted because there has been fraud and gross neglect, and there has been gross neglect admitted by the appellant himself, if the letter of June 1958. Of course that does not get over the argument of Section 72, but he is admitting that he has been negligent. That is reinforced by Col. Bellman's own letter when he was writing in relation to the 1954 assessment. The absence of any explanation in the interview of the 18th April, 1956, could leave you the one conclusion to draw.

Adjourned.

No. 50
Counsel's Addresses - 22nd March 1961

C.A. 4 - 11 of 1959

9 a.m. 22nd March, 1961

MR. SUMMERFIELD:

My Lord, yesterday I was dealing with the question of the proper interpretation to be put on section 72 of the 1952 Act, and in some respects I feel I ought to amplify my submissions on that particular section, and if I may say so, the observation of your Lordship in relation to the word "attributable" is very forceful, and I think it would be advisable for me to suggest an alternative interpretation which would not undermine the whole purpose of section 40 and make nonsense of the intention of the legislature.

The application of this proviso has two important aspects: the first in relation to the

years of income 1946 to 1950, as to whether the Commissioner can assess at all. He can only assess at all if there has been fraud or wilful neglect; and the second aspect is whether, if he can assess, he can impose additional tax - whether that proviso confines him to recovering only the basis tax attributable.

JUDGE:

Will you repeat that, Mr. Summerfield.

MR. SUMMERFIELD:

The years of income 1946 to 1950 were assessed beyond 7 years; that brings in 1951, 1952 and 1953, so we do not have to look at proviso at all. The other years 1946 to 1950 were outside the 7 year period. There are two aspects which could arise, but it is as well to distinguish them for the purpose of interpreting them. The Commissioner can only assess if the re is fraud or wilful default. Secondly, if he can, can he recover additional tax? As to the first of those two, I would say first of all that they do not arise in this case at all because the point has not been taken in the Memorandum of Appeal. The right of the Commissioner to assess has not been challenged.

JUDGE:

I thought it was.

MR. SUMMERFIELD:

I know your Lordship made that observation and I agreed, but I have looked at it more carefully, and I can convince your Lordship to the contrary.

JUDGE:

I thought that it was contained in the grounds of appeal.

MR. SUMMERFIELD:

I concluded that it had taken that point, but I do not now think that to be the case. I am looking at the Memorandum of Appeal for 1949, which I think is common to the remainder of that category. (Reads). And that is, I think the hub of the argument, and that is what I was seeking to deal with yesterday.

JUDGE:

Are we safe in considering only the provisions of section 52, because I observe the Memorandum of Appeal refers to the provisions of Chapter 254.

MR. SUMMERFIELD:

I am looking at section 8 of Cap. 254, which says: (Reads). I do not think any argument on that has been elaborated at all; I can only think it means section 8 of the Act which is the charging section of income, and I think what is alleged there is that certain amounts which were not income were charged as tax. It makes more sense looking at it that way.

JUDGE:

I do not think section 8 has anything to do with the matter at all.

MR. SUMMERFIELD:

I agree, my Lord.

MR. FOOT:

My Lord, I do not recollect that I have addressed any argument on this particular ground, and I think my learned friend can leave it for the moment.

JUDGE:

Very well.

MR. SUMMERFIELD:

Leaving that aside, there is ground 2(a). (Reads) That was the ground I was trying to deal with, not very happily, yesterday. (Reads grounds 3 and 4). Nowhere does it challenge the right to assess under section 72, and I am looking at the Income Tax Supreme Court Rules, 1959, Legal Notice No. 12 Rule 4. (Reads). Looking at Rule 15: (Reads). No application has been made. It would be a little too late now to make such an application, and in my submission the right to assess cannot be challenged. There has been fraud or wilful neglect in respect of those years to entitle the Commissioner to assess. I have arguments to address to your Lordship, if you wish me to do so, but I think the proper course would be to adhere to that stand at this stage and only address your Lordship on that if at a later stage your Lordship should permit the appellant to argue the further

ground that the Commissioner had no right to assess. It does say very clearly in para. B of the proviso: (Reads). That includes the rules you must take it in your Memorandum of Appeal, and your Lordship will recall that this is not the first Memorandum of Appeal; this is the second Memorandum of Appeal.

JUDGE:

Is this the one signed by Mr. Mandavia?

MR. SUMMERFIELD:

No, by Mr. . I do not know if it is exactly the same. I think they are exactly the same, but I will have that checked. At any rate it is the second Memorandum. The second aspect, then, is the amount which can be included in the assessment where the Commissioner has to rely on proviso 72A, and that affects the years 1946 to 1950. My Lord, here again, the Memorandum of Appeal merely challenges the right to include what they call a penalty - by that they mean additional tax. What they are challenging is the right to include additional tax under section 72A. They are not saying, and in my submission they are not entitled to say, that any sums included in the assessment have been improperly included as not being attributable to fraud or wilful default. They must confine their grounds or arguments as to why these assessments are excessive to the grounds they have raised in the Memorandum of Appeal, and they appear, so far as the quantum is concerned, in para. 4 of the Memorandum of Appeal, which says: (Reads). I admit it raises amongst other things .... but that does not carry the matter any further. And it sets out the Shs. 10,000/- for African wages. The commissioner has wrongly added back legal expenses, the rents not received, medical expenses and repairs to relatives' property.

JUDGE:

Yes, but are you not forgetting, as would seem to me at present as being the real question raised by ground 2(a), that is to say, as I read it, that the proviso only applies in relation to the making good of

the loss to the revenue?

MR. SUMMERFIELD:

The ordinary meaning of that, my Lord, is that they are concerned with the addition of a penalty only, and they have said it is wrong to add back the penalty.

JUDGE:

They may say it is wrong to add back the penalty for a variety of reasons, but is not one of the reasons implicit in this ground 2(a), that you can only assess out of time, if you can assess at all, for the purposes of making good the loss to the revenue.

MR. SUMMERFIELD:

It is a rather concealed way of putting it. They are saying that under section 72A you cannot add a penalty; it is not saying more than that. If they wish to show that sums were included in these assessments which should not have been included because they were not due to fraud or wilful default, I think they should say so.

JUDGE:

That may be. Their contention, is it not, is that the imposition of additional tax is contrary to law as the assessments are made more than 6 years after the year of income.

MR. SUMMERFIELD:

That is how I read it.

JUDGE:

If that is so, is it not implicit in that context that the statute only authorises the assessments after the expiration of 6 years for the purpose of making good a loss to the revenue. Therefore any penalty cannot be included.

MR. SUMMERFIELD:

That would conflict with what we say in para. 4.

JUDGE:

Para. 4 is not dealing with penalties. It is

the alleged additional income.

MR. SUMMERFIELD:

That is so. There are two aspects, my Lord: one, whether the Commissioner can put in a penalty under section 72A, and the other is, what kind of income can he assess. They have not challenged the income he has assessed.

JUDGE:

No, not the right to assess.

MR. SUMMERFIELD:

Not the right to assess. They have not challenged that the amounts included in the assessments cannot be included because they are not attributable to fraud or wilful default. I will deal with what can be included in an assessment under section 72. To do that I ought to read first of all section 71; that says: (Reads). The point I am making is that that section is dealing purely and simply with basic tax, and that is made very clear from sub-section 3. (Reads).

JUDGE:

Is it not an offence to fail to deliver a return?

MR. SUMMERFIELD:

Yes, my Lord, and it also attracts additional tax. Turning to section 72: (Reads). I submit that that is also, as in the case of section 71, dealing purely and simply and exclusively with basic tax. It is not concerned with additional tax at all, because additional tax is not really assessed in the ordinary sense of that word; it is imposed automatically by section 40. So what section 72 is saying is where a person has not been assessed the Commissioner may assess him to the basic tax which according to his judgment ought to have been assessed. However, if more than 7 years elapses between this discovery in the basic tax, in assessing basic tax, he is restricted in assessing basic tax only to that portion which is omitted which is attributable to fraud or wilful default. In

other words, he cannot include in the assessment any innocent or inadvertent omission which is 7 years old. That of course gives the words "any loss of tax attributable to fraud or wilful default" a very real and proper and sensible meaning.

JUDGE:

Have you read sub-section 3 of Section 40, because that may take you a very long way along your path.

MR. SUMMERFIELD:

I was going to suggest that the charging of the additional tax is quite a separate exercise altogether from the assessment under section 71 and 72. and that, as your Lordship has observed, is governed by section 40. That imposes the additional tax which is exigible under section 71 or 72, and as your Lordship has pointed out, sub-section 3 of that section makes it clear beyond doubt that it can be imposed where the assessment has been made under section 70. It says so expressly, and I think it makes it clear that that is not part of the basic process at all. If you will look at section 40 it says: (Reads). It does not say shall be assessed for that amount of tax.

My Lord, that then with respect leads me to the point that what section 72 is saying is that you are restricted in your basic tax to the amount which is attributable to fraud or wilful default. As to separate exercise, he can impose additional tax under section 40, which incidentally supports that view because 41B says this: (Reads). That would mean it is there restricted - the calculation of the basic tax.

JUDGE:

I should have thought that sub-section 3 draws a clear distinction between the tax which may be assessed under 72 and the additional tax, because it expressly provides that the additional tax is to be charged in relation to the tax which is assessed.

MR. SUMMERFIELD:

With respect, I entirely agree.

JUDGE:

It would seem to me to dispose of this point.

MR. SUMMERFIELD:

I will not pursue this matter at this stage. But it does lead on to the submission I have to make that it has not been challenged that any of the sums included in these assessments 1946 to 1950 have been improperly included under section 72, proviso A because they are not attributable to fraud or wilful default, but as dealing only with basic tax. They have confined their challenge to the fact that accepting that the amounts have been....included you cannot impose any additional tax. I do not think I need go further into that particular aspect. Assuming your Lordship were to hold that it was incumbent on me to show that the appeal does cover the fact that these should not be included because they are not attributable to fraud or wilful default, then I perhaps ought to reserve my comments on that if it is raised.

MR. FOOT:

My Lord, I will read the first ground of appeal: (Reads). In my submission, that would be wide enough to enable me to argue that there was not here fraud or wilful default. Also your Lordship will recollect that when I opened this case last summer I endeavoured to place before you an argument that where you have a taxpayer who has two sources of income and there has been wilful default in relation to one source but not relation to the other, the taxpayer cannot be penalised in respect of both sources of income, but only in respect of the source of income in which there has been wilful default. There is the example of the professional man who writes for the press as a sideline. The penalties would only attach in relation to the main source of income and it would be wrong to impose a penalty based on the whole of his income.

MR. SUMMERFIELD:

I do not think that in any case entitled my learned friend to enlarge his ground of appeal unless he makes application under the rule. To deal with it briefly, I think what my learned friend may have in mind is the fact that in the U.K.....

JUDGE:

I do not think you need deal with that at this stage. As I understand the law, whatever may appertain in England where tax is leviable under separate cases, in this country income tax is not leviable under separate cases but is imposed by a single section.

MR. SUMMERFIELD:

I agree entirely, and the quantum of the penalties is governed by section 40 which does not make any....

JUDGE:

Mr. Foot's argument may nonetheless have great force in this regard, that where there has been fraud or wilful default there is a power to assess more than 6 years after the relevant year of income, but that power is confined to a power to assess for the purposes of making good the loss to the revenue attributable to the fraud. If therefore a professional man has by fraud or negligence omitted to return £10 from his minor source of income he can only be assessed under section 72 in the sum of £10, because that is the only loss to the revenue attributable to his fraud or his neglect. It matters not whether one tries to treat his income as separate income. Here one is concerned with the loss to the revenue attributable to the fraud.

MR. SUMMERFIELD:

That is so. But assuming that it was £10 that was fraudulently excluded and he was assessed at £100, when it comes before your Lordship he must put in his Memorandum of Appeal that this should have been £10 and not £100, because the other £90 is not attributable to fraud or wilful default. He has not said that, so he cannot challenge the amount in the assessment on that ground. Once that £100 is in, the penalties spring from what is in the assessment and is not confined to £10. All I am saying at this stage is the fact that he cannot challenge the fact that these assessments are wrong on the grounds that none of the income is attributable to fraud or wilful default. That is all I am saying, and I do not know if I should ask your Lordship for a ruling. I might say this. If he could raise the point despite the fact that it is not in his Memorandum of Appeal,

the onus is on him, in my submission, to show that any amount included in the assessment for those years 1946 to 1950 should not have been included because they are not attributable to fraud or wilful default. The onus is on him to show that.

MR. FOOT:

It may be convenient if this matter could be cleared up at this stage. In my submission, it would not be the correct procedure for my learned friend to split his argument into two parts. The submission I have to make is this, that if I should decide to ask your Lordship that there was an absence of fraud or wilful default either in relation to any one of the returns or in relation to part of then, I would be covered by the first ground of appeal. (Reads first ground of appeal). It may be it could be more clearly expressed, but penalties attach where there is fraud or where there is wilful default, and if I said that this is not a case in which penalties should be imposed at all, they say that this is a case in which there was not the necessary element upon which the penalties can be founded, that is to say, fraud or wilful default.

JUDGE:

As I understand it, the only reference to fraud or wilful default in 72 is in proviso A, which solely relates to the right to assess out of time. 40 on the other hand attaches penalties to certain failures quite regardless of fraud. But 42 enables the Commissioner, if he is satisfied as to the absence, inter alia, of fraud, to remit those penalties; in other words, the attraction of the penalty under 40 is in no way concerned with fraud or gross or wilful neglect. The remission of the penalty by the Commissioner is only permissible in the absence of fraud or gross or wilful neglect. That would seem to be the logical construction of the section.

MR. FOOT:

But of course the taxpayer can say two things: First of all that the Commissioner has made a mistake, that there was no default, or else he can say, under section 40(2) that the Commissioner ought to have been satisfied that the omission was not due to fraud or wilful default.

JUDGE:

Can he say that? Have I not power to substitute my own for the Commissioner's? Is it not one of those provisions where the authority who is entrusted with a function is made the final authority on the exercise of that function?

MR. FOOT:

I am looking at section 78, which reads (Reads). He can prove that in my submission in any way.

JUDGE:

It seems to me at present that there is no question of an assessment or penalty. The Commissioner is empowered to assess to what for convenience I term basic tax. Having done that, the penalty is automatically attracted in the circumstances contemplated by section 40 (1). The Commissioner, however, enjoys a further power where he is satisfied that there was no fraud or wilful neglect to reduce or to remit the penalty.

MR. FOOT:

Your Lordship is entitled to review the whole position of the Commissioner. It would be a very strange state of affairs if the taxpayer who has been held by the Commissioner to be guilty of fraud, and the Commissioner says, I am satisfied about this - in such a case the taxpayer cannot come and say, Well, I was never guilty of any fraud at all.

JUDGE:

You may not appear familiar with the history of the income tax legislation of East Africa, but until very recently there was an expressed power which enabled the Court to reduce or mitigate penalties imposed in respect of these matters, and that power was taken away by the legislature. So presumably the legislature did not think the courts were competent to challenge the Commissioner's discretion in these matters.
(To Mr. Summerfield): Is there a section specifically dealing with this, Mr. Summerfield?

MR. SUMMERFIELD:

There is not in the 1952 Act, but the Court of Appeal has, before the matter was argued before it,

taken the view that the courts can interfere with the quantum under the 1952 Act. The point was never argued. When it was about to be argued, the court said, We have done it now twice before and I think it is too late to argue it.

MR. FOOT:

I think it was the Mandavia case. In that case the Court of Appeal did reduce the quantum of penalty. If your Lordship is entitled to do so, then of course you are entitled to look at the conduct of the taxpayer and see how far you think there was an element of fraud or gross or wilful neglect. (Reads section 40). That would appear that the onus is upon the taxpayer to satisfy the Commissioner, because unless he is satisfied he does not remit. If your Lordship is entitled to exercise the same function, it will be necessary for me to satisfy you in relation to these omissions that they were not due to fraud or gross or wilful neglect.

JUDGE:

I do not think so, because I have read the sub-section very carefully, and I think the view which I expressed tentatively is reconcileable with the decisions of the Court of Appeal, because on re-reading the sub-section I observe that the Commissioner has no discretion in relation to the remainder of the tax where he is satisfied that there has been no fraud. He is obliged by the section to remit it. He has, however, a discretion in any other case - that is where he is not so satisfied - to remit or reduce the penalty. And it would seem therefore that the Court of Appeal decision did not turn on the question which was exercising my mind - they were exercising the general power of the Commissioner to remit or reduce. It is not a question whether they are satisfied as to the existence of fraud or otherwise.

MR. FOOT:

In my submission, it must be open to an appellant to show that the Commissioner was not entitled to be so satisfied. I am a little handicapped because I did not know the point was going to arise in this way.

JUDGE:

You will have an opportunity of addressing me on this point. At the moment you are merely interposing with a view to preventing Mr. Summerfield dealing with anything that it is unnecessary for him to deal.

MR. FOOT:

Yes, My Lord. I do not know whether your Lordship will rule now on the submission with regard to the first ground of appeal. In my submission, it is sufficiently wide to cover this point.

JUDGE:

I prefer in a case of this nature to deliver as few interlocutory rulings as possible. Deal with it when your time comes on the footing which you have suggested.

MR. SUMMERFIELD:

I will advance my argument on the first ground of appeal. That says the assessment appealed against it excessive. (Reads ground 1 of appeal). It is addressed purely to the question of whether a penalty can be added. It does not open up generally the question of fraud or wilful neglect in relation to assessment to basic tax. It does not raise the question of fraud or wilful or gross neglect at all, because it is dealing purely and simply with the imposition of the tax, not the power or duty or discretion of the Commissioner to remit it in whole or in part. As your Lordship has observed, the imposition of the tax in law or in fact does not depend on any question of fraud or gross or wilful neglect. Imposition is automatic. The question of fraud or gross neglect only arises in relation to the Commissioner's duties or discretion, which is not covered by this ground one. Even if I am wrong on that, it is quite clear that in talking about penalty at this stage it cannot be taken to entitle the appellant to argue in relation to 72A, which talks about fraud or wilful default. It is confined purely to the question of penalty and not to basic tax. My learned friend did say that the taxpayer can show that he had made no default and that he would ask your Lordship to intervene. The answer of course is, certainly, if he has taken the point in his Memorandum of Appeal, but not

otherwise. As he has not taken it in his Memorandum of Appeal, he is precluded from raising it. I am dealing with 72A, imposition of basic tax. The question whether you are entitled to vary the amount of additional tax imposed is a matter on which I shall address a completely separate argument because that may depend on whether your Lordship is bound by section 101 of the 1958 Act.

In relation to interlocutory matters, I will say this only, that I will deal with it briefly, but still reserving my right to say that my learned friend may not deal with it, and possibly at a later stage crave your Lordship's indulgence if the matter is raised.

MR. FOOT:

With great respect, I am entitled to know the whole of the argument which my learned friend desires to address the Court.

JUDGE:

As I understand the position, Mr. Summerfield at this stage is making his final address. After he has concluded his final address, you address me. Mr. Summerfield then has a right to address me in relation to any authorities cited by you in your final address, but not otherwise, and that would seem to be conclusive of the matter. He must now deal with the whole of his case. Later on you may cite authorities and he may comment upon them.

MR. FOOT:

The question, my Lord, is Is he only entitled to comment on fresh authorities?

JUDGE:

Yes.

MR. SUMMERFIELD:

Am I expected to address your Lordship on a matter which does not appear from the Memorandum of Appeal to be part of his case. Am I entitled to do that so that my friend can broaden his case in his closing address?

JUDGE:

I think you must, Mr. Summerfield.

MR. SUMMERFIELD:

In making this submission I do so with the reservation that Mr. Foot is not allowed to raise this point in the appeal. I do it on that basis only.

JUDGE:

This is purely an alternative argument. Your argument will be in these terms. If, however, Mr. Foot is entitled to rely on the absence of fraud, then I ...

MR. SUMMERFIELD:

I said if he is entitled to raise it, then the onus is on him to show that any amount included in the assessment should not have been so included because it is not attributable to to fraud or wilful default, and for that proposition I would refer to the Mandavia case: East African Law Reports (1958) P. 407 (Reads). That follows section 113(c) of the 1958 Act. (Reads). It is not objected to that the assessment has been made; there is an onus on the Commissioner to show fraud or wilful neglect.

JUDGE:

Have I held that?

MR. SUMMERFIELD:

I think in an interlocutory matter you did hold that in an earlier case.

JUDGE:

The matter arises in the Pritam case.

MR. SUMMERFIELD:

Your Lordship said the onus was on the Commissioner to show fraud or wilful neglect.

JUDGE:

Yes, I remember.

MR. SUMMERFIELD:

That appeal has not been challenged, and the question then arises as to whether it is excessive because it includes matters not attributable to fraud - that is part of the income assessed in the

assessment, and the onus in respect of that must be on the taxpayer under section 113(c), and Mandavia's case. He must show that this or that item should not be included because it is not attributable to fraud or wilful default. I would respectfully submit that no attempt whatever has been made to that. Assuming you should hold that all this income has been omitted, there has been no attempt to show that that has not been due to the fraud or wilful default by some person acting on behalf of the taxpayer. With respect, no defence could say, I left everything to my accountants and I signed the returns blind. First of all there is authority that a taxpayer is responsible for the acts of his agent. Quite apart from failing to discharge the onus on him under section 113 (c), I think it may be urged very strongly that the evidence leaves no doubt at all that there was fraud. I am relying on fraud primarily. If there was no fraud, there was certainly wilful default. That clearly, in my submission, emerges from the evidence as a whole. I would first of all refer to the note of interview of 22nd March, 1956, in Exhibit 2 and the annexure thereto. (Reads second para. of note of interview). That at any rate shows that Rattan Singh knew that the returns had not been included for income.

JUDGE:

But if someone pays into my bank account in some other country monies of which I am unaware, when I make out my income tax return, no doubt being truthful person, in due course I say, I am afraid my return is wrong, because I have received those monies and I did not know about that at the time.

MR. SUMMERFIELD:

That would be true. But this of course is before the investigation.

JUDGE:

It is before the investigation by accountants, but presumably one must bear in mind the background, which is that he paid no attention to his accounts himself; he left everything to Nanda, and even signed his income tax forms in blank. When he is asked about it he no doubt takes a greater interest

in his affairs and they discover that there were irregularities. The strongest point on that would seem to me to be the very late disclosure of the existence of two bank accounts.

MR. SUMMERFIELD:

That conduct of the appellant shows what was in his mind at the time; but I was going to refer to the next note of interview in which the amount of income which had been excluded was disclosed - the note of interview of 18th April, 1956, P.2. (Reads). Here we have two properties returning a rental of £700 a year which had been systematically omitted year by year. That is completely incompatible with innocence. It clearly shows a deliberate act on the part of somebody either acting for Mr. Rattan Singh, or more probably Mr. Rattan Singh himself, because no junior employee is going to deliberately execute a fraud on behalf of his employer.

JUDGE:

Were other returns made of rent in those years?

MR. SUMMERFIELD:

Yes my Lord.

JUDGE:

What I have in mind is this. If in a particular case I return rents from some premises and not from others, it would appear to me that the omission of the others was at least not due to a failure to realise that rents formed part of one's income.

MR. SUMMERFIELD:

Some rents were returned; they are from Blenhaim Road - £365 a year. I can say this, my Lord, that no real effort has been made to displace the obvious inference which can be drawn from that systematic omission of rents over those years. He must have known that he had omitted those rents of £700 a year and he said no. He must have knew at that stage that he had omitted that kind of income from his returns. And then I think the figures speak for themselves in relation to amounts returned: 1946, he returned £516 business profits; £557 rents; whereas in the second report the profits amounted to 757, - comparing it with the

agreed figure of £1,500 and the rents returned by Thian in his first Report of £1,049. Almost double. 1947 the business profit is £492, the rents returned £375; profits, Thian second report, £2,466. Again, I must say it was an estimated figure by Thian. But again compare it with the agreed figure of £6,250 business profits in 1947. 1948; the profits returned were 512, the rents returned, £375. Thian's unadjusted second report figure of business profits before Mr. Easterbrook touched it was £6948, and the rents were £1557.

At 11 a.m. Court adjourns for 15 minutes.

Wednesday, 22nd March, 1961 11.15 a.m.

JUDGE: Yes, go on Mr. Summerfield.

MR. SUMMERFIELD:

I was reading out the comparison of the figures in the return, Thian's report, and the agreed figures with Thian. I ought to point out in relation to 1948 and 1947 Your Lordship will recall that from 1948 there was an adjustment back to 1947 of 91,000, which would account for the apparent anomaly of course in Thian's business profits of 7,000. The agreed profits fall back to 4,000.

JUDGE: Yes, I remember.

MR. SUMMERFIELD:

My Lord, turning now to 1949, the return of profits, business profits, were 563, rents 375.

JUDGE:

How much?

MR. SUMMERFIELD:

375. Business profits, as a result of Thian's second report, 2719, business profits.

JUDGE:

I haven't got the rent figure returned.

MR. SUMMERFIELD:

375, My Lord.

JUDGE: Yes.

MR. SUMMERFIELD:

As a result of Thian's second report, the unadjusted figure - all these figures I am giving in this second report are unadjusted figures - 2719; rents 1293. 1950 - I beg your pardon, I should have given the agreed figure of profit, 1949 was 5710.

JUDGE: Yes.

MR. SUMMERFIELD:

For 1950 the return of profit was 1148, business profit. Rents 375. Unadjusted Thian's second report, profit 6798; the rents 1358; and the agreed profit, business, was 5771. Of course, when I say "agreed" I must make it clear that is the computation. Of course the figures have been agreed.

JUDGE: Yes, quite.

MR. SUMMERFIELD: I have not given Your Lordship the rents subsequently agreed in the final computation. Of course they include Gian Singh's rents. I am only concerned with the discrepancy between what was returned and what Thian said was the rents to support my view that the figures speak for themselves.

JUDGE: Yes.

MR. SUMMERFIELD:

I think that is all I need give Your Lordship because those are the only years which are concerned under Section 217(a). The other years were of course all in time, 1951, 1952 and 1953.

JUDGE:

What about Blackhall's figures for those years? Are they substantially in excess of the return or not?

MR. SUMMERFIELD:

Only two of them, My Lord. The two years are substantially in excess; that is to say, 1947 and 1948. The others, it is very interesting,

my Lord, that they are less than what was returned. In some cases, 1946 for instance, business profits returned was 516, Blackhall's figure in the 6th June report is 300, and in the Exhibit 26 it is 419, business profits.

JUDGE:

Yes.

MR. SUMMERFIELD:

Of course the rents are very much higher, the one returned by Blackhall, very much higher than those returned. In every case it is substantially higher than those returned. My Lord, I think the best thing would be for me to have this typed, which I think sets out a comparison of all these figures, to assist both Your Lordship and probably My Learned Friend.

JUDGE:

Have you any objection?

MR. DINGLE FOOT:

No, My Lord, not in the least. I think it might be of assistance if My Learned Friend, when he is having it typed, would carry it right through to 1953.

MR. SUMMERFIELD:

I have 1953. That is Exhibit 26.

JUDGE:

Very well. A typed table of comparative figures will be handed in and will deem to be incorporated in Mr. Summerfield's address.

MR. SUMMERFIELD:

If it please you.

JUDGE:

That is an order made by consent.

MR. SUMMERFIELD:

Well, an Accountant, or a taxpayer

for that matter, may have made a mistake once or even for that matter twice. The consistent course of under-statement here, My Lord, in my respectful submission points to only one reasonable conclusion, and I would say, my Lord, despite what Mr. Rattan Singh said in the box that he handed everything over to his Accountant and signed the return blind, it does defy belief that any man, any businessman, any prudent businessman he would have to be a fairly prudent businessman to build up a business of Mr. Rattan Singh's size - would be so unconcerned as to what his books say that he would do such a thing. Every man must be interested in what is being returned on his behalf. The only conclusion, if there is any truth in what he said, is that he wilfully turned a blind eye to what he knew perfectly well would be to his advantage. My Lord, I would, in this connection, wish to quote certain observations of Mr. Justice Rowlatt in the Attorney General v Johnston. It is reported in 10 Tax cases. I am afraid it is not there, My Lord. I have only just got it in the interval. I have got the Library copy. It is reported at Page 758. The facts, I don't think are important. It was a recovery of penalties case, but this is what Mr. Justice Rowlatt says at Page 763 - I think it has particular application to this case - at the bottom of the page there:-

> "Do you tell me that a man who can conduct a successful business - he says he does it all himself - making £1,500 a year does not know at the end of the year what his books show? His banking account will tell him; his household expenses will tell him; what he has in his pocket will tell him. He would know if he made £300 or £1,500. It is no use putting up this argument to me or to anybody else who knows anything of human affairs. Anybody with the slightest knowledge would know it."

He goes on to say :-

> "It is a very bad case. Year after year a false statement was put forward, and knowingly put forward to deceive the

officers of the State and of the public and to escape a fair share of taxation which this man ought to have borne just as other people in the country bear it, so as to share the burden fairly between the population according to law".

My Lord, I think that is particularly apt here having regard to the discrepancy in the amounts of income returned, both business and rental, year after year, with the true amount, and can leave no doubt in Your Lordship's mind, I submit, that he knew perfectly well of these omissions and that that amounts to fraud, and particularly if it is coupled with the evasiveness, evasive conduct subsequent to the investigation in bringing the true facts to the knowledge of the Income Tax Authority. As Your Lordship will recall, there were two reports. The first report was far from complete and even the second report was not an adequate disclosing of the full facts of this man's affairs. Again, My Lord, one can couple it with his own admission to Mr. Easterbrook of entering up loans made, or loans repaid, as sums payable to Contractors and treated as deductible for income tax purposes. If you link it up, furthermore, with the admissions, at least by Mr. Thian on his behalf, of certain fictitious credits, allowing certain creditors in the books to be treated as fictitious creditors, and add that to the concealment of the bank accounts, as Your Lordship has already pointed out ...

JUDGE:

You see, Mr. Thian may have been wrong about the creditors being fictitious, but the bank accounts, it would seem to me, as at present advosed, it is unlikely that the taxpayer would have forgotten.

MR. SUMMERFIELD:

There is that doubt, I agree with you, My Lord; there is that doubt, but I don't think an Accountant would lightly allow creditors to be treated as fictitious.

JUDGE:

No, but he may have been mistaken for some reason or other.

MR. SUMMERFIELD:

As I submit, My Lord, that is all constant with only on conclusion. There is of course the admission in his own letter, I think, of the 19th April, of neglect. Your Lordship may treat that as not very significant although he must have been advised by somebody. His own admission in that respect may not carry a great deal of weight: I would not want Your Lordship to put a great deal on that letter.

MR. DINGLE FOOT: 19th June.

MR. SUMMERFIELD:

19th June. I am much obliged. Of course there is Bellman's own letter, and he is a Chartered Accountant who assessed the position and made it quite clear. In his view his conduct had attracted penalties.

JUDGE:

What date?

MR. SUMMERFIELD:

That is the letter of the 13th April, 1958. "My client will clearly have to pay heavy penalties for this", that is to say, the earlier omission. My Lord, all that - probably a sledge hammer to crack a nut at this stage - is leading up to my earlier submission that there can be little doubt at all of the entitlement to assess, and entitlement to assess these sums, all these omissions, as being attributable by fraud and at the very lowest wilful default. Of course one can use the same facts, same arguments to justify the imposition - not 'imposition' because it is clearly an omission - but to justify the remission of the whole of the tax, or to treat it as a serious case and to remit only part of the additional tax. If, in my earlier submission on this aspect, it cannot be raised by My Learned Friend, he is over-ruled. His

position with regard to 1951 and 1953 is of course very much easier. We don't have to rely on Section 72(a) there at all; we simply rely on Section 72; no question of fraud or wilful neglect before assessing either basic tax or additional tax. Any tax on income which has been omitted may be brought in and, of course, if there has been an omission, then the additional tax automatically follows, subject of course to the power to remit if there has been no fraud, gross or wilful neglect.

JUDGE:

In relation to those years.

MR. SUMMERFIELD:

Can be dealt with in relation to those years, but of course again, My Lord, if one looks at the rents alone, the rents alone in each of those three years, the rents returned was £375, and the rents as appear in Thian's report, which doesn't substantially differ from Blackhall's, are in the region of £1,600. and the business profits as returned were 771 in 1951. Thian showed a loss for that year in his second report. £1,600.

JUDGE:

Thian or Blackhall?

MR. SUMMERFIELD:

Thian, My Lord. Blackhall showed a profit of £1,100. but the agreed profit, Thian's agreed profit, was £2,945. 1952 the profit, business profit returned, business income returned, 4,415, the highest for any year. Mr. Thian's second report makes it 9,885. Mr. Blackhall makes it in his first report 3,000, but the agreed profit was 11,543. In 1953 the returned profit was 2,929. Mr. Thian makes a loss of 3,500. Mr. Blackhall makes it 600 in one report and a loss of 231 in the other, but the agreed profit was 7,575. Well, My Lord, there is clearly the right to assess and I do submit the penalty

should automatically follow. The question which now really arise on all this is whether Your Lordship has power to reduce, or increase for that matter, the quantum of additional tax which has been imposed. My Learned Friend's argument in opening on paragraph 1 of the 5th Schedule to the 1958 Act - Your Lordship will recall that he argued that:-

"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 -

(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."

Now My Learned Friend argued that.

JUDGE:

I haven't found the Schedule yet. What page is it? Yes, I have got it now. Yes.

MR. SUMMERFIELD:

My Lord, the significance of Parts X to XVII being read into the 1952 Act is of course to bring Section 101(5) 1958 Act into force in relation to appeal. It says :-

"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, default, or omission which gave rise to the charge under sub-section (1) was due to any fraud or to any gross neglect ..."

JUDGE:

What Section?

MR. SUMMERFIELD:

101, sub-section 5.

MR. DINGLE FOOT:

My Lord, Page 155.

JUDGE:

Much obliged. Yes.

MR. SUMMERFIELD:

"... 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."

So, My Lord, if that Section applied to this appeal, your Lordship would be confined in deciding whether there had been any fraud or gross neglect. If there has, then the quantum is with respect outside Your Lordship's jurisdiction. If, of course, there has not been, then of course the whole of the additional tax should be remitted. My Learned Friend, Your Lordship will recall, said that this Act, was published on the 30th December, 1958, and the notice of appeal was subsequent to that date.

JUDGE:

When did it come into operation, the Act?

MR. SUMMERFIELD:

The Act came into operation - well, of course it took effect from the 1st January, 1958, but the 5th Schedule does talk about the date of publication of the Act, and that was the 30th December 1958.

JUDGE: Yes.

MR. SUMMERFIELD:

And the Notice of Appeal was subsequent, some days, few days, subsequent to the 30th December, 1958. My Learned Friend argues that there were legal proceedings pending by or against the Commissioner as at that date and that as his client would be prejudicially affected by Section 101 sub-section 5, the position with regard to consideration of the quantum of penalties should be governed by the 1952 Act in which the Court of Appeal has held from time to time that the Courts have a discretion as to the quantum of additional tax.

Now My Lord, Your Lordship may feel that a decision on the submission of My Learned Friend only arises if Your Lordship is disposed to vary the additional tax. I think that would be, with respect, the correct approach. If Your Lordship felt disposed, thought it was excessive or not enough, Your Lordship was disposed to vary it, only at that stage would Your Lordship, or need Your Lordship, consider whether you have power to do so. And, My Lord, my first submission therefore is addressed to the question of whether this is reasonable or not. If Your Lordship were to take the view that the additional tax imposed is reasonable, then I think the matter can end at that stage.

My Lord, the over-all rate of additional tax imposed is 152% of the basic tax. For the year of income 1946 to 1950 it was 119% of basic tax. Your Lordship will appreciate of course that at that stage under the old Ordinance the maximum imposable was 200%. For the year of income 1953 the additional tax was 180% of the basic tax, the maximum imposable being, under the 1952 Act, 300% which of course explains why different rates were imposed in respect of different categories, the maximum was different. The total amount imposed is Shs. 783,911/-. I don't know where the figure of 60% was obtained which was used both in the memorandum of appeal and in My Learned Friend's

opening, but that figure is clearly incorrect. Now I would submit, My Lord, broadly that having regard to precedent in many cases which have come before Your Lordship and before the Court of Appeal, and to the whole history of the case, that is a very reasonable percentage of additional tax to impose. I have already submitted, and given reasons for the submission, that this is calculated fraud for the most part, calculated fraud, but at the very lowest it is the grossest neglect, and, even ifyou accept the Appellants own statements, he has turned over, even if you were to accept it, he has turned over his tax affairs to a completely incompetent man to perform on his behalf.

JUDGE:

Yes, but the liability which attaches to a taxpayer in relation to acts done by his servants must I think, so far as the execution of penalties is concerned, be coloured by the reasonableness or otherwise of what the taxpayer has done. If a taxpayer believes that someone is a competent Accountant, it is less unreasonable to leave that Accountant to fill in the Income Tax returns, and here it must be borne in mind that we are dealing with a Builder who, if I recollect aright, gave his evidence in his native tongue and therefore must, I think, be presumed to be not wholly familiar with English and possibly not to be competent to examine meticulously figures in books kept in English. If he gives it to an Accountant, or someone he believes to be an efficient Accountant, it is one thing: on the other hand, if he said to his Office Boy, "Here is my Income Tax return: fill it in", there would be a much greater degree of negligence.

MR. SUMMERFIELD:

My Lord, I think in the first place that a man, to start with my Lord, the

law deems him to be cognizant of all facts.

JUDGE:

Quite. I agree he cannot escape liability by saying, "I left it to my subordinate", but I think in determining, should it become either proper or necessary to determine, the question of what penalty ought to be exacted from him by reason of his subordinate's default, one may properly say, "Did he have some justification for leaving this to this particular subordinate, or was it a wholly unreasonable act for him to do?" As I say, if he had said to his Office Boy, "Will you look at the books and fill in my return?", it would show the utmost degree of negligence over the matter. If he says to someone whom he has cause to regard as competent, "Will you do it?", it is not so much negligence that he should have checked what was done.

MR. SUMMERFIELD:

Yes, if he knows that. The very least he can do is to make available to the Accountant all information including his rents which ought to be returned, and he ought to explain that that had in fact been done. In my opinion there is that duty. I think it would be a very dangerous situation if incompetent Accountants became at a premium for the simple reason that a taxpayer could hide behind that incompetence when it came to assessing penalties for omissions. It would create a very dangerous precedent. I think the duty on him, if he does not make sure himself that it is correct, the very least he can do is to make sure he has got a reliable Accountant and of course it would have been obvious to him if he had looked at his own return whether all the rents had been included or not. That must have been obvious from the returns. It shows Blenheim Road. He knows there must be other properties. That would throw him on his guard.

JUDGE:

If you were living in India and had to make

your return in a foreign language, would it be obvious to you that somebody had filled in the whole of your affairs?

MR. SUMMERFIELD:

It may not, because I don't speak any of the Indian languages, but the fact that he gave evidence in his native tongue does not mean that, having been here all these years, he doesn't know how to read and write English.

JUDGE:

No probably has some knowledge of English but I have no material before me which would warrant me holding that he has a fluent knowledge of English.

MR. SUMMERFIELD:

My Lord, I do submit that it does not absolve him from getting an incompetent Accountant, even if you accept his explanation, which I do submit is rather an unusual one, for any man to say, "Fill there what you like or what you can get from the books", he would certainly have it at least explained to him, and no Accountant is going to deliberately omit anything on behalf of his employer for the fun of it: he is only going to do it as part of a conspiracy at his employer's request if he does it deliberately. If he doesn't do it deliberately it is because full information has not been made available to him. We don't know what the full circumstances are, My Lord, and the full circumstances must be produced by the taxpayer himself before Your Lordship can assess whether this was, as it appears on the face of it, a deliberate fraud in which they are both engaged. In any event, My Lord, in construing the remission element, considering the remission element, a very important factor of course to take into account is the conduct subsequent. It doesn't of course affect the imposition but it does affect the remission. On that, My Lord, I would

say first of all this was not a voluntary disclosure, it was a disclosure on challenge, and it is not on first challenge. On first challenge he said of course there were no irregularities through Mr. Shaffie. It was only subsequently that he admitted some irregularities.

If I may just pause there to revert to the question of language, he had, it would appear, some competent employees to translate everything on his behalf in the form of Mr. Shaffie, so really language difficulty is not a real difficulty. We can take into account there are plenty of people who can speak English and his own language. There is nothing stopping him getting at what is in his return or what should be down.

My Lord, secondly - I use this expression deliberately - the Income Tax people had to prise the information out of him. The first report, as Your Lordship will recall, was incomplete and so was, for that matter, the second report. There is the incident with regard to the bank accounts, again to obstruct the purposes of obtaining the true facts, and My Lord, looking at the case as a whole I would submit there is very little room for sympathy and that the maximum that could have been remitted has in fact been remitted in this case. My Lord, that of course is on the basis - that was my first submission - Your Lordship will look to see if the penalty or remission of tax should be made where Your Lordship can vary it. If Your Lordship considers it unreasonable, then the question of the power of Your Lordship to vary it arises. Now on that, My Lord, my submission is that no legal proceedings were pending at the time of the publication of this Act to enable the proviso to Section 1 of the 5th Schedule to be invoked. My Lord in approaching the matter I would respectfully submit that it is important to disregard the emotional appeal of My Learned Friend when he points to the

hardship which would arise if Your Lordship were to take another view. He points to the case where his taxpayer may be assessed to treble tax and then under the Act he is divested of his right of appeal against the quantum. My Lord, if there is any hardship in this case it arises entirely from his own default. There would have been no question of this point arising at all if he had made a full and proper return at the right time, so he cannot invoke any argument or any plea on his behalf based on hardship so as to strain the meaning of the words used in the 5th Schedule. My Lord, this is the sort of argument that can cut both ways. If Your Lordship were to accept My Learned Friend's submission then it could have consequences creating hardship the other way, so to speak, because My Learned Friend in asking you to accept that legal proceedings are pending during the projection from the point of time of objection proceedings, if that is so, My Lord, then it must revert back to assessment. You must take the same view there, because it is the same part of the same process of law as he puts it, and if that is so, it must go right back to the time of the issue of the return, and if that is the position, if legal proceedings are pending from that time, then of course it can work a hardship the other way, because, for instance the Commissioner could issue the return before the Act was published, it comes back, the return comes back after the Act is published, he can issue assessments but he is then in a position to impose trouble penalties under the old Act instead of the double penalties under the new Act.

JUDGE:

Mr. Summerfield, does the hardship question really enter into this aspect of the matter?

MR. SUMMERFIELD:

I would have thought not.

JUDGE:

Surely I have got to construe the Statute in the light of the words actually used and all the authorities in relation to the meaning of those words.

MR. DINGLE FOOT:

My Lord, if I might perhaps assist on this, My Lord, I wasn't making an appeal here ex curia - that would have been entirely out of place - I was addressing Your Lordship on a point of law. I was only dealing with the hardship on the taxpayer insofar as it might assist your Lordship to determine the point of law, because Your Lordship will have to consider whether the legislature could have considered such a significance as that. It was only on that matter I was seeking to address Your Lordship.

MR. SUMMERFIELD:

I appreciate that, but I was going on to say that if Your Lordship puts the interpretation on it My Learned Friend does seek to have put on it, then of course the hardship can work the other way as well. I think, as Your Lordship points out, the question of hardship must be completely disregarded in construing this proviso.

JUDGE:

The picture of a sorrowing Commissioner is unlikely to influence me in construing the Statute Mr. Summerfield.

MR. SUMMERFIELD:

I am not worried about the Commissioner's hardship, I am thinking about another taxpayer. The Commissioner would retain his right, on My Learned Friend's interpretation, in certain circumstances to impose treble penalties when quite clearly on the proper and ordinary construction he would be restricted to double penalties. I am only thinking about the hardship to another taxpayer. I do submit that the clue to the interpretation of the expression "any legal proceedings" is contained

in the words, "by or against the Commissioner". My Lord, I think those words make it clear beyond any doubt that what is intended is the ordinary concept of legal proceedings. My Lord, My Learned Friend tried to urge that 'legal proceedings' there meant if you are seeking any remedy, any process which is governed by Statute, that is a legal proceeding. My Lord, I say in my submission that if 'legal proceedings by or against the Commissioner is given its ordinary conception, it is of its very nature, it must be, an action, an appeal, either before the Local Committee or the Supreme Court,whereas the objection procedure, My Lord, hardly falls within that definition of 'proceedings by or against the Commissioner'. He is not a party to anything at that stage; he is an administrative arbitrator, if you like - no more than that.

JUDGE:

There cannot be 'proceedings by or against the Commissioner' because the Commissioner cannot be judge in his own cause.

MR. SUMMERFIELD:

With respect, I agree entirely, My Lord.

JUDGE:

Though it may be proceedings between the taxpayer and the Commissioner. the sense that they are both parties to an attempt to negotiate a settlement, they could hardly in common parlance be described as "by or against him?.

MR. SUMMERFIELD:

I agree entirely, with respect. It is little more than, what he does, is to take an administrative decision, and I think it is clearly intended there to have the obvious meaning of proceedings which have been commenced before a Court or Statutory Tribunal for the determination of the rights of the parties, and in that respect I would again submit that legal proceedings are hardly pending until the first steps in those legal proceedings

have been taken to bring them before that Court or Tribunal.

JUDGE:

Didn't I hold in a Mombasa case something in relation to the point at which appellate proceedings commenced? Wasn't the case in respect of the time for appeal? I think it was an appeal by the Commissioner.

MR. SUMMERFIELD:

Yes, My Lord, that was so. 43, I think it was. My Lord, that was referred to by My Learned Friend in opening and I think he urged that Your Lordship was deciding a rather different point in that case, and I don't think I dissented from that.

MR. DINGLE FOOT:

It was the occasion, if Your Lordship recalls, I asked if Your Lordship was bound by your own decision.

JUDGE:

That is so, Mr. Foot.

MR. SUMMERFIELD:

43 is Volume II, Part III, and I think what Your Lordship was concerned with there, and Your Lordship so held, that the giving of notice of appeal is a condition precedent to an appeal and not a definite appeal. I think it was a slightly different point there, My Lord.

JUDGE:

Yes.

MR. SUMMERFIELD:

The view I am urging on your Lordship, My Lord, is very nicely summed up in Stroud's Judicial Dictionary under the definition of "pending". I have got Volume 3 of Stroud's Judicial Dictionary and it is the first example given there under "pending". It says:-

"A legal proceeding is "pending" as soon as commenced and until it is concluded, i.e. so long as the Court having original

cognisance of it can make an order on the matters in issue, to be dealt with, therein."

It refers to two cases, My Lord in Reports Volume 5 and Reports Volume 7, neither of which unfortunately are available for me to open to Your Lordship, but it does there rather emphasise what I have tried to emphasise, that it must be before a Court or at the very least a Statutory Tribunal. I think it also refers to a case also opened to Your Lordship by My Learned Friend in opening Smith against Williams, 1922, King's Bench Division, Volume I, Page 158. I will read the Headnote to Your Lordship. This is, incidentally, a case before the Commissioners and has a very useful bearing on this case:-

"The Respondent successfully appealed to the General Commissioners..... inasmuch as the notice in writing given by the appellant to the Commissioners requiring them to state and sign a case was the commencement of the proceedings".

My Lord, that I would submit is on allfours with the lodging of a notice of appeal to the Supreme Court. I don't think I need read 2 and 3. I don't think they have any bearing. Again at Page 163, Mr. Justice Sankey observes - bottom of that page:-

"In my view, as soon as a notice in writing mentioned in Section 59 has been given requiring the Commissioners to state and sign a case..... and they may end with a decision of the House of Lords".

Then it goes on:-

"I am unable to accept Mr. Latter's contention that the proceedings only begin when the case is filed in Court .....there were no proceedings that could be continued."

My Lord, I would submit that that makes it quite clear the equivalent of giving notice of appeal at any rate is the commencement of proceedings. I would also respectfully submit to Your Lordship that the assessment procedure on an objection, where there is an objection, is not completed until the issue of what was called a notice of refusal under the 1952 Act, or notice of confirmation under the 1958 Act, or in either case I think it is called an Amended Assessment, Amending Notice. The objections, in my submission, merely continues the process of assessing and arriving at the figures for the assessment and is not part of any legal proceedings. My Lord, if Your Lordship were to accept that view, then of course My Learned Friend cannot invoke the provisions of the proviso (a) to paragraph 1 of the 5th Schedule of the 1958 Act, and that being so, as the proceedings did not commence until after the publication of the Act, I would respectfully submit that Parts X to XVII inclusive, which includes Section 101, govern the hearing of the appeal now before Your Lordship and that, however sad it may be, that takes away Your Lordship's right to deal with the quantum, leaving to Your Lordship only the question whether there is gross neglect.

Now, My Lord, I turn to a different matter altogether. That deals with the first point. I have been rather long about the first of the four points which I said I would have to address Your Lordship on. I turn to the second point which is Gian Singh's rent, and I hope I shall be very much shorter on this. I would, first of all, submit to Your Lordship that this is fairly straight forward. My Lord, in Exhibit 3, which is the deed of Settlement which was put in by My Learned Friend, Clause 3 says this:-

> "It is hereby expressly declared by the said Rattan Singh that he has paid the amount of the purchase price of Shs. 17,000/- in consideration of natural love and affection for his said son, Gian Singh, who is at present a minor".

Well, that is very specifically stated in the Deed. Now even if Your Lordship were disposed

to accept Mr. Rattan Singh as a truthful witness when he says the money was supplied by Gian Singh's grandfather, I submit that it would be very difficult for Your Lordship to do so in the face of the clear wording in the Deed, and furthermore in the face of Gian Singh's own evidence, My Lord. I submit that he is a very much more reliable witness than his father was. This is what he says about it. Unfortunately we have not got agreement as to the pages. I can only quote from my numbering.

MR. DINGLE FOOT:

My Lord, I have got the same numbering as your Lordship. If I can find it in my copy I can give Your Lordship the page.

MR. SUMMERFIELD:

I am now looking at the morning of the 8th.

JUDGE:

8th of what month?

MR. SUMMERFIELD:

It would be the 8th June. It all took place in June, the first hearing. It is 8th June in the morning.

JUDGE:

What page in the morning?

MR. DINGLE FOOT:

One moment and I will give it to you, My Lord. My Lord, it comes immediately after Rattan Singh. Yes, My Lord, it is Page 079 in Your Lordship's numbering at the top right-hand corner. He begins at Page 078.

JUDGE:

I have got it, yes.

MR. SUMMERFIELD:

I am much obliged. About the middle of that page, My Lord. This I would emphasise is in-chief, not in cross-examination.

"Q. What has been your understanding regarding the rents in Gulzaar Street?
A. I have never thought of the property in connection with rents.
Q. Do you regard the property as belonging to yourself?
A. The simple fact is that it is in my name; that is all it means to me.
Q. Apart from the receipt of rents, as far as you were concerned you thought the property was your own?
A. Not in a monetary gain way - only as far as the name went."

That was his view of it in-chief.

JUDGE:

Which was qualified by his earlier answers in relation to how it came to be his.

MR. SUMMERFIELD:

My Lord, I don't for one minute dispute the fact that it was given to him, that it was in his name. All I am suggesting is that it was a settlement by his father on him, and that being so, the income from it must be treated as the father's income under section 24 of the Act.

JUDGE:

Would you read the question before that? "What was your understanding of the destination of the property after it was built?" The same page.

MR. SUMMERFIELD:

Earlier page?

JUDGE:

No, same page. The question and answer before you began to read.

MR. SUMMERFIELD:

Earlier it says:-

"Q. What was your understanding of the destination of the property after it was

built?
A. During the course of the construction my grandfather intimated that the building was purchased for me and when it was erected it would be for myself.
Q. Were there certain drawings in connection with the building?
A. Yes."

My Lord, I don't think that carries it any further. His grandfather told him it was his property. It doesn't say, "My grandfather said, 'I am giving you this property'". With great respect I don't think that is saying, "My grandfather told me that my grandfather was going to buy me this property". It was merely told him that the property would be his. Then it goes further, My Lord, not only would the rents normally be assessable on the father because it is a settlement on the son and it is brought in by Section 24 - of course if Mr. Gian Singh is to be believed it was really, although in his name, the rents were really his father's - it would be caught by the avoidance provision.

JUDGE:

What Section is that?

MR. SUMMERFIELD:

In the old Ordinance, My Lord, it was Section 22, and in the Act it is 23. I think under the Act of course it has to be a notice by the Commissioner. I don't think I could rely on Section 23 because there has to be a notice, saying "I treat this as an avoidance provision". I am relying, and have always relied, on Section 24.

JUDGE:

24 of what - the Act or ...

MR. SUMMERFIELD:

The Act.

JUDGE:

Which one?

MR. SUMMERFIELD:

The 1952 Act. Of course, under the Ordinance of course it doesn't have to be a notice issued. The Act says, My Lord:-

> "Where by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of income, the income shall be treated for all the purposes of this Act as the income of the settlor for that year and not as the income of any other person."

JUDGE:

How is 'settlor' defined?

MR. SUMMERFIELD:

I think it has its ordinary meaning.

JUDGE:

If it has the ordinary meaning, surely an outright gift is not a settlement.

MR. SUMMERFIELD:

It is defined. It has a special meaning in sub-section 9(b):-

> "the expression 'settlement' includes any disposition, trust, covenant, agreement ..... unless such order is made in contemplation of this provision".

Any disposition.

JUDGE:

But must not the word 'transfer' be read 'ejusdem generis' with what has gone before, and doesn't what has gone before import the idea of some agreement to which the person who benefits from the so-called settlement is a party?

MR. SUMMERFIELD:

My Lord, with respect I would urge other-

wise. I think these words must be given their ordinary meaning and they say "any disposition".

JUDGE:

Why didn't they put in the word 'gift', which I would have thought was a good enough word, if they wished to attract the word gift. Take this case, Mr. Summerfield: a man gives outright to his son property; that child is - is 'child' defined as a person being under the age of 21 or something of that sort?

MR. SUMMERFIELD:

Under 18. Under the age of 18 - step-child, adopted child.

JUDGE:

That child has a right of disposition of that property. Can it be said to be a settlement in any way?

MR. SUMMERFIELD:

It can be, I say with respect, under 9(b). This, as Your Lordship is well aware, is the favourite method of escaping the law of tax, to transfer income yielding assets to children, and that is what this is designed to avoid and it deems income from those assets to be income of the father, and that is why it is so wide. Of course this also raises this problem as to whether that point can be raised at this stage in view of the memorandum. My Lord, I think, as My learned Friend has put forward the case so far, he is saying, "This is not a settlement by the father because it was a settlement by the grandfather", and Rattan Singh has said so in evidence. He said, "My father (Rattan Singh's father) supplied the money for this property".

JUDGE:

But it is not limited to the child of the settlor is it?

MR. SUMMERFIELD:

Yes, My Lord, limited only to the child of the settlor.

> "Where by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of income, the income shall be treated for all the purposes of this Act as the income of the settlor for that year and not as the income of any other person."

JUDGE:

Yes, I see.

MR. SUMMERFIELD:

And that includes any disposition, My Lord. It is intended to curb the very prevailent tax avoidance - only avoidance: I am not saying the device of settling property on your children.

JUDGE:

Yes.

MR. SUMMERFIELD:

And turning to Section 22 of the Ordinance:-

> "Where the Commissioner is of the opinion that any transaction ..... shall be assessable accordingly."

My Lord, using that - it only covers the period up to 1950 - using that alone this clearly falls in that category if not under Section 24 for the reason Your Lordship will recall that year after year Rattan Singh claimed a child allowance in his return for Gian Singh and in the column which says, "What is the income of this child?" either left it blank, put a dash, or said "No", "No income", My Lord, and coupling that with Mr. Gian Singh's own evidence, that is clearly a tax avoidance device. But, of course, My Lord, the argument so far has been based on Section 24 only, and, as I understand the argument

put forward, the only point which has been put forward is that it is not a settlement by the father, it is a settlement by the grandfather, and first of all I have asked Your Lordship to look at the Deed and I would go further and submit that in view of Section 91 of the Indian Evidence Act it is not open to the appellants at this stage to say, "It was a settlement by the grandfather".

MR. DINGLE FOOT:

My Lord, of course this objection was taken by My Learned Friend Mr. Newbold, and I think Your Lordship ruled upon it.

MR. SUMMERFIELD:

Your Lordship ruled as to the admissibility of the evidence and Your Lordship ruled it admissible despite Section 91. I don't think that precludes me at this stage, notwithstanding that the evidence is admissible at this stage, that Your Lordship cannot rely on it, cannot look at anything other than the document in view of Section 91.

JUDGE:

I should have thought my Ruling would have covered that point too, wouldn't it? My ruling, as I recollect, broadly was that Section 91 applies to the seeking to give evidence varying a written document in proceedings of the parties to that document.

MR. SUMMERFIELD:

That is true, Your Lordship at that stage was concerned with the admissibility of evidence. I am now not challenging that it is admissible, I am merely saying that, notwithstanding that it may be admissible, Your Lordship must disregard it in view of Section 91. I don't think I am precluded from urging that, My Lord.

MR. DINGLE FOOT:

My Lord, it is referred to at Page 034 and Page 035. My Lord, I think it starts earlier than that.

JUDGE:

I see my Ruling is based regarding the giving of evidence of the parties to the document.

MR. DINGLE FOOT:

Yes. Your Lordship said:-

"Section 91 of the Indian Evidence Act precludes the giving of any evidence of the terms of certain contracts to which the Section relates other than the document itself or secondary evidence thereof where secondary evidence is admissible. Here Mr. Foot is not seeking to give evidence of the terms of any contract but rather as to the identity of the parties to the transaction."

JUDGE:

Yes.

MR. SUMMERFIELD:

May I have Exhibit 3? My Lord, if it is a question merely of admissibility of evidence for the identity of the parties, then assuming it to be admissible, My Lord, accepting it to be admissible, then of course it wholly fails in its purpose because here quite clearly the party to the transaction is signed as Mr. Rattan Singh.

JUDGE:

Yes.

MR. SUMMERFIELD:

And, incidentally, in Roman script. My Lord, I would submit that Your Lordship would be precluded from going beyond that purpose for which the evidence was admitted,

looking further than the Deed as to the terms of the Deed by virtue of the provisions of Section 91 of the Indian Evidence Act. It says :-

> "When the terms of a contract, or of a grant or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

I think that means one can rely only on the document itself and that holds out quite clearly that Mr. Rattan Singh is the settlor within the meaning of Section 24.

My Lord, the second submission on that very same point, if I might refer Your Lordship to the interview of the 18th April, 1956, My Lord, Page 5 of that interview:-

> "Mr. Shaffie said that he wanted particularly to refer to the property in Gulzaar Street, the rent for which was Shs. 12,960/- per annum, and that he could in no way see that Mr. Rattan Singh was concerned with this seeing that the property was legally owned by Mr. Gian Singh."

I think there was a general discussion upon who was responsible for the return of rents from that property. I don't think I need read it all to Your Lordship. This is the interview of the 18th April, 1956. I think at that interview it was stoutly maintained that it was not returnable on Mr. Rattan Singh. Perhaps I had better read it all, My Lord.

"Mr. Shaffie admitted that right up to the present time Mr. Rattan Singh had collected the rents but that did not make him the legal owner of the monies thus collected, and that as he understood the situation Mr. Rattan Singh might at some future time have to repay to Mr. Gian Singh the total of the accumulated rents."

Incidentally, My Lord, that rather gives the lie that this money was sent each year to Mr. Gian Singh while he was in England.

"As this was so, surely it was not Mr. Rattan Singh's responsibility to include in his disclosure the rents from this property ....It was pointed out to Mr. Shaffie that whatever decision was arrived at in this matter that the actual cash from the rentals received should be a matter to be taken into account in the examination of Mr. Rattan Singh's affairs".

That was the position on the 18th April, 1956. If I might refer Your Lordship now to the interview of the 6th February, 1958, that is in Exhibit 2, paragraph 3 of that interview.

JUDGE:

Yes.

MR. SUMMERFIELD:

"Following the previous interview, Easterbrook drew Thian's attention to Section 24 of the Income Tax Act on the question of Rattan Singh's settlement of the Gulzaar Street property on Gian. Thian said that he agrees that Rattan Singh is assessable for all years on the rents received on this property."

Well, My Lord, Your lordship will observe who was present at that interview, that is to say, Mr. Rattan Singh, Surgit Singh,

Gian Singh and Mr. Thian.

JUDGE:

Yes.

MR. SUMMERFIELD:

Now, My Lord, my submission to Your Lordship is that the appellant is now estopped from denying that that is the position and that he has been properly assessed in relation to Gian Singh's rents under the provisions of Section 115 of the Indian Evidence Act.

JUDGE:

Where is that?

MR. SUMMERFIELD:

I have got Woodroffe's here.

JUDGE:

It doesn't really matter. I want to see the text of Section 115.

MR. SUMMERFIELD:

It says:-

> "When one person has, by this declaration act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing".

JUDGE:

Very well, Go on.

MR. SUMMERFIELD:

My Lord, quite clearly by his act there he intended the Commissioner to act and rely on that fact, and of course it could be said with some force that the Commissioner acted to his detriment in relying on that because had he not accepted that, then he could of course have assessed Gian Singh for these rentals which he is now

precluded from doing by reason of the time bar, and furthermore he could have considered perhaps taking criminal proceedings for the false claim for child allowance, which he did not do. So My Lord, I respectfully submit that it is not competent for the appellant at this stage to say that those rentals are not properly assessable on him.

JUDGE:

That, no doubt, would be a convenient point for the adjournment. Are you going to finish today, Mr. Summerfield?

MR. SUMMERFIELD:

I don't think so, My Lord, but I don't mind starting even earlier tomorrow.

JUDGE:

Well, we will see about that at 4 o'clock.

Court adjourned at 12.55 p.m.

22nd March, 1961. 2.15 p.m.

MR. SUMMERFIELD: Contd.

Before the adjournment I had just completed my submission in regard to Gian Singh, but if I might just add one point in relation to that item. I had submitted that under the Indian Evidence Act it is incompetent for the appellant to deny at this stage the right of the Commissioner to assess him in these sums. Of course, it goes a little further than that, and I would submit that the appellant is debarred from taking the point at all in the proceedings because it does not appear in his Memorandum of Appeal . ...

The nearest approach to anything regarding Gian Singh's rents to be brought under the heading, I suppose E - it says the Commissioner has wrongly included rents not received. Well, my Lord, I don't think that can be reasonably held to cover this specific question of Gian Singh's rents, because there is no question of it having

been received. I don't think I need waste any time on that. In any case your Lordship has no evidence of any rents not having been received.

JUDGE:

Except the rent allegedly in the hands of the advocates.

MR. SUMMERFIELD:

That would, of course, have been "received by your agent" - that is good enough. My Lord, I think that is all I need say about that.

I will turn to my next point, which is the Grogan Road property. My Lord, again at the outset, I should say that the appellant is again, in my respectful submission, debarred from raising this point in these proceedings. This again is not a matter included in the grounds of appeal. I suppose I had better deal with it generally with any matters I have, and I will make the following submission, my Lord. First of all, assuming he is entitled to raise the question, I don't think there is any dispute as to the amount, that is to say Shs. 80,000/-, attributable to the Grogan Road property which was sold in 1953. Now my Lord, there are numerous cases with which your Lordship is familiar as to the onus of these property transactions. The position is quite clear - the onus is on the taxpayer to say that it is of a capital nature and not a revenue transaction, and the test, by and large, is whether at the time he acquired the property he acquired it for the purpose of resale and to make a profit on it or whether he acquired it as an income yielding investment, to yield income on the capital invested. I have already submitted that Mr. Rattan Singh was an unsatisfactory witness but even if your Lordship believes what he says about this particular transaction, I still submit that it falls very far short of discharging the

onus which is upon him. I must refer your Lordship to the morning of the 7th page 17. This is the examination-in-chief. Now this is what Mr. Rattan Singh said. (Page 040 about one-third of the way down from the top):

"Q. What sort of premises did you erect there?
A. Underground rooms, stores, my Lord."

Now this is the important part:

"Q. Mr. Rattan Singh, when you started building on this second plot in Grogan Road what did you intend to do with the completed premises?
A. I had the intention of letting it out.
Q. Letting it out to one tenant or more than one tenant?
A. At that time it was not in my mind as to how many tenants were to occupy the premises.
Q. But you were going to let it?
A. Yes, it is true."

I think that is all I need quote at this stage. My Lord, the important thing there is what he intended to do when he started to build. Not when he acquired the property, which is the rightful aspect so far as Your Lordship is concerned in deciding whether it is a revenue or capital transaction. He was not asked what he acquired the property for.

JUDGE:

The profit was the profit from a house, so the dominating intention would be the intention with which that house was acquired. I should have thought the intention was the intention with which it was acquired or the intention with which it was built.

MR. SUMMERFIELD:

This is a property transaction. You cannot

sell the house apart from the land.

JUDGE:

Are you sure that is the case in Kenya, Mr. Summerfield? I agree that is the principle which applies in the United Kingdom. I think there is doubt as to general applicability in Kenya.

MR. SUMMERFIELD:

I know there are special provisions - I am probably thinking about Tanganyika.

JUDGE:

I think it rests on some doctrine which may have been imported into the Landlord of the coastal protectorate from some Muslim source. That is not a proposition that I would accept as being necessarily true in Kenya. It may be that it applies in the Colony but not in the protectorate - I would not like to express a view.

MR. SUMMERFIELD:

There has been no suggestion here of selling the house separately. He bought the land and built on it. He sold the land with the building. On page 041, you will see my learned friend asks him in examination-in-chief:

"Q. Mr. Rattan Singh, your ordinary business is that of a building contractor, is it not?
A. Yes Sir.

JUDGE:

The next answer is helpful.

"Q. Do you normally build on sites of your own?
A. Yes.
Q. How many sites have you built on?
A. Altogether three plots, two in Grogan Road and one at Parkland Avenue 6."

JUDGE:

One of those three represents a house in which he himself lived?

MR. SUMMERFIELD:

Yes, the one in Grogan Road was the one in which he lived.

JUDGE:

Is not there some evidence as to where his mother lived?

MR. DINGLE FOOT:

My recollection is that she lived in the building until it was demolished. In Gulzaar Street, the one which was demolished.

MR. SUMMERFIELD:

Well my Lord, be that as it may, the vital aspect to determine -whether this was a revenue or capital transaction has not been referred to by Mr. Rattan Singh. The other two houses which he built - he did not sell them. The presumption is that he was not building these for sale but that again, I submit, would be a false approach to this problem. The probability is that he was investing his capital in these houses as an income producing asset; buying up his capital for that purpose. Why did he sell it? The reason he sold it was because he wanted money so he says for the purpose of depositing it on two contracts, one was the Moshi Bank contract and the other the County Council contract. Having said earlier that he wanted it for deposits in relation to these two contracts, this is what he said in cross-examination: (p.053) (by Mr. Newbold)?

"Q. Did you use all the money that you got to pay the deposit of this Shs. 140,000/-?"

There were two deposits, one for 60,000/- and one for 80,000/-.

"A. The Nairobi Branch of the National Bank of India told the National Bank Moshi that I had my bank account at Nairobi, so no security was required for N.B.I., Moshi.
Q. So you did not deposit Shs. 60,000/- for Moshi?
A. No.
Q. The Shs. 80,000/- was for the Nairobi County Council?
A. That Shs. 80,000/- was not deposited. It so happened that when we .. for deposit and deposit was not kept for 4 to 5 months and by that time the building had started.
Q. You did not deposit either the Shs. 60,000/- or the Shs. 80,000/-?
A. That is true."

Then it goes to the bottom of the page:

"Q. Did you sell the property before you started these two jobs, or after?
A. I think before the beginning of these two jobs."

He certainly was not very clear on that.

"Q. And at the time you sold it you say you were selling it because you wanted the money to deposit for Shs. 140,000/-?
A. Yes.
Q. Did you get cash of Shs. 193,000/- for the property?
A. No, I did not get it in cash.
Q. How much did you get in cash?
A. To start with I was given a cheque for Shs. 25,000/- and Shs. 68,000/- was paid when the deal was completed.
Q. In fact you left Shs. 100,000/- on mortgage?
A. He asked me that he did not have this Shs. 100,000/- and he will pay me afterwards, and I agreed to it."

Well, my Lord, two points arise. First of all it would appear that he is treating

that as circulating capital but more significant than that my Lord is that there is no evidence of the use to which he put this money when it was not required for these two deposits. My Lord, had it been as he suggests, capital which he is going to utilise to produce income, and he had to sell it because he needed the money, surely if he did not need the money, as it transpired, he could have said to prove that it was capital "I then invested it in this capital asset", but there is no suggestion of that at all. Furthermore, I would submit that it is very difficult to believe him at all. If he had wanted 140,000/- for this deposit it did not seem the right way to go about it because it would only have yielded part of the money required, that is to say about 93,000/- for 140,000/- he would have required for the deposit. That is hardly a very plausible story.

That is one aspect of it. The other aspect is that Mr. Thian agreed that it was assessable on Mr. Rattan Singh. That is in the interview of the 10th April, 1958, page 2:

> "Reference was then made to the previous disagreement by Thian that Shs. 80,000/-, being profit on the sale of the property in Grogan Road in the year of income 1953, was a taxable receipt in Rattan Singh's hands. On reflection Thian said that he now agreed that this was a taxable profit".

He was the man who had been intimately concerned with the circumstances of the sale. However, carrying it one stage further, my Lord, if you accept Mr. Easterbrook's evidence on this transaction it does not really matter whether it is a capital or a revenue transaction, because it would appear that the whole of the 93,000/-, the proceeds of the sale, was credited to his capital account, and there is no evidence that he reimbursed the business with 100,000/- which was the cost of building it.

So that would amount to a drawing from the business of 100,00/-, not merely 80,000/-. Well my Lord, that brings me to the fourth point which is a general point on whether the assessments are excessive. This is my last point, but I am afraid my Lord it is a very lengthy one. I feel before proceeding with it I ought to refer to several cases - the general attitude of the Courts in England to these estimated assessments. There is no case that I know of right on the point - they are all very side issues. I think the reason for that is purely and simply that what might be called a speculative assessment by the Inland Revenue is accepted as a proper exercise by the rights given by the statute. As there appears in the cross-examination by Mr. Easterbrook - the Department did not go out and seek what they had no right to - all those things my Lord in my respectful submission are not part of the business of the Inland Revenue at all, they never have been. I think I ought to support by reference to some of these cases. First of all Section 72, - it is really an extension of Section 71 - that this power is given to the Commissioner to make an assessment according to the best of his judgment. It would be quite impossible for a Commissioner, where there is insufficient evidence, to go out and seek the evidence for himself if that were held to be the case. The cost of bringing in the tax would probably exceed the amount yielded. He is given this power of exercising his judgment. It does not matter whether that judgment is good or bad. No right of appeal is given on that score. It was a bona fide exercise of his judgment. That, so far as the act is concerned, is the end of the matter. The duty imposed on the taxpayer, under Section 1113(c) the corresponding Section of the 1952 Act. I don't think it has ever been challenged in the United Kingdom but that position does emerge very clearly from the cases.

First of all I would ask your Lordship to look at 36 Tax cases. It is McLuckey's Executrix v. Commissioner of Inland Revenue, page 163. I don't want to go through it

extensively but there is this in the head note of the last paragraph: "Additional assessments to Income tax for the years 46-47 . . . The Appellant demanded a case". This is a question of whether or not there was a discovery. P168 in the middle of the page: "The question of the law is put to us . . . had been made within the meaning of Section 41".

In the same volume, my Lord, Kilburn v. Bedford at page 262. This again is not directly in point, the point was not at issue, but these are the observations of the learned Judge, Mr. Justice Harman, at page 267. Half-way down the last paragraph on that page it says: "As regards the extra tax imposed it was for the appellant to show . . . quite unreliable".

Turning now my Lord to 11 Tax Cases at page 657, Haythornthwaite v. Kelly, 3rd paragraph "In 1924 the Inspector of Taxes . . . . " Might I ask you to turn to page 664, second paragraph: "The Inspector in the present case . . . new capital of some £23,000 been provided". Page 671, one third of the way down, this is what Mr. Justice Sargant said: "The position seems to me to be this, that originally the then Inspector had been satisfied . . . throwing the onus on them of so doing".

And that is the position as it is understood in the United Kingdon. I submit that this is the position as at is in this country. And further down that page, near the bottom sentence: "In that state of things it seems to me that the very first thing . . . had not been taken by the Company although they were aware". Well, that shows the duty of the appellant where there has been a speculative assessment.

If I might ask your Lordship to look at Earl Beatty v. Commissioner of Inland Revenue. 35 Tax Cases, page 30: "Assess the Income Tax on the income of the Canadian Company . . . within the meaning

of Section 125". Again this is on the question of whether there has been discovery.

Might I now ask your Lordship to turn to Mr. Justice Vasey's observations in the course of his judgment, page 41, at the bottom of the page. The last paragraph, about half way down that paragraph: "Be it observed that he has not to discover the exact quality or quantity . . . it was a much greater or smaller omission than he supposed". Turning over the page, the fourth paragraph: "The Appellant's contentions are plain enough . . . the ground upon which they have made the assessments". That was the passage quoted in McLuskey's Executrix v Commissioner of Inland Revenue.

If I could quickly now turn to Attorney-General v. Till, a small passage in 5 Tax Cases, at page 440, that of course was the prosecution for failing to make a complete return. I will not go into the facts, I will merely quote one passage which I think fairly represents the position, at page 468, third paragraph: "My Lords, the power of assessment and surcharge . . . best available estimate". That is the only approach to make this act work.

Then I would ask your Lordship to look at Wall v. Cooper, 14 Tax Cases, page 552: "The appellant appealed to the Special Commissioner ....." Page 558, beginning of the 3rd paragraph: "That the Inspector should have accepted . . . discretion of the Inspector".

Finally my Lord, Carlisle v. Commissioner of Inland Revenue, commencing at page 37. The facts are long and involved, but the observations which appear on page 55, last paragraph: "originally having no material at all".

I quote those cases with a view to showing that the question of whether Mr. Easterbrook had all the material before him when he made those assessments is quite immaterial in the matter. There is no duty on him to go out and search for the material on which to base this, still less so when a Chartered Accountant, operating for the taxpayer, agrees the figure which he chooses. It is wholly immaterial. One matter which your Lordship has to determine - whether he worked on the correct basis, was one which is open to criticism - on examination in making his assessment, according to his judgment. The bona fide exercise of his judgment - that is the end of the matter, and it is not necessary to show it would be better this way or that way. There is only one remedy open to the appellant, and that is to show that the figure he arrived at was excessive.

Now my Lord, at this stage, before I go on, the question again arises as to how far the appellant can go in his submission that these assessments are excessive. In other words whether he can go beyond his Memorandum of Appeal. Now he has said these are excessive for the following seven reasons, which he enumerates as A to G in his Memorandum, paragraph 4 of his Memorandum of Appeal, and in my submission he cannot go beyond that. He is confined first of all to showing that it is excessive. I make that point because he has not tried, with respect, to show that any of these items, as I understand the case, have been improperly included. He has not said that this money you have added back, 10,000/- for African Wages, was really and truly spent on African wages. He has not gone into the box, or anybody else, and said 'these sums you have treated as fictitious creditors were not really fictitious creditors at all; these are the real persons, I owe them this money, I will call them if you like and they will say that I owe them this money'. He has not gone into the box and said 'This money is not spent in respect of these contracts. He has

gone about it in a completely different way. That is why, even to the extent to which he may succeed, he is limited to these particular matters which he has raised.

Now my Lord, I turn to his final matter, which is the general question of the excessiveness of these assessments. Now there are, as your Lordship is well aware, a number of cases on the onus of proof, but I do not propose to worry your Lordship by quoting these one after the other, but I will quote one, my Lord. 36 Tax Cases. I am going to quote to your Lordship a case where one iten was shown to be wrong in the accounts of the taxpayer, and on that one iten the Inland Revenue in the United Kingdom justified assessments running into thousands of pounds over many years - that case is Rosette Franks v Dick. It is reported in Volume 36, at page 100: "The appellant company carried on the business of ladies' outfitters . . . subject to certain agreed adjustments". Now that is the head-note, and I would ask Your Lordship to turn to page 107, the last paragraph: "Is there evidence upon which the Commissioners could come to such a conclusion . . . whole of the trading profit of the company". Your Lordship will see that was not confined to those additional assessments. They were all upheld on the basis that the appellants were not able to establish that their accounts were correct. That gives some idea of the onus on the appellant, particularly in this case where there are many items involved.

My Lord, I turn first of all to the question of allocation of the profit on Mr. Ogilvy's figures. I will deal with that particular aspect first, my Lord, because I don't wish to spend very much time on it. I think it can be disposed of very simply indeed. My Lord, I have read the record of Mr. Ogilvy's evidence very carefully and I don't want to be unkind - I think I can fairly say that it is impossible to make head or tail of the basis for the set of figures for the allocation of the profits. He was the architect, and I think on a fair reading of Mr. Ogilvy's

evidence as a whole that he himself did not appear to know why Mr. Blackhall chose the figures he did in the allocation of profits. I think it would be a waste of time to read that evidence. I know your Lordship will be reading the evidence as a whole and I make that as a reasonable comment on the evidence taken as a whole. That is exemplified by several factors but no reliance can be placed on this method for allocation. First of all your Lordship will recall that one set of figures was given in the first report, that is to say the report of the 3rd June, 1960. Now those figures for allocation mysteriously changed in the second report of the 6th June, allegedly because of further information given by Mr. Ogilvy. Well, my Lord, it transpired that Mr. Ogilvy only gave further information in relation to the years 48 and 49, but somehow or other that appears to justify Mr. Blackhall's change of weightings in the 6th June Report. Again I would very briefly say that no rational explanation emerged as to why any of those sets of figures were chosen, still less why they were changed, and in my respectful submission it would have done just as well if they had taken the figures off a tram ticket and used those. Well that is one aspect to my learned friend's address, to see if he can make any head or tail of the weightings which have been used and why there has been a change from the 3rd June to the 6th June. Not only are the two reports different in their weighting, but both reports would appear to conflict with the position as reflected in the returns, the original returns of Mr. Rattan Singh when presumably he had the books. The books were stolen sometime in 1956. The lowest figure, according to the weightings used, is 1953 - it is held out as a very bad year and therefore the weightings should be low, whereas in Mr. Rattan Singh's own return, when he had the books, that was the second highest year for the whole period. He made a profit of nearly 3,000/- only £400 less than his best year which was the year previous.

Now my Lord, I don't think I need waste

any more time on that. All I ask your Lordship to do is to disregard completely that what I have already called pseudo scientific attempt to get the years of profit, and the only reliable method to do so is to look at the accounts which were painstakingly built up by Thian and signed by the appellant himself. That is the most reliable method of deciding which years the profit was made. Now my Lord, I will leave that aspect in view of the general aspect of excessiveness. Before I deal with any items in detail, it would be as well to emphasise certain aspects of the respondent's case. Now my learned friend may be able to think of an isolated instance, here and there in the whole course of this investigation, and play it up with his friendly skill and try to paint a picture of oppressiveness and abuse on the part of the Department. However skillful he is in that, when his spell-binding is over I do submit that there will remain these fundamental facts, the harsh realities of this case which cannot be escaped. The first is that throughout this case the appellant has held up Thian, Surjit Singh and Shaffie, but principally Thian, as his agent and representative to ascertain an agreed figure to be taken as his income for the years concerned. The authority of these three, to speak on behalf of Rattan Singh, has never been challenged in this case. It has never been suggested that he did not have the authority to agree. It has never been suggested that he exceeded his authority in agreeing these figures. Thian, it is important to emphasise, is a Chartered Accountant and he and the other two, Surjit Singh and Shaffie, had been intimately connected with the affairs of the appellant and his books, and in fact carried out a very detailed investigation into those affairs covering many months. Now that is one factor my Lord. The next factor is that Mr. Thian, as a result of that detailed investigation, with the assistance of his client and the bookkeeper, produced accounts, in his first report each and every one of which,

the balance sheet at any rate, was signed by Rattan Singh. He was holding that out as correct. The third important factor, my Lord, is that each and every figure in the final computation, with the minor exceptions which Mr. Easterbrook referred to, one was the 200/-, a year I think for repairs to relatives property, apart from those minor expenses every figure in that final computation which was the basis of the assessment was agreed by the Department and the Chartered Accountant, who was the agent of the taxpayer for that purpose. Now my Lord, if there is any better way of arriving at a reasonable assessment of a man's income, then that I am afraid I cannot think.

Here you have a chartered accountant agreeing the figure which should be put in; not only is it a good way of assessing the income but it comes from the man who knows most what it is. Before he can retract from that he must show why he is retracting from it. He has said this is my income, through his chartered accountant. He has placed a figure on it. How can he resile from that without showing why he resiles from it. My Lord, it may be argued of course that he retracted from that agreement in his letter of the 3rd May. With great respect I don't think there is any question of a retraction to be construed from that document.

I would in this connection ask your Lordship to look first of all at the letter of the 15th April, 1958, which makes it quite clear that there had been verbal agreement to these figures. "Your verbal agreement to these figures has been noted but, as promised by you at the interview referred to above, I shall be glad to receive your written agreement". That was never departed from.

We have the following interview on the 18th April, 1958, with Mr. Rattan Singh present, Mr. Surjit Singh and Mr. Thian. There again the agreement is averred to again - second paragraph:

"Addressing Rattan Singh, Easterbrook said that the point had now been reached where certain figures had been agreed with his accountant. Easterbrook said that the Branch's figures, as finally agreed with the accountant, had been sent to the accountant for his information, and the Branch was anticipating a written agreement to those figures. However, for the sake of clarity Easterbrook said that he proposed to detail certain figures to Rattan Singh this afternoon. These figures were as follows :"

But no murmur that that had not been the case in the course of that meeting. In the light of that the letter from Mr. Thian cannot be treated as any departure from the agreement reached, no more, in my submission, than an attempt, when he realised how high those figures were after discussion with his client, to negotiate a further reduction which is perfectly proper. He is quite entitled to do it at any stage - to go on trying to bring this figure down. Even the letter of the 3rd May only challenges very few of the figures.

My Lord, perhaps before I get off that, there is another note of interview on the 22nd April, 1958, which had a bearing on the agreement. This is the third paragraph:

"Thian said that he had had discussion with his client regarding these figures and wished to make a request that the item of $23,176 stated by Rattan Singh to have been inherited from his father but which he did not declare for Estate Duty purposes, should be deleted from the pre-1946 income, then Rattan Singh will agree to the remainder of the figures agreed with the Branch by Thian".

He is now asking for 23,000 to be knocked off. In the result of course that £23,000 was never assessed - it was knocked off the assessment as relating to 1945.

Adjourned until 8.30 a.m. 23rd March, 1961.

8.45 a.m. Thursday, 23rd March, 1961

Court as before.

MR. FOOT:

Before my learned friend resumes his address, I have one further document to inflict upon the Court. Mr. Blackhall has worked out the comparison of percentage to turnover. If I might hand the document to your Lordship.

JUDGE:

Do you object Mr. Summerfield?

MR. SUMMERFIELD:

No objection, my Lord.

MR. FOOT:

I have asked Mr.Blackhall to prepare these figures, and Mr. Blackhall has added some notes. These notes are not agreed, and I will ask your Lordship to ignore them. I shall of course when I come to address you work out these figures in detail in my address. It will save time if they can go before your Lordship in the form.

JUDGE:

Do you agree the column of figures, Mr. Summerfield?

MR. SUMMERFIELD:

I agree with them mathematically. (Exhibit 29).

In the Supreme Court

No. 50
Counsel's Addresses 23rd March 1961 Continued

May it please my Lord. Yesterday I also put in a schedule of figures. There are two small matters to which I should draw your Lordship's attention: one is that I should have drawn your attention to Case No. 46 - East African Tax Cases, Vol. II, p. 275, which deals with the question of wilful default. It is a short passage on P. 290: :It is clear on the evidence ....section 72 of the Act". (Reads). Wilful default can be committed after the making of the return and can relate to the conduct of the taxpayer while the Commissioner is trying to obtain the necessary information in order to assess him correctly. Your Lordship did raise the question about whether it can be a settlement, and I have a case directly in point, and that is Thomas v. Marshall, Vol. 34 of the English Tax Cases, at p. 178. If I could first refer to page 180, where the provisions of section 21 of the Finance Act, 1936, are quoted. The relevant parts of that section are identical with out section 24 of the 1952 Act. I will read the headnote: (Reads).

I will turn now to the comparison percentages of turnover which have been handed in. My Lord, I would respectfully submit that this is a wholly unreliable guide of the business profits over the years in question. To start with, we have no evidence as to whether all the turnover figures have been included in the books. The mere fact that they relied on Thian's figures as contained in his accounts for income tax purposes does not of course mean that these figures are necessarily right and contain everything. To rely on these figures in the absence of clear evidence that they contain the figures of turnover would be in my submission improper; and the danger is exemplified by the fact that the turnover figures for 1946 given by Cook, Sutton are very much lower than the turnover figure given by the appellant himself in his very first return, which was later admitted to

be incorrect. Furthermore, the turnover figure by Cook, Sutton for 1951 is less than that returned by Mr. Rattan Singh in his original return. They take a figure of 300,000 and Rattan Singh's turnover figure was in the region of nearly one million. That appears on Exhibit 28. And for the year 1953 again the figures of Messrs. Cook, Sutton & Co. are very much less than the figures originally returned by Rattan Singh in his accounts which we were told were wrong. That demonstrates very clearly the unreliability of this approach now put before your Lordship. And furthermore, you will see that the turnover figures of Cook, Sutton & Co. are less than the aggregate of those of Messrs. Thian. No explanation as to how that difference arises has been made. All I am admitting are that these are the figures that appeared in Cook, Sutton's reports and the others are the figures which appeared in Mr. Thian's reports. That in itself automatically shows that one must be on one's guard as to the reliability of these figures.

Secondly, I would submit that to rely on these figures is very dangerous, because one had to know what kind of work he was doing at these various times. We know he is a builder, but on large contracts he may make only a small percentage, whilst on other small jobs such as plumbing etc., he may well make a very much higher rate of profit which one cannot reconcile with these figures. Again the matter depends entirely on his supplies. He may have a source of supply of materials which means that he can do work at very much greater rate of profit. All these factors enter into it, and I think it is fallacious to place any reliability on these percentages of turnover. Even if my friend says, Take Thian's figures - they are still very high. We cannot take Thian's figures, because we do not know Thian's figures ..... by the figures of turnover.

One further point was that it was remarked during the course of the cross-examination of Mr. Easterbrook that he had

spoken to certain matters which had been contained in his computation which had not been put to Rattan Singh and the witnesses in cross-examination. I have now had an opportunity of looking at the record, and in my view everything that has been contained in Easterbrook's computation was at some stage or another raised. I would go on and submit that the conduct of the case by the appellant did not make it necessary to put every such item. My Lord, the appellant knew, and his advisors knew, that so far as the Income Tax authorities were concerned every item had been agreed; it is in the correspondence in the notes of interview, and no evidence was led to show that these were not agreed. No evidence was led to refute any of the assumptions made by Mr. Easterbrook, or only a very small part of the evidence was directed to a small portion of the assumption made by Mr. Easterbrook; and that being so, I do not think that it is necessary to have put all these items one by one to Rattan Singh, who himself said he had very little knowledge of the books and what went into them and of the other professional witnesses called by the appellant, who also deny any knowledge or any familiarity with the books.

I would like now to turn to a letter of 3rd May, 1958 - in Exhibit 2. It would appear to me that there was no real agreement between Thian and Easterbrook on these figures and this can be seen from the fact that Mr. Thian wrote this letter of 3rd May, 1958. I would submit that this letter makes very little difference to the position. First of all, it deals with the £23,000 inheritance money. That, I assume, was allowed. It also deals (as item 7) with cash lodged in Indian banks, Shs. 30,000/- that was allowed. So that is not before your Lordship. It goes on - Item 2 - Work in progress. In Thian's accounts for 1948, signed by the appellant the business profit returned was over £8,000. I am suggesting that this remark in para. 2 of Mr. Thian's letter completely

misconceives the position. The return income for 1948 was £8,000; he had agreed with Easterbrook that the 1947 income should be 1,256, and all that Easterbrook did was to deduct the Shs. 91,000/-, which, merely for the sake of identifying it, is called work in progress, deduct that for 1946 and reduce that 1948 amount by that figure and treat that Shs. 91,000/- as part of the Shs. 125,000/-. It is inconceivable that the position should be as suggested by Mr. Thian in para. 2 here, because as your Lordship will recall he himself has suggested a 10% bank basis to obtain the income for 1947, and that in itself would have been higher than the figure he arrived at by his computation; it would have been Shs. 49,000/- as against Shs. 43,000/-. That was the approach which Mr. Easterbrook rejected and arrived at the agreed figure which included Shs. 91,000/-. And I should also state that there is no evidence at all before your Lordship to show what the true income in 1947 was.

Turning now to African wages estimate raised by Mr. Thian in his letter. It has been made clear that this was a purely arbitrary allocation by Thian in the accounts. There is no evidence to support the allocation whatever, nothing to support the fact that it was African wages; nor has any evidence been brought before your Lordship to show that this sum was in fact spent on African wages. In that connection, I should say that Easterbrook had already allowed some £22,000 unexplained money to be treated as African wages, and so it was not really unreasonable for him to insist on handing back this sum.

The next item is stock adjustment. Now again there is no reliable evidence as to what the stock was at the end of 1953 or any other year. I appreciate my friend's difficulty because of the incomplete records. Mr. Rattan Singh said that it was never higher than Shs. 5,000/-. But I do not think Mr. Rattan Singh is a very reliable witness, and on this particularly he must be unreliable

because in his statement he said he never had anything to do with the books, which he left to his accountant; so it is most unlikely that he would be a very reliable person to say what the stock in hand was in those years, the last of which was nearly 7 years ago. I think it would be dangerous to rely on what Mr. Rattan Singh said the stock was, and I would submit that Mr. Easterbrook's estimate is a reasonable one and has never been disproved.

As to reasonableness, I will refer your Lordship to Mr. Blackball's evidence Transcript, 14th, p 297: "I understand you to say ..... reasonable as any other". (Reads). I do not think I need say more here. On page 298: "Now take the figure .... Shs. 74,000". (Reads). It was treated as Shs. 75,000/- It is not an unreasonable figure, which has never been shown to be wrong. Of course, the 1953 turnover figure given by Mr. Rattan Singh in his original return was very much higher than that; he gave a figure of nearly one million shillings - 10% of that would have been higher still. So did Thian give a very much higher figure in his turnover figures for 1953.

The next item in the letter of 3rd May is legal expenses. What Mr. Easterbrook was ranting before he lodged any legal expenses was full account of what legal expenses had been included in the accounts and deducted for the purposes of arriving at the profits which were in fact properly deductible. He was never given that figure, and in the end Thian agreed that the whole amount should be added back. All he sent with the 3rd May letter was this statement from Messrs. Khanna, and I do submit that there is nothing in that statement from which either Mr. Easterbrook or your Lordship could properly come to the conclusion that any sums which were added back by Mr. Easterbrook are included in that statement and are properly legal

expenses for business purposes. One does not know what sums were contained in the accounts and treated as business purposes, and no presumption can be drawn.

The next item is cash overdrawn. Again, all I can say is that no evidence has been brought to reconcile the allowance quantity appearing in the Cash Book which resulted in this particular adjustment in the balance sheet which depressed the profits and the assets for that particular year. Those at that time and 3rd May, 1953, are the only items he is querying and I think the conclusion at para. 9 of p. 3 of that letter means that he is agreeing every other figure.

JUDGE:

Before you come to that, Mr. Summerfield, what was the total income on which Mr. Easterbrook ultimately recommended the taxpayer being assessed?

MR. SUMMERFIELD:

64,026.

JUDGE:

Is there not a marked similarity between that figure and the figure suggested here?

MR. SUMMERFIELD:

There is, my Lord, and I see what is passing through your mind, and I should say that that figure is intended to cover the years 1940 to 1945 as a whole.

JUDGE:

I am trying to arrive at the figure on which Mr. Easterbrook was proposing to assess the taxpayer in respect of the years relevant to this appeal. In other words, I want to know what figure was the figure which would have been challenged by Mr. Thian.

MR. SUMMERFIELD:

I suppose it is a matter of simple arithmetic.

JUDGE:

Perhaps somebody will do that while you continue your address.

MR. SUMMERFIELD:

He goes on, "Whilst I am unable to...." (Reads). I have shown why they should reasonably have been added back. There is agreement at that stage again, subject to these minor adjustments. I would like to say this: if there had been no agreement as had been intimated in cross-examination of Mr. Easterbrook, why then was not Mr. Thian called to say there was no agreement? Why was not Mr. Rattan Singh asked to say there was no agreement, and why was not Mr. Shaffie and Mr. Surjit Singh approached to say there was no agreement as to these figures? I think the obvious inference to draw is that they could not say there was no agreement and that there was in fact agreement. And I would add to that that if there had been any suggestion of duress or sharp practice or non-disclosure, surely Mr. Bellman would have said that, surely Mr. Thian would have been called to say that at the time he agreed these figures. I am told that the figure appearing for 1946 to 1953, excluding the items which Mr. Thian challenged in the letter, amounts to 60,214 - a little under 4,000 less than was assessed.

JUDGE:

What I want to know is what was the figure which represents what Mr. Easterbrook was putting forward before the letter of 3rd May as being the figure upon which the appellant should have been assessed in respect of the period 1946 to 1953.

MR. SUMMERFIELD:

That 64,026. There are three stages. There was the gigantic figure which was agreed in the 1st schedule - that was agreed at 98,000 for the years 1940 to 1953, and in the result he only took the years 1946 to 1953, which amounted

to 64,026.

JUDGE:

Which of these items challenged by Mr. Thian relate to the period 1940 to 1946?

MR. SUMMERFIELD:

My Lord, only item 1, the £23,000.

JUDGE:

Now perhaps you will be able to answer three questions. What was the figure put forward by Mr. Easterbrook prior to the receipt of the letter of 3rd as being the taxable income of the appellant in respect of the years 1946 to 1953.

MR. SUMMERFIELD:

64,026.

JUDGE:

And what was the amount of Thian's proposals which should have been deducted for the period 1940 to 1946?

MR. SUMMERFIELD:

23,177.

JUDGE:

In para. 8 Mr. Thian says, in substance, that the taxable income as determined by you over the period is 98,000 odd. I am concerned only with 1946 to 1953. I want the figures to be so adjusted as to relate only to that period.

MR. SUMMERFIELD:

For the period 1946 to 1953 will be the difference between £7,417. £1,500 had already been allowed and should not have been included.

JUDGE:

I am not concerned with particular items.

MR. SUMMERFIELD:

The difference is £5,917. That relates to items 2 to 6.

JUDGE:

If Mr. Easterbrook had acceded to all Mr. Thian's suggestions, the taxable income would have been about £58,000. In fact it was £64,026.

MR. SUMMERFIELD:

Yes, my Lord. I will now turn to another matter, and that is the fact that it appears to me and from the cross-examination that the main complaint of the appellant was first of all the method of arriving at the sums for the years of income 1940 to 1945 which were never assessed. I suppose I ought to deal with that.

JUDGE:

I am concerned only with this case.

MR. SUMMERFIELD:

What I have to say on this is really relevant to the remainder of my case. First of all, it is important in my submission to get a clear idea of the type of man with which Mr. Easterbrook was dealing. His case was not that of the ordinary taxpayer. His case had been dealt with by the I.B. and taxpayers are not lightly turned over to the I.B. I.B. officers are not conditioned to accept every explanation without some evidence to support it. Secondly, this man, on his own showing, would appear not to have hesitated to commit perjury in order to defraud the revenue. That would appear from the swearing of a false estate duty affidavit. I do not think it is open to him to say that he did not know what was in that affidavit because he does not understand the language. I am certain that no advocate would have allowed him to swear an affidavit without informing him exactly what was in it; and in any event, perjury is committed if you swear something

recklessly, whether it be true or false. Then thirdly, there is another aspect. Here is a man who on his own admission has systematically defrauded the revenue in my submission by the omission of income year by year. We need only look at the rents - no further than that. Following upon that, one report was put in signed by the appellant which was far from a full disclosure, covering only part of the period to be investigated. Now admittedly at that time some of the books had been conveniently stolen, and I would ...

MR. FOOT:

My friend is not entitled to say so much. I do not think that it can be said that Mr. Rattan Singh was a party to the disappearance of the books.

JUDGE:

That is so.

MR. SUMMERFIELD:

That is true and perhaps I should withdraw it. Mr. Rattan Singh then puts in a second report disclosing $2\frac{1}{2}$ times the income he has returned in his original return, and when agreement is finally reached it amounted to something like $4\frac{1}{2}$ times what he originally returned. He is a man who has deliberately concealed bank accounts from the investigation officer trying to ascertain his true position, and he is a man who would not hesitate to charge up items like jewellery in his business accounts and have them deducted for income tax purposes; or, on his own admission, to treat certain sums which were supposed to be paid to contractors which were in fact loans or repayment of loans. That is the man with which Mr. Easterbrook is dealing. Therefore it is small wonder that in compiling the schedule he was to put before Mr. Thian he would proceed with caution and not accept everything which appeared in the report. He would not accept everything at its face value; indeed, if he were to do so he would be failing in his duty. There was no evidence before him except an assumption which could be

taken from the report that these two accounts on pages 2 and 6 of Thian's first report which have been criticised were in fact business accounts at all. He was not at that time given the accounts to examine. If they were not business accounts, it would have been strange for wages, etc. to have been paid out. All he did was to put those figures in his draft computation and to ask for an explanation. In the result, he was given the explanation and he accepted the explanation and he deleted it from his computation; and yet my friend appears to complain at that part of his conduct in those circumstances. I do not want to labour it. Nothing could have been more reasonable or more compatible with his duty not to accept these things at their face value, but to ask for an explanation, and when the explanation is given, if he is satisfied with it, allow it; and in the result, he did not assess him at all in those years.

As to the 1954 accounts, I think I need only refer your Lordship to what Mr. Bellman said about those accounts to justify Mr. Easterbrook rejecting them out of hand and proceeding to arrive at a figure by negotiation. In the letter which Mr. Bellman sent to his client he told his client clearly that the accounts were unreliable. He made it clear to Mr. Easterbrook and in his evidence.

Now turning to my main theme, that is to say, the lack of evidence to dispute any of these matters which were taken into account by Mr. Easterbrook, I should add that there was no evidence to show that the accounts submitted by Mr. Thian were not a proper basis for assessment.

I have not found the extract of Mr. Bellman's evidence: Transcript of 8th June, afternoon, pages 8 and 9: "You were .....it should be". (Read).

Going back to the main theme, your

Lordship will recall that Mr. Thian reconstructed the ledger from prime documents from which he prepared his accounts. There has been no evidence to show that these reconstructed books were not suitable for the purpose. Instead the appellants have tried to show that these assessments are excessive by quite a different method - an oblique method - by a comparison of worth at two dates with an estimate of expenditure in between. I am not saying that is not an illegitimate approach in certain circumstances, but by that method it is not possible to show which of the years are wrong. I would not press that point if your Lordship were to take the view that over the whole period the total amount .....

JUDGE:

Can I do that? The law says an assessment shall stand, unless the appellant proves that it is excessive.

MR. SUMMERFIELD:

That is true from a legal point of view.

JUDGE:

That is what I am here to dispense. I am not in a position to decide what Mr. Rattan Singh should pay by way of income tax. I have to decide whether Mr. Rattan Singh has shown that the assessment in respect of particular years is wrong, and in that event only am I called upon to determine what he should pay for any particular year.

MR. SUMMERFIELD:

That is one very obvious defect in this method. The second very important point is that it is not a system recommended either by Roper or by Simon as the standard method. I have read the relevant pages, and I can find nothing in them to support the view that this is a standard method for all back duty cases. The other authors, Stapeles and Bechgaard, emphasise the necessity for accounts where this is possible, and Bechgaard goes on to say that this method of capital worth on two dates a

long distance apart should only be used as a check for the intervening period. I do submit that from a common sense point of view it is not because it is not a back duty case that this method has to be adopted; it has to be adopted only in cases where there are no adequate records. Guess work can never be a satisfactory substitute for records. My Lord, records must always be of assistance even if you do in fact adopt that system. From those books you will at least get some assistance as to deciding what the assets are at the relevant dates. Your Lordship will also get some guidance as to the expenditure and drawings in the intervening period. That system adopted by Mr. Blackhall is not to be compared with the system which was adopted by Mr. Thian, where he produced these balance sheets and got his client to sign them as correct. The correct procedure I should have thought, would have been for him to sign it as correct and adopt it as his own. A very important point which must be borne in mind is that if it is over a long period - in this case 12 years - it is liable to serious error. A man can start off with a capital of Shs. 100,000/- and he can earn Shs. 60,000/- a year throughout the period and end up with less capital at the end of the period. People going bankrupt every day have in fact done that. Capital may be spent, losses may be made, gifts may be made - all sorts of items can affect the appellant on such an approach. That is made clear by Cook himself when he spoke to Blackhall.

JUDGE:

Mr. Cook was giving evidence?

MR. SUMMERFIELD:

It was Mr. Blackhall who said what Mr. Cook said to him. The effect of it was that Mr. Blackhall had started off to do what Mr. Thian had done and found it impossible and was going to average. I will find that particular passage in a moment. The error is clearly demonstrated by the fact that in the two reports we find that the

closing figure for 1953 is higher than the closing figure for 1957. It emphasises how there can be this loss of capital in the intervening period.

The fourth point is that there must be accurate figures for the opening assets and accurate figures for the closing assets and accurate figures of expenditure during the intervening period. For all these vital elements to this approach and particularly expenditure you must rely in some part on the client, the taxpayer himself. So to a large extent it does depend upon the reliability of the taxpayer. Mr. Bellman, Mr. Cook and Mr. Blackhall are all agreed on that. Failing this basic element it can be hopelessly unreliable as a guide to income in the intervening period.

I have already given my assessment of Mr. Rattan Singh's reliability and I do not propose to go over that again. Your Lordship will have made up your mind; but I do submit that because of the clear admission of unreliability - for that reason alone no great reliance can be placed on this approach, because in the ultimate analysis they must depend on him. We do not know what radiograms there are or what he has made to his wife. All those factors would affect it.

What I am more interested to know is whether there is any independent evidence of the value of his real property and of his cash in the bank at the opening and closing dates.

MR. SUMMERFIELD:

My Lord, so far as the opening and closing assets are concerned, we do not dispute those figures, but we cannot say that they constitute all because we do not know and that is the great loophole in this particular approach. There has been no inventory of furniture, household effects, expensive carpets, radiograms, expensive jewellery. It is a very common thing in Mr. Rattan Singh's

community to tie up a good deal of money in things like gold buttons and jewellery generally. In the ultimate analysis there is only one man who can tell us and Mr. Rattan Singh is the person. And we do not know if there are any bank accounts or post office accounts in England in the Children's name. All those would affect the reliability of this estimate.

I have had the passage referred to earlier found now, (Reads from Transcript of morning of 10th p. 160: "Any average might be erroneous....."

A fifth vital element which must not be overlooked is of course the reliability of the accountant who prepared the report. I do not want to be unkind, but I feel constrained to say this: I have sound reasons for advancing the view that in this case at any rate Mr. Blackhall has been very far from reliable. The report which put forward with the schedules were torn to shreds after a very little time in which to examine them in cross-examination. In fact, he had to concede something like $7,000 on the original $17,000 in re-examination. Further, I would submit that the whole trend of the evidence shows that there never was such a case in which an accountant has deliberately throughout his investigation put a telescope to the wrong aye. He used a method which was clearly open to errors. He kept strictly away from the books and he never relied on a record where an estimate would do, and that is clearly exemplified in the drawings figures. I would have thought that he would at least have some regard to the drawings which Mr. Thian had painstakingly extracted from the books and got his client to sign as correct, but those were completely disregarded - and the drawings figures of Mr. Blackhall and those of Mr. Thian are hopelessly at variance. He turned right away from all the painstaking

work done by Mr. Thian; he paid no regard to it at all. But what gives the value of the report the coup de grace is his own admission that he only saw his client once and that he never saw the book-keeper at all. (Reads from Transcript - morning of 14th page 3, bottom; "Did you go to Rattan Singh at all.... Yes, sir". All the authorities, Staples, Bechgaard and Roper, stress the necessity of shaking out the truth from the client on this matter of expenditure, because notoriously they underestimate it, and in view of these circumstances in the preparation of the report, I suggest that in itself means that you would be very chary of relying on any part of it. Of course, in the end, it all boils down to the reliability of Rattan Singh and your Lordship can see the room for error there is in the different figures which are available for the ending capital in 1953. We have the figure which appears in Ex.26; we have the figure which is different in Blackhall's earlier calculation of the ending assets given in his evidence on the afternoon of the 10th, at page 16: "Have you got the figure of 31st December, 1953...." (Reads). It differs by some £4,000 from the figure which Rattan Singh himself gave in a letter of 19th June, 1958. That may not necessarily increase the income during the intervening period, but of course on the other hand it may well do; he may have got it from a reliable source.

On the question of expenditure, I have already submitted that the sums of drawings and expenditure as agreed between Mr. Thian and Mr. Easterbrook are very much higher than those which appeared in Mr. Blackhall's Schedule. There is nothing in the report submitted by Cook, Sutton in any way to reconcile those figures. On this very vital aspect I think one ought to see what Mr. Rattan Singh himself had had to say about his drawings over the period to see if any reliance can be placed on that evidence. I would refer your Lordship to the Transcript, morning of 7th, page 046 in Your Lordship's

copy. In examination-in-chief, Mr. Rattan Singh looked at these schedules and the report of 6th June and agreed they were correct, and this is what he says in cross-examination: "How much did your father give to your wife for household expenses .....I take them as correct". (Reads). in the afternoon of the 7th, page 056 is your Lordship's copy: "Mr. Thian worked for a long time on your books ..... I can read very little". I do submit that in the case of that statement by Rattan Singh it is impossible to rely on his later statement that his drawings were only round about Shs. 950/-. a month on household expenditure, particularly as in a letter to the Department he had put his household expenses as high as £1,200 a year. I would submit that probably the greatest indictment against their reliability is if one had the figures returned as business income by that method with the figures returned by Rattan Singh in his first returns and later admitted by him to be incorrect. If one takes 1946 alone, Mr. Rattan Singh returned , whereas in the report for 6th June, Mr. Blackhall's calculates it at 300.

JUDGE:

At that time Mr. Nanda was Mr. Rattan Singh's accountant.

MR. SUMMERFIELD:

He would not have over-stated it. These accounts were stated later to be under-stated the income.

JUDGE:

Perhaps Mr. Nanda was slightly less accurate than Mr. Blackhall.

MR. SUMMERFIELD:

It is not suggested that he over-stated the income. That is not as good an example as 1953, where Mr. Rattan Singh returned business income of nearly £3,000, whereas in Blackhall's

6th June report he returned £600, and in his Exhibit 26, a loss of 231. The total amount of business income which Mr. Rattan Singh returned for the years 1946 to 1953 was £10,000; the total emerging from Mr. Blackhall's Exhibit 26 is only £8,000. Furthermore, a further indictment of its reliability is the fact that on a 10% basis it would be £24,000 as against the £8,000 contained in Exhibit 26. Even leaving that aside, I am not saying that this system is a wrong system, but when it is done rightly, in my submission as it was done by Mr. Easterbrook in the past with very little time in which to make the adjustments, your Lordship will recall that he brought the figure up to very nearly the same as that assessed. The difference was a little over £2,000.

There are very few points left. One is the retention money, 1953. In cross-examination Mr. Easterbrook conceded that the figure he used was higher than the figure as it was put to him by 6,800. I would say this about that: on the face of it that might appear that the 1953 assessment should be reduced by that amount of money. It would appear from that evidence that there could be a reduction of Shs. 6,800/- is the computation of Mr. Easterbrook. You can only make that deduction if you are satisfied that the whole of the income is in the computation. I do not think there is evidence to that effect; that was merely Mr. Easterbrook's computation and there is nothing to show that is necessarily right. The onus is still on the appellant to show that they are excessive. It does not help to show that one of the figures in the computation is wrong and is allowed. Furthermore, there has been no appeal against that particular item. It is not in the Memorandum of Appeal and it was included by agreement with Thian. I would suggest that even if it is wrong, section 115 of the Indian Evidence Act would apply.

That leaves very little left. If I might turn briefly now to the Memorandum of Appeal;

I think they are very much the same. I am looking at the one 8/59. I have dealt with the stock adjustments, with the legal expenses. "Excessive sums have been added to the Grogan Road plot. The Commissioner made excessive adjustments". (Reads). There is no evidence to that effect. "The Commissioner has wrongly included rents not received". I do not think there is any substance in that. "The Commissioner has wrongly added ..... medical expenses". No evidence has been put before your Lordship as to what proportion of the medical expenses are attributable to labour except the evidence of Mr. Rattan Singh, when he said it might be part. I think that is unsatisfactory evidence. Memorandum of Appeal 11 of 1959 (Reads).

JUDGE:

That is different from mine. I am looking at a notice of appeal signed by Messrs. Sirley & Kean dated 4th June, 1960 and my paragraph is in the following terms: "Excessive sums have been added to the profits.....Grogan Road plot". (reads). Mine is year of assessment 1951.

MR. SUMMERFIELD:

That would be the difference. Retention money is also mentioned in mine. I was under the impression they were all the same. But this does definitely appeal against the Grogan Road building and the retention money at Moshi, so I must correct that.

JUDGE:

Can you explain what they mean by "excessive sums have been added..... Grogan Road plot".

MR. SUMMERFIELD:

I think that on the computation which is part of the letter of 15th April, 1958.

JUDGE:

I am faced with having to consider in relation to each year what portion of the figures dealt with in the report are applicable, because as I say I do not think that I am entitled to say over a period of 6 years the Income Tax Department's figures are or are not excessive. I think I must apply my mind to the year 1946-47 seriatim, and if I have to do what it will be necessary for me to take the figures in so far as I am able to do it in relation to each year. I cannot deal with it as a block adjustment.

MR. SUMMERFIELD:

I think, with respect, Your Lordship is definitely right.

JUDGE:

Which may well mean that after I have come to my conclusions on matters of law, I may invite you and Mr. Kean to come into my chambers and to go through the figures to determine which figures apply to which particular year.

MR. SUMMERFIELD:

I think that will emerge from the schedules. I would like to say, my Lord, that these figures were all agreed, and had Cook, Sutton & Co. presented their reports at a reasonably early stage, it might not have been necessary for your Lordship to consider them in such detail.

JUDGE:

I am not casting any blame on Cook, Sutton or on Mr. Easterbrook, or on the party's advocates, but I do consider that it is most regrettable that a judge should be called upon to examine accounts rather than to decide questions of law in these matters.

MR. SUMMERFIELD:

I agree, my Lord.

MR. FOOT:

I do not know whether it is a suitable moment to intervene. I am looking at the Income Tax Rules, Rule 21. (Reads). When you have a reference to the Civil Procedure Rules I would have submitted that it covers it. If your Lordship thought fit, it would be open to you to make a reference under Rule 11.

JUDGE:

That can be considered at the conclusion of the case.

MR. FOOT:

I am much obliged.

MR. SUMMERFIELD:

I do not think it arises here. I think it only remains to apologise for misleading your Lordship. The Grogan Road building has not been included in the Memorandum of Appeal. That completes my submission, and I do submit that the appellants have completely failed to discharge the onus on them and that the appeal should be dismissed with costs.

Court adjourns at 11 a.m.

Thursday, 23rd March, 1961 11.15 a.m.

JUDGE:

Yes, Mr. Foot.

MR. DINGLE FOOT:

May it please Your Lordship. Particularly in the last stages of his speach My Learned Friend, if I may say so, was a model both of lucidity and conciseness, and I only hope I shall be able to emulate his example, but, My Lord, before I come to the matters which Your Lordship has to consider may I mention one point which he raised in his address yesterday. He referred to the memorandum of appeal and he suggested, as I understood it,

that certain matters were not open to me on the memorandum of appeal as they had been filed. So far as Grogan Road is concerned my Learned Friend was in error, but he went on to suggest, if I understood him correctly, that the matter of Gian Singh's rents was not covered by the memorandum of appeal; also he went on to suggest that under the present memorandum of appeal it was not open to me to argue the method of statement of comparative worth was the proper approach in this case. That is, as I understood the substance of My Learned Friend's complaint, and I understood him also to suggest that it was not open to me on the present memorandum of appeal to argue that there was not fraud or wilful default in particular on any particular admissions. My Lord, with great respect to My Learned Friend, it is, I would submit, rather a late stage to raise objections of that kind. My Lord, all these matters have been very fully canvassed, with the possible exception of the last, very fully canvassed during this very prolonged hearing, last year and now this year. My Lord, the whole basis of the case which has been put forward on behalf of the appellant has been that the comparisons of the statements of worth show that these figures, these assessments, must be grossly exaggerated.

JUDGE:

Mr. Foot. I don't want to interrupt you unnecessarily but my view is this; you have to prove that the assessments are excessive.

MR. DINGLE FOOT:

Yes.

JUDGE:

It is open to you to do that either by attacking the figures which have been given or, if you like, by producing a whole new set of books to say these are the figures, or in any other way which can show that those figures were excessive.

MR. DINGLE FOOT:

Yes, My Lord. With respect, that was the view which I was about to urge upon Your Lordship. All I was going to say was this; if Your Lordship thought it was necessary I should of course have recourse to Rule 15 of the Income Tax rates and allowances rules which says the appellant shall not, except by leave of the Court and upon such terms as the Court may determine, rely on any ground other than the ground stated in the memorandum of appeal. If Your Lordship thought there ought to have been in the first place specific reference to these arguments in the grounds of appeal, My Lord, I would venture to invoke that rule, but My Lord all these matters have been very fully canvassed before Your Lordship, and My Lord it would be, in my submission, rather an absurdity if at this stage it were decided merely upon the grounds of the memorandum.

JUDGE:

I don't think you would have to put in your memorandum of appeal, "We propose to produce a ledger which we have now found".

MR. DINGLE FOOT:

My Lord, that would really leave, would it not, Gian Singh's rents.

MR. SUMMERFIELD:

I am not attacking the use of the statements of capital worth, My Lord. I ought to make that clear. All I was saying, My Lord, was three things. First of all that he has not attacked in the memorandum of appeal, he has not challenged that we could assess in the memorandum of appeal, that he has not challenged that any amounts included in the sums which we could assess are attributable to fraud or wilful default. He could still say they are excessive within the bounds of his memorandum. That is all I was saying, My Lord. He could show that by statements of capital worth or any other

means. All I say about the statements of capital worth is that it does not achieve what it ought to achieve.

MR. DINGLE FOOT:

I propose to follow the order I proposed to follow. I think it might be convenient if I were to deal with the Grogan Road property and Gian Singh's rents.

MR. SUMMERFIELD:

My Learned Friend was about to ask Your Lordship to rule whether he should make application to deal with those matters which I say they cannot raise as they are not in his memorandum. Is he abandoning that?

MR. DINGLE FOOT:

I understood Your Lordship to direct me to proceed with my argument.

MR. SUMMERFIELD:

I would oppose very strongly any such application.

JUDGE:

No application has as yet been made.

MR. DINGLE FOOT:

Yes, it has My Lord. If it be necessary, My Lord, I do apply for I have to raise the question as to Gian Singh's rents.

JUDGE:

What do you say, Mr. Summerfield?

MR. SUMMERFIELD:

My Lord I oppose that. It is a very late stage to make an application of that nature, My Lord.

MR. DINGLE FOOT:

You are not taken by surprise.

MR. SUMMERFIELD:

I am not suggesting I was taken by surprise.

I know it was in My Learned Friend's opening, but I submit it is wholly unwarrantable procedure, My Lord, not to make the application at the right time which is at the opening of the case and then make the application for the first time in a closing address and say, "Well, of course you were not taken by surprise: you know all about it". The correct time to take it is at the very beginning and to amend the memorandum accordingly. My Lord, of course that is only part of the issue. I mean that relates purely and simply to Gian Singh's rents.

MR. DINGLE FOOT:

My Lord, perhaps I had better complete the application. The other matter to which My Learned Friend referred, as I understood him, was the question of fraud or wilful default - fraud or wilful default under Section 72, and fraud - I think it is gross neglect - under Section 40. My Lord that also is a matter which has been canvassed during the hearing and I would ask leave for that.

JUDGE:

Yes Mr. Summerfield: do you seek to amplify your objection. I will deal with it as a composite objection unless you want to amplify your objection.

MR. SUMMERFIELD:

I would oppose this application, My Lord. With respect to My Learned Friend it is a complete abuse of the powers given to Your Lordship under Rule 15. I am not saying it is necessarily the case that we would have conducted the case any differently, or My Learned Leader would have conducted the case any differently, but had this application been made at the correct time there is that possibility. My Learned Friend does say the question of

fraud or wilful default has been canvassed throughout the case. That may be so, but I cannot recall any reference to it in My Learned Friend's opening.

MR. DINGLE FOOT:

Yes, there was.

MR. SUMMERFIELD:

My Learned Friend says "Yes" and I accept that.

MR. DINGLE FOOT:

Your Lordship may recall that I did suggest in my opening that the onus of proving fraud or wilful default would rest upon the Revenue even though the onus of proving the assessments are excessive rests upon the taxpayer. My Lord, I also addressed the argument to the Court, as Your Lordship will remember as Your Lordship has referred to it during this series of hearings, that supposing you had two sources of income, a professional man with two sources of income, his professional income and his income from some side-line, that you might have fraud or wilful default in relation to one source of income and not another. Your Lordship will remember that I opened it in that way.

JUDGE:

I remember.

MR. SUMMERFIELD:

I accept that explanation, My Lord, but even then I think My Learned Friend is seeking to introduce a further matter which I say has not been raised in opening or at all, and it is not in the memorandum; that is to say whether the sums included in the assessments were or were not attributed to fraud or wilful default; but I think it is quite open to a party, even if the other side does open and mention certain matters, to sit back and wait for him to make the application and it

is not open to him to say, "I mentioned this in my opening: I know I didn't make an application to argue it now: you are not taken by surprise", and at the conclusion of the case, when I can do nothing about it - I don't know whether I would have done anything about it in the way I conducted the case - he then makes application to argue those particular matters, and I do submit that the application ought not to be granted.

RULING

JUDGE:

I am not prepared to express a concluded opinion at this stage whether the memorandum of appeal in their present form raise the question of Gian Singh's rents or of fraud or wilful default. There has, however, been a great deal of evidence and of cross-examination in relation to Gian Singh's rents, and Mr. Summerfield in his closing address dealt with certain aspects of the evidence which he contended established fraud on the part of the taxpayer or at least wilful default. In those circumstances it seems to me that it would be undesirable to seek to preclude the taxpayer from relying on matters which may well be vital to his case merely because they were not specifically referred to in his memorandum of appeal despite having been fully canvassed throughout this hearing. I am therefore disposed to allow the proposed amendment. I am not, however, prepared to allow an amendment the exact terms of which neither I nor Mr. Summerfield has seen. I therefore postpone my decision on this application until such later time today as there may be available typed copies of the amendments sought, indicative of the years of assessment or of income in relation to which those amendments are sought to be made.

MR. DINGLE FOOT:

My Lord, I am very much obliged. I had

in fact prepared the manuscript. I was not entirely clear under the Rule whether an amendment was necessary or whether I should merely ask for leave. Perhaps the convenient course would be if I showed the copies to My Learned Friend, Mr. Summerfield, and if I were to make this application after the adjournment.

JUDGE:

Very well.

MR. DINGLE FOOT:

If I might now proceed, My Lord, I was indicating the way in which I proposed to approach these matters. My Lord, I think it might be convenient if I were first of all to refer to the matter of Gian Singh's rents and the Grogan Road property. My Lord, then I would propose to go to the main issue in this case and ask Your Lordship to consider whether the assessments are excessive.

JUDGE:

Yes.

MR. DINGLE FOOT:

My Lord, then I would go to the question as to whether there was fraud or wilful default, or fraud or gross neglect. Of course the different phraseology is used in Section 72 and Section 40, and My Lord, lastly I think it would be convenient to ask Your Lordship to consider the legal consequences if Your Lordship should accept my submissions on the earlier questions. My Lord, I think that is the convenient order.

JUDGE:

Yes.

MR. DINGLE FOOT:

Then, My Lord, in the matter of Gian Singh's rents, would Your Lordship look just once more to the evidence on this point. My Lord, it begins in Your

Lordship's transcript at Page 032, at the bottom of the page. I have asked about properties which were transferred to Mr. Rattan Singh in his lifetime; then I asked the witness - this is Mr. Rattan Singh - in addition:-

"Q. Did he make any other transfers of property to anyone?
A. One plot was transferred by him to the name of my son.
Q. Which son was that?
A. My eldest son, by name, Gian Singh.
Q. And can you say where was that property?
A. Gulzaar Street."

Then My Learned Friend, Mr. Newbold, makes a formal objection - My Lord, I will come back to that - at least he makes an objection and he raises Section 91 of the Indian Evidence Act.

My Lord, just dealing with the evidence Gian Singh himself deals with the matter at Page 079, and Gian Singh said - I put the question to him about six lines down:-

"Q. The Gulzaar Street property - I think you assisted your father in building that property ?
A. Yes.
.....
.....
Q. Apart from the receipt of rents, as far as you were concerned you thought the property was your own?

A. Not in a monetary gain way - only as far as the name went."

Then, My Lord, pausing there, because those last questions and answers were raised by My Learned Friend, and in relation to those questions and answers of course it is, in my submission, important to bear in mind that you are dealing here with a general undivided Hindu family governed by the Mitakshari Law. My Lord, at another stage I put some questions about that to Mr. Rattan Singh and he agreed he

was the Kartar of this family which means the family property would be under his management. Therefore, if My Learned Friend is seeking to found any argument on these questions and answers by Mr. Gian Singh, I would submit that is a factor which has to be borne in mind.

JUDGE:

Yes, but under the Hindu Law can, for want of a better term I would call a subordinate member of the family, own any separate property and that property still be brought into the 'hotch-pot'?

MR. DINGLE FOOT:

Well, My Lord, he can own separate property as I understand it. I haven't got the authority here but I can get it during the adjournment. My Lord, as I always understood Hindu Law you can have property separately owned. A Good deal of litigation arises in the Courts as to whether they are family property or as acquired.

JUDGE:

What I have in mind is this, you see; can the as acquired property be regarded as forming part of the 'hotch-pot'?

MR. DINGLE FOOT:

No, My Lord, I don't say necessarily it can in strict law. All I am saying of course is, if you have a Hindu family who are accustomed to this system of family property which is jointly owned by them all, they are all owners in common of the family that family would not bother very much as to whether the rents were actually his own in law because they are accustomed to this form of communal holding. My Lord I am not putting it higher than that, but merely dealing with the attitude there of Mr. Gian Singh.

JUDGE:

Yes.

MR. DINGLE FOOT:

That is the only reason I referred to the Mitakshari Law at that point.

My Lord, then the question arose, Your Lordship may remember, of the drawing which was in existence and I think it was used for town planning purposes at the time when the Gulzaar Street property was put up. My Lord, that is referred to at Page 088 - it is at the end of this witness' evidence - and I said - the last paragraph on Page 088 - I said:-

> "Before Colonel Bellman gives evidence, I wonder if I might mention one other matter. There was the question of the drawings put in this morning, and the question was raised as to the original drawing. My Lord, the drawing we have now ascertained is in the possession of the City Council, and it is recorded that the name Gian Singh does appear there and it is dated 6th August, 1941. It would require an Order of the Court to bring it here".

And then Mr. Newbold said he doesn't want the order and Mr. Newbold said he would like the original examined and he would do that without an order. I haven't got the next reference but Your Lordship will recall at a later stage the matter was raised again and Mr. Newbold did say the drawing had been examined on behalf of the Revenue at the City Council and the name Gian Singh did appear.

MR. SUMMERFIELD:

I agree.

MR. DINGLE FOOT:

My Learned Friend agrees with that. Therefore that, in my submission, is also a piece of evidence which needs to be taken into account. My Lord, therefore,

so far as the evidence goes, in my submission, it is really all one way.

JUDGE:

There is a matter which has just occurred to me. It might not be a point of substance. I would like you to deal with it if necessary. That is this; the plot was purchased and the building was then erected.

MR. DINGLE FOOT:

Yes.

JUDGE:

Gian Singh's case is that he was given this by his grandfather.

MR. DINGLE FOOT:

Yes.

JUDGE:

The Revenue say that it was given to him by his father.

MR. DINGLE FOOT:

Yes.

JUDGE:

Gian Singh has given evidence, which I noticed when you were reading it through, that he remembers the erection of the building by his father.

MR. DINGLE FOOT:

Yes.

JUDGE:

That being so, unless the grandfather paid for the cost of erection, that cost would seem to be, at first sight anyhow, to be a matter which should have been taken into account.

MR. DINGLE FOOT:

With respect at this time, in 1941 when the building was put up, it was the

grandfather's firm, My Lord.

JUDGE:

Of course, that is the answer.

MR. DINGLE FOOT:

Mr. Rattan Singh ...

JUDGE:

Very well, Mr. Foot, you have answered my question. I remember precisely.

MR. DINGLE FOOT.

Then, My Lord, the objection was taken that this evidence as to the grandfather having supplied the money was not admissible by reason of Section 91 of the Indian Evidence Act. My Lord, I would, if I may very respectfully do so, dopt Your Lordship's reasoning on this point which is recorded at Page 034 and on the next page. Your Lordship says at the bottom of the page:-

> "Section 91 of the Indian Evidence Act precludes the giving of any evidence of the terms ..... but rather as to the identity of the parties to the transaction".

My Lord, then Your Lordship goes on to rule Section 92 has nothing to do with it. I don't know if that arises now. My Friend, I don't think, at this stage is relying upon Section 92. Then, My Lord, there is a question which follows which perhaps I should have referred to when I was dealing with the evidence:-

> "Since that time have you regarded the income from the plot at Gulzaar Street as being your income or your son's income?"

He says, "Gian Singh's", and it has not yet been paid over to him. My Lord, I would respectfully adopt, if I may, Your Lordship's reason at the bottom of Page 034 and top of Page 035. I am not seeking

to vary the terms of the contract. My Lord, looking at the Section 91 of the Indian Evidence Act, My Lord, there is an illustration that in my submission may be of assistance on this point, My Lord, assuming Section 91 has no application here, if Your Lordship would look at illustration (d) :-

> "A contracts, in writing with B, for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion. Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible."

My Lord, in my submission that comes quite close to this. We say we are not seeking to vary the terms of a document but we say the person who in fact provided the money here was Nagina Singh, the grandfather, and My Lord, if that is so he was the settlor and we avoid the operation of Section 24. My Lord, that would be my submission with regard to Gian Singh's rents. My Lord, with regard to the other separate issue which was raised by My Learned Friend - My Lord there is one other matter I must deal with. My Lord, it is apparently suggested that there is here some kind of estoppel and My Learned Friend referred to the note of interview taken by Mr. Easterbrook when it appears, or it is said, that Mr. Thian agreed that these rents should be charged as part of Mr. Rattan Singh's income. Now My Lord, I shall have to say something more a little later about Mr. Easterbrook's notes of interview. My Lord, it does not appear that this was ever shown to Mr. Thian My Lord, in my submission on any view the notes of interview are not a complete record. Mr. Easterbrook at some stage relied upon his written notes which have not been put into the typewritten notes of interview, and at some stages he relied upon his memory alone and he spoke about matters of which he

has no written record of any kind. My Lord, in those circumstances, since it doesn't appear that Mr. Thian ever agreed that record, My Lord it would be very dangerous in my submission to try and found an estoppel upon it. My Lord, of course I shall also be submitting later on when I come to it, on this aspect of the matter, that there is a great deal of doubt here about how far a general agreement was reached on all matters in issue between Mr. Easterbrook and Mr. Thian. Simply dealing with the estoppel point, My Lord, I would also submit that of course this is not only a matter of fact, it is a matter of law, and it is a little difficult to see how Mr. Thian and Mr. Easterbrook could have agreed together upon a matter of law in such a way; indeed upon a matter of law which affected not only the taxpayer but affected another person. My Lord, therefore I submit Section 91 does not apply, that there is no sufficient material here upon which to be found an estoppel, that in any case Mr. Thian could not have arrived at an agreement which would be binding on anyone on this point, and that therefore there is nothing to preclude Your Lordship from considering the evidence. My Lord I have already made my submission about the evidence. It all points one way. This building was erected for Gian Singh and those were his rents throughout.

Then, My Lord, I come to the other matter, the matter of Grogan Road. My Lord I don't think I need deal with this in any great detail because Your Lordship I know has it very clearly in mind. My Lord, in my submission the matter is really determined by Mr. Rattan Singh's evidence, if Your Lordship accepts it, which has already been referred to and which is in the transcript at Page 040. My Lord this is where I was examining Mr. Rattan Singh in-chief and I said:-

> "Mr. Rattan Singh, when you started building on this second plot in Grogan Road, what did you intend to

do with the completed premises?
A. I had the intention of letting it out.
Q. Letting it out to one tenant or more than one tenant?
A. At that time it was not in my mind as to how many tenants were to occupy the premises.
Q. But you were going to let it?
A. Yes it is true."

And then he explains why he didn't let it in the end because he had the two jobs and there was the question of finding a deposit of a lot of money. That evidence, in my submission, there is no reason why it should not be accepted because it is quite clear, and indeed I referred to it later, or I asked Mr. Rattan Singh about it later - I think it was in re-examination - yes, it is at Page 041. My Lord I said - it is later in his examination-in-chief where I put the question to him, about half-way down the page:-

"Q. And I think you told My Lord that you obtained this money by the sale of the Grogan Road property?
A. Yes.
Q. Mr. Rattan Singh, your ordinary business is that of a building contractor is it not?
A. Yes, sir.

.....

.....

Q. Otherwise has your building consisted of building as a contractor on other plots, other land?
A. Yes sir, it is true."

Now, My Lord it is quite clear, in my submission, here you have a building contractor. His business of course is building on other people's land under contract and when you find he is engaged in something which is quite exceptional so far as he is concerned, he acquires the plot and he builds on it, he builds on it intending it either

for his own occupation or for letting to tenants and thereafter because of supervening circumstances he has to change his mind and sell the house, My Lord in my submission that is quite clearly a capital transaction My Lord I would submit it satisfies every test.

My Lord, here again it is alleged that the matter is covered by an agreement with Thian. Here again we are in the difficulty that we don't know what Mr. Thian had in mind. If there was an agreement at all, was Mr. Thian merely dealing with the amount, saying, "Yes, this amount was received", or was Mr. Thian acting as a lawyer and trying to solve this problem as to the distinction between a capital gain and ordinary income? We don't know and in my submission there is no question of estoppel here.

JUDGE:

Perhaps you will refresh my memory Mr. Foot. Rattan Singh himself had lived in Grogan Road.

MR. FOOT:

Yes.

JUDGE:

What was the situation of the plot that was sold vis-a-vis the building on which Rattan Singh's house stands?

MR. DINGLE FOOT:

My Lord I am not quite sure that I understand your question.

JUDGE:

What I mean is this. Did Rattan Singh buy two plots at the same time, on one of which he built his own house and on the other he built the house which was ultimately sold, or did he buy one plot, either that which was sold or that on which his own house stands, and some other

time buy some other plot, possibly at the other end of the Road?

MR. DINGLE FOOT:

The one plot was sub-divided actually.

JUDGE:

Possibly. I think there was some evidence of sub-division on something.

MR. DINGLE FOOT:

I think there was. I cannot charge my recollection with it at the moment. May I look for it during the adjournment?

JUDGE:

What I have in mind as regards that is that Mr. Summerfield contends, as I understood him, that the operative date in determining the intention of the expenditure of money in relation to Grogan Road must be that not of the building of the building upon it but of the acquisition of the plot. Now that contention may be well founded if in fact the plot was at the other end of Grogan Road. If, however, it was either part of the plot which Mr. Rattan Singh purchased and then sub-divided, or possibly, although less strongly, immediately adjacent plot which he bought at the same time, the inference would obviously be less strong.

MR. DINGLE FOOT:

I wonder if I might check on that. I remember there was some evidence about it and my recollection is that it was a sub-division of the same plot. I may be wrong and I will try and check on that.

JUDGE:

Very well.

MR. DINGLE FOOT:

My Lord I come to a matter which was - or perhaps I might say this, My Lord; of course if I am right on these two issues, if Gian Singh's rents were Gian Singh's and should not have been treated as Rattan

Singh's income, and in addition if Grogan Road should have been treated as a capital transaction and that Shs. 80,000/- should not have been included in the computations, My Lord I have already gone quite a material distance to establishing that these assessments are excessive..

My Lord, before I come to the actual question of assessments I want to refer to one matter on which my Learned Friend laid great emphasis both yesterday and today, and indeed it appears from his statement of facts. What is said here is that all these figures, apart from the item which Mr. Easterbrook added back, were all agreed with Mr. Thian or with Colonel Bellman. My Lord, the first question which arises is how far...

JUDGE:

Before you pass to the question of the agreement with Thian, there is another matter in relation to Gian Singh's rentals which might be worth of consideration, and that is this; if the house was built when the business was Nagina Singh's and if the cost of the building was debited to the business in the business books, is that not some evidence which tends to establish that the building was not given by Rattan Singh to Gian Singh inasmuch as Rattan Singh would not have been in a position to give the building, in that the plot was purchased out of the business and the building was erected put of the business which was not at that time Rattan Singh's business? I do not know whether there is any evidence as to that or not. It is a matter again which might be considered during the adjournment.

MR. DINGLE FOOT:

There is no evidence, of course, of any other income at that time but My Lord there is certainly no evidence that Rattan Singh himself furnished

the funds or was in a position to do so.

JUDGE:

Rattan Singh's evidence was that he was living at home and being given pocket money by his father.

MR. DINGLE FOOT:

My Lord, just dealing with the evidence as to the state of the family at that time, Rattan Singh, as Your Lordship says, was just being given these odd sums he needed, which of course is not inconsistent with a joint undivided Hindu family.

JUDGE:

Quite.

MR. DINGLE FOOT:

But I was coming now, if I might, My Lord, to the agreement with Thian, or the alleged agreement. Mr. Easterbrook was so very categorical on this point. Again and again when I was cross-examining him he said, "This was done with the agreement of the taxpayer's representative". My Lord in my submission it is first of all necessary to consider how far the parties did agree, and I would ask Your Lordship to refer once more to the letter of the 3rd May where Mr. Thian writes:-

> "With further reference to the above case, we wish to advise you that Mr. Rattan Singh has now agreed to most of the items set out..... and subject to the observations made by me later in this report."

My Lord, those were the assets not accounted for; then there is the work in progress adjustment; then there is African wages estimate; then follows the stock adjustment and legal expenses, cash overdrawn and so forth, and cash lodged in Indian Bank Account. My Lord, according to Mr. Easterbrook all those were matters which had been agreed. For instance, take the legal expenses, Mr. Easterbrook's evidence was that all this,

that that matter had been agreed to be added back. I forget whether it was on the 8th or 18th April. I think he said it was on the 8th, all the matter said to be agreed referred to the interview of the 8th April; but, My Lord, that is one matter: You would have expected Mr. Easterbrook immediately to respond by saying, "Why do you re-open this? We had agreed about this", or, at any rate, one would have expected him to acknowledge the letter and say, "Well, do you now want to reconsider something which I thought we had disposed of?,". My Lord, no communication of that sort is sent by Mr. Easterbrook. My Lord, it is more remarkable when you look at the work in progress adjustment - that is item 2:-

> "When discussing this adjustment with Mr. Easterbrook, the point at issue which appeared to be raised was as to how the work in progress should be brought into the 1947 and 1948 accounts.....
> but should like an estimate of the 'profit' on the work in progress and this figure should be added to the Shs. 33,972.35 shown in your schedule".

Then he adds it up and arrives at the total of 43,093 odd. My Lord, that in my submission is wholly inconsistent with the account that was given by Mr. Easterbrook. What Mr. Easterbrook said, as Your Lordship will recollect, is that there was agreement that although this represented sums shown to have been paid in 1948, it was agreed between the parties, apparently for the assistance of the taxpayer, that this sum should be put down to 1947, put down under the heading stock adjustment estimated. What Mr. Easterbrook was saying was that this was a profit which we decided between us should be transferred from the one year to the other. My Lord, in my submission one cannot reconcile that with this passage in Mr. Thian's letter.

JUDGE:

The passage under the heading paragraph 4, stock adjustment, is it?

MR. DINGLE FOOT:

No, work in progress adjustment.

JUDGE:

Work in progress adjustment.

MR. DINGLE FOOT:

That is the passage I was reading from.

JUDGE:

Yes.

MR. DINGLE FOOT:

You see Mr. Thian is arguing here about the adjustment as the work in progress asset. Now My Lord Mr. Easterbrook's account, if I followed him correctly, was here was something which was undoubtedly an item of profit but it was somewhat arbitrarily transferred back from one year to the other, and the point was made that what was to the advantage of the tax-payer, and yet you have, you see, the letter written a few days later, a circumstantial account of this matter, and one cannot reconcile the two - the account here and the evidence Mr. Easterbrook gave. My Lord, I put it this way, the effect of Mr. Easterbrook's evidence was that although it is described as a stock adjustment in the schedule that it wasn't really looking now at his calculations, work in progress adjustment, although it is under that heading that it was included in his computation. Mr. Easterbrook was saying in effect that this wasn't a work in progress adjustment, this was a figure of profit. It was put back. Then you had a notional figure which has also been agreed of Shs. 125,000/-, and therefore they have to fit in, so to speak, the Shs. 91,000/- into the 125,000, and that is how they arrive, by a process of substraction, they arrive at the remaining figure of

33,972.35. That is Mr. Easterbrook's account, but according to Mr. Thian - of course this must have been very fresh in his recollection when he wrote the letter - he says :-

> "It seems that certain items were eliminated from 1948..... .....under normal circumstances, would have been to have included the work-in-progress as an asset...."

My Lord, in my submission it is quite clear, when you look at Mr. Thian's account, and when you look at the way in which this matter was classified in Mr. Easterbrook's computations, that this was treated as a work-in-progress item, not simply as an arbitrary transfer of a figure of profit from one year to another, and, My Lord, it is important in my submission because so much emphasis has been laid upon this matter of agreement.

My Lord, one can carry it further than that, because what is being said here again, when you go to the next item, the item of African wages estimate, it is said that Mr. Thian had already agreed upon a very large sum which wasn't accounted for in Muster Rolls I think the sum was 23,000 which Mr. Easterbrook said, and that the sum Mr. Thian had agreed to eliminate, the sum left over, that was Shs.10,000/- for African wages. Well, having done that, then Mr. Thian goes back, if Mr. Easterbrook is right, on everything he has agreed. It is very surprising indeed that should not provoke any rejoinder at all from Mr. Easterbrook.

I have already dealt with the legal expenses and the cash overdrawn. My Lord, cash overdrawn - this is item 6 of the letter.

> "In both the years of 1951 and 1952, my client insists that the amounts overdrawn came from his own pocket, and that consideration should be given to the fact that his business inevitably became confused with his personal affairs."

My Lord that certainly reads as if this were - the word 'insists' - a contention which had been put forward earlier, this was a matter which had been discussed earlier and the taxpayer must have given his explanation which Mr. Easterbrook was reluctant to accept.

My Lord, I agree that the cash lodged at the Indian Bank Account does not arise now at this stage except this, that if this was a matter which had already been disposed of, again you would have expected a rejoinder from Mr. Easterbrook.

Now, My Lord, of course I am not suggesting that Mr. Easterbrook was attempting to mislead Your Lordship, consciously attempting to mislead Your Lordship when he gave evidence of these matters of agreement. No doubt he is fully persuaded now that there was a measure of agreement in 1958 between himself and Mr. Thian. My Lord, of course Mr. Easterbrook is dealing with matters which occurred three years ago. He is to some extent relying upon his recollection. I know that he has notes. He says various matters were agreed, but when he writes, as he does at one stage, and says, "We have agreed orally; can I have your written confirmation?". he doesn't get it: instead he gets this letter of the 3rd May, of course, even the notes, or the typewritten notes, were notes which were prepared, I think Mr. Easterbrook said, either later the same day or the following day. My Lord they would include matters which were particularly fresh in Mr. Easterbrook's recollection, but these notes were not sent to the taxpayer or his representative; these notes didn't even purport to be a full record of everything that was said; they were merely a record made by Mr. Easterbrook for his own purpose or for the purpose of the Department. My Lord, in those circumstances, if it be material, I would submit that it would be a very dangerous inference to draw that there had been complete agreement in the sense that they agreed the figure on all

these items which were certainly in dispute by the 3rd May.

My Lord, supposing I am right about this and you deduce that there had never been any agreement upon these items in Mr. Thian's letter; My Lord, it may be that there was no real agreement between the parties on the other items to which Mr. Easterbrook has referred.

Then My Lord one goes on to another matter, and that is the question that it is said that these figures were partly a matter of give and take, and that the figures were agreed on as a compromise. My Lord, it is very important to see how the compromise was arrived at and from what position the parties started. My Lord, nearly all the items here alleged to have been finally agreed between Mr. Easterbrook and Mr. Thian were agreed, Your Lordship will recall how that interview began. It began by Mr. Easterbrook producing the figures which he had prepared in Exhibit 'P', prepared from figures which had been supplied to him in Mr. Thian's second report.

JUDGE:

8th or 11th April?

MR. DINGLE FOOT:

8th April, My Lord, this was My Lord, I haven't got it readily available haven't got them marked as yet, My Lord, but I did cross-examine Mr. Easterbrook to say, "Were all these various items agreed on the 8th April?". I think I am right in saying that he agreed. Now, My Lord, I am going to submit of course and I think this will come as no surprise, that this document, Exhibit 'F', the production of which the interview of the 8th April began, was made up of grossly exaggerated figures. It is said that there was here a process of give and take. My Lord a process of give and take depends upon

how you start. If your opening figures are fantastically inflated and you come down a little, you are not really giving anything away. My Lord I am going to come back to that in a moment. This is not the last reference I want to make to Exhibit 'F' but I want to make clear what my case is as regards Mr. Thian. My case is that Mr. Thian's own figures were too high. It is perfectly true that Mr. Thian is a qualified Chartered Accountant, but the evidence is that he had never before engaged in this particular type of work. My Lord, therefore it is, in my submission, of great importance in this case to observe the views of another Chartered Accountant who does have wide experience in this particular field. I am referring now to Mr. Tolfourd-Cook. Now his evidence, when he refers to Mr. Thian's two reports - his evidence began at page 110 and he refers to Mr. Thian at Page 117. Now, My Lord, I am going to submit that this is evidence of the very highest importance in this case, and the second question, or third question he is asked:-

"Q. Have you compared the figures which you have produced according to your report with those produced by Mr. Thian?
A. My Partner has prepared a rough approximation reconciliation.
Q. .....
.....
A. It would inflate the profits if you are going to charge round sums to personal expenditure.
Q. Do you remember the total amount for the 8 years of difference between your figures and Thian's figures?"

Then he says he doesn't remember the figures. My Lord then he also refers to this - I think it is in cross-examination - at Page 138 - in cross-examination by My Learned Friend, Mr. Newbold:-

"Q. I gather from the evidence which you gave that you do not place very

much reliance on Mr. Thian's report."

My Lord, it is a third of the way down the page.

"A. No.
Q. Can I take it that you regard it as a more or less incompetent report?
A. Partially so.
Q. .....
.....
Q. Would you dispute his figures?
A. In part, yes."

Now My Lord, it is important, perhaps I should have referred to it in the beginning, just to see what are Mr. Cook's qualifications. That is at Page 110, and he is asked and he says he was qualified as a Chartered Accountant in 1933.

"Q. Have you had any considerable experience of back duty cases?
A. Since roughly 1930.
Q. Both in this country and the United Kingdom?
A. Basically in the U.K.
Q. Would you say you had a wide experience or slight?
A. Unfortunately a wide experience."

My Lord, in the 15th or 16th day of this case one rather sympathises with him.

JUDGE:

Yes.

MR. DINGLE FOOT:

"Q. And have you negotiated with the Revenue on many occasions?
A. Many thousands occasions."

So Your Lordship is dealing here not only with another Chartered Accountant but a Chartered Accountant who quite clearly is an expert in this particular field which Mr. Thian was not, and My Lord, going back again to the passage

which I read at Page 117 My Lord, in my submission one really has here a clue to the difficulty in this case. My Lord, Your Lordship has already seen these figures of drawings for cash which were not allowed in Mr. Thian's report, not allowed as business expenses my Lord, and it is that figure, it is those figures which have largely inflated Mr. Thian's calculations, and it is because Mr. Thian has fallen into this error; he has assumed that everything that isn't accounted for as a business expense must be private expense, and to the question the witness says:-

> "As far as I can see by examining his report and the schedules, what I cannot prove to be business must be private - a fallacious argument."

My Lord, there, he is putting his finger, in my submission, on the fault in Mr. Thian's report, and My Lord, of course, from Mr. Thian's report the Revenue figures are compiled. They take Thian's report and they proceed to add some figures of their own and they arrive at their totals, and then, when we try to check by a different method - we employ the statement of worth method - we find there is a very wide discrepancy between the two, but My Lord here I would submit is the explanation. My Lord I don't want to leave for the moment the question of agreement. I am saying that first of all these figures were too high and, even though they were too high, that the Department added other figures, but My Lord it is important to see what happened here. Thian offers a compromise in the letter of the 3rd May; he says there are these items which I am not prepared to agree and he offers to agree a figure at £55,000 for the whole period. My Lord, the Department could have accepted that offer. My Lord, if they had done so, and Mr. Rattan Singh had attempted to dissent from it, I suppose some question might have arisen as to the extent of Mr. Thian's authority. There is evidence that

he was authorised to prepare the accounts and to negotiate with the Department: I don't think there is any evidence that Mr. Thian was ever authorised finally to agree the amounts without reference back to his principle, but My Lord, of course this offer was made clearly on the authority of his principla. My Lord, the Department refused. They insisted on their assessment of 64,000 odd pounds, with the result that these proceedings followed and that in due course the taxpayer went to other advisors, other legal advisors, and to other Accountants. My Lord, fresh Accountants were called in and they say, "We don't agree with what was done by the first Accountant. We think that the figures at which he arrived, let alone the Revenue figures, are much too high. My Lord, in those circumstances, since there was no final agreement between the parties, in my submission the taxpayer is fully entitled to come and say, "We haven't agreed and I now wish to impugn these assessors." My Lord, if we take an analogy, the obvious one, the analogy of the legal profession. My Lord, a client, we will say who is a defendant, goes to a lawyer, the lawyer advises him to settle the claim for a large sum. My Lord, no settlement is reached. The client, then becoming dissatisfied with his legal advisor, goes to another one. The second lawyer says. "Well, I have looked at the case, I don't agree with your first advisor. I believe you have got a perfectly good defence. The amount which has been offered by way of settlement is excessive. The plaintiff can't recover anything like this sum." My Lord, even if the negotiations have not been without prejudice, the client is perfectly entitled to take the advice he receives from the second lawyer, and in that case the plaintiff has only himself to think. He had the opportunity of arriving at a compromise and he wouldn't take it. My Lord, those are the submissions I make so far as the question of agreement is concerned. My Lord, I put it in this way, that what Your Lordship has to consider is of course whether the assessments are excessive, and of course I have to discharge the onus, however light or heavy it may be, of satisfying Your Lordship that they are excessive. My Lord, the fact

that there may have been some tentative agreement, if there was an agreement, between the Accountant and Mr. Easterbrook, really doesn't go very far to assist Your Lordship in this matter, I would submit, particularly when you have regard to the circumstances in which the agreement, if any, was reached.

Now, My Lord, I come to the assessments themselves, and, as I have just said, of course the burden does rest upon me to satisfy Your Lordship, and of course to satisfy Your Lordship in respect of each of the years, and My Lord I accept that of course, in respect of each of the years, that these assessments are excessive. My Lord, at an early stage Your Lordship, when I was opening the case last June I think it was, Your Lordship put to me a question on the degree of the onus of proof. My Lord, the submission I made then was, of course these are civil proceedings, there cannot be any burden upon a taxpayer to prove what he has to prove up to the hilt; he hasn't got to satisfy Your Lordship beyond reasonable doubt; the onus is simply the onus which rests upon any plaintiff or indeed on any party who has to prove something in a civil suit; that is to say, what Your Lordship has to consider is the balance of probabilities and no more, and My Lord, if Your Lordship thinks, in relation to any particular year, that it is probable, just probable, that the figure is excessive, then in my submission I would be entitled to succeed on that issue. Of course it does leave Your Lordship the task thereafter of naming the figure, or may be remitting the matter to someone else to discover the figure, but My Lord, so far as that principle hurdle is concerned I get over it if I can show that it is more likely than not that a particular assessment in a particular year is excessive. My Lord I don't have to satisfy Your Lordship, in my submission, as to a precise figure. I don't have to say, "Well, this is the

figure they have arrived at, and this is the figure they should have arrived at." My Lord, Your Lordship is entitled to look at the whole background of the case, at the way in which the computations of the Revenue were arrived at, and everything that passed between the parties, and the various figures which have been supplied, and at the statements of worth and the other factors in the case as well, and then Your Lordship has to consider in respect of each year, I would submit, just where the balance of probabilities lies.

Now, My Lord, in my submission in this case I can satisfy Your Lordship in three ways that these assessments were excessive. Firstly by an examination of Mr. Easterbrook's computations themselves; secondly by a method on which it is sought to rely in this case that is, by a comparison of the statements of worth and by the addition of estimated expenditure. My Lord, so far as that is concerned, of course I appreciate that it only refers to the whole period because Your Lordship has to arrive at a decision in relation to particular years, but My Lord, if I can show that there is a very substantial discrepancy between the figures arrived at by this method and the total of the assessments for the 8 years, then it follows inevitably that all the assessments or some of them must be excessive. My Lord, I appreciate it is not an easy sum to work out at the end of the day, but My Lord there is no escaping, if there is a substantial difference - I shall seek to satisfy Your Lordship there is - then these assessments really cannot stand. My Lord, there is a third method - I don't place so much reliance upon it, but it is the one on which My Learned Friend commented this morning - and that is by looking at the assessments as a percentage of the turnover. My Lord the evidence is that Contractors may make as much as 10% on their turnover. I think

exceptionally it might be 15% and it varies of course as between one class of work and another. I concede that. Also it varies from one year to another. My Lord, I shall come to that a little later, but I submit there can be very little doubt that 1953 was a very bad year.

JUDGE:

Didn't Mr. Blackhall say in that table that was handed in by you this morning in relation to one year that the relationship of profit to turnover was 40%?

MR. DINGLE FOOT:

Yes, one year, My Lord.

JUDGE:

Well I should have thought, accepting at the moment Mr. Blackhall's figures, I should have thought that a variation between 40% in one year, and in another year I think I am right in saying it was 4 or 5%, I should have thought that a variation of that order immediately invalidates any attempt to determine what the ratio of profit was, because it is so great that it is quite impossible to average it out over a period.

MR. DINGLE FOOT:

My Lord, with respect here are the figures - I don't ask Your Lordship necessarily to accept the estimates of turnover by Messrs. Cook Sutton, that is to say, Mr. Blackhall's figures; I am quite content to take Mr. Thian's figures. After all, Mr. Thian's figures are the figures which have been adopted by the Department. Mr. Thian's are their starting point, so these are the Department's figures that they adopt. 1949 is the year in which they arrive at the ratio of 40.6. My Lord, Mr. Thian's turnover is Shs. 281,000/- and that is the figure the Department have accepted and from which they have worked, and My Lord one comes back and finds the assessment on trading income on

which the Department have relied. My Lord, I don't say that this method by itself will enable Your Lordship to arrive at a figure, but I do say that, when you find figures of that sort, and when the evidence is as we know it to be, what you would expect Contractors to make falls very very far short of that, that is a factor which Your Lordship can take into account and say, in relation at any rate to that year, this assessment must be heavily out.

JUDGE:

So far as that is concerned, Mr. Foot, as at present advised I should say that the discrepancy in the ratio of profit to turnover as shown from year to year is too great apparently in relation to Rattan Singh's business - it may not be so in relation to other business - but is too great for me to be prepared to draw any inference as to the profit in any particular year merely from the turnover figures.

MR. DINGLE FOOT:

Well, My Lord, put it this way, supposing Your Lordship thought there was substance in my contention as regards the other methods of approach, if Your Lordship were inclined to think that the figures of the Revenue are inflated figures, or if you thought that there was a very great discrepancy between the statements of worth, in my submission Your Lordship would also be entitled to have regard to this and say, "Well now, these figures lend some support to the same conclusion". My Lord, I agree that it is not such a satisfactory method of approach as the other methods which I have tried to indicate.

JUDGE:

I don't see how, assuming the turnover was 10,000 you have arrived at an assessable income in some other way, I don't see how I can look at these turnover figures or that turnover ratio to see whether your figures appear to be

right or not, if the turnover may have been 40% or it may have been 5% according to the particular year.

MR. DINGLE FOOT:

My Lord, the turnover of course, the figures are accurate as taken from Mr. Thian's report.

JUDGE:

I am not challenging the accuracy of the figures, I am merely saying that it appears from Mr. Blackhall's document that the variation in the ratio of profit to turnover from year to year in relation to Mr. Rattan Singh's business was so great that I do not think that it would be possible to use this method as a check upon any other computation.

MR. DINGLE FOOT:

Well, My Lord, perhaps I might leave that for the moment. I was not proposing to place any great reliance upon it.

JUDGE:

Would this be a convenient time for the adjournment.?

MR. DINGLE FOOT:

If your Lordship pleases.

Court adjourned at 12.50 p.m.

23rd March, 1961 2.15 p.m.

MR. DINGLE FOOT: cont:

My Lord,this morning your Lordship intimated that I should make formal application to amend the revenue. If your Lordship will look at the three sheets of paper - the first deals with Gian Singh which says the assessment is excessive in that it wrongly includes a sum of money. The other two relate to fraud or wilful default under Section 72 - fraud or gross wilful neglect under Section 40.

JUDGE:

Mr. Summerfield, do you wish to add anything to the opposition to the granting of this amendment?

MR. SUMMERFIELD:

First of all no sound reason has been advanced to justify the course at this stage.

JUDGE:

Well, you dealt with that earlier.

MR. SUMMERFIELD:

Only very briefly. I was taken by surprise, my Lord. I think that with regard to Gian Singh's rents that was opened very fully and the case has proceeded on the basis that that was an issue. While I am not conceding that he can ask leave to argue that now, I can see there are some grounds on which your Lordship could exercise your consideration in his favour. As regards the other two, these are fundamentally one case, as I understand it, the assessability under (a) and my learned friend does say that (c) deals with Section 40. If it is confined only to Section 40.

JUDGE:

It is.

MR. SUMMERFIELD:

I don't think I shall take objection. I think (c) has already been covered by (1). As regards (a), my Lord, I have taken the opportunity of going through my learned friend's opening. I would not like to say it is exhaustive, but the only references I can find in the opening which have any remote bearing on it - first of all on page 7 (my learned friend will of course amplify this if I am wrong) where Section 72 is dealt with, and on page 9. In both those cases he was dealing with the additional tax, or penalty as he called it then. Both those were directed to the question of penalty, not to the

question of assessability at all as I understand (a) wishes to introduce now. At page 7, Section 71 and 72 - Section 71 is the ordinary procedure, 72 deals with additional assessment. That whole part is addressed to the question of penalty. Penalties cannot be imposed more than 7 years back. That is a very different thing from assessability which should never have been challenged.

The nearest reference that I can see appears on pages 11 and 12. If course there he does talk about onus, and this is what he says (Page 020), middle of fourth paragraph:

> "My Lord, then I go back to Section 101, and My Lord, Section 101, 1(b) provides that 'any person who omits . . . with respect to his total income'. Then there is provision in sub-section 5 'where any appeal . . . shall be remedied'.

What he is dealing with there is Section 101.

"I have two submissions to make about that Section. As your Lordship has already seen, 'The onus of proving shall be on the person appealing'. That only goes in my submission to the amount of the assessment. If the issue arises as to whether there has been fraud or gross neglect, in my submission, that sub-section, paragraph (c), Section 113, has no application".

My Lord, he says all that in relation to Section 101.

"Secondly, Section 101, 1(b) refers to the omission of an amount which should have been included therein .. Now, my Lord, you may have a case, and indeed you have a case here, where the taxpayer has two separate sources of income . . . . Let us suppose he makes a mistake by pure inadvertence he makes an error, which is not due to fraud or gross neglect. He may include £1,000 in one year instead of another; he makes that mistake

without any fraud or gross neglect, in relation to his professional income. Then a very much smaller sum is due to him for this entirely different occupation which he follows in his spare time, and he omits to return that, then it may be that that omission is due to fraud or gross neglect. I submit that that small sum would not infect the whole, and that the Court would need to consider separately these two omissions. I do not say that this problem will arise here, but it is a submission which I may have to make in relation to this case".

Now that is the nearest reference throughout the opening. Quite clearly I don't see how the respondent was in a position to glean from that that this particular ground of appeal would be urged in the closing address. That is so, there was no right to assess because there was no fraud or wilful default. What he is dealing with there is a separate source of income, inflecting the whole, again having a bearing on the question of penalties. Now My Lord, in your Lordship's provisional ruling your Lordship referred to the fact that I had dealt with these aspects of fraud or gross neglect. I would ask your Lordship to recall that I dealt with those aspects under protest, reserving explicitly that the appellant would not be allowed to raise it. My Lord, at the time I was merely isolating the issue and I was told that if certain aspects should be raised I had better deal with them then or not at all, and without prejudice I dealt with them, again reserving my right that he should not be entitled to raise this. My Lord, Mr. Newbold is in Dar es Salaam so I have not been able to consult him. Whether or not it would have been the case if he would have conducted the case differently, had this ground of appeal been before the Court, I am unable to say, but I don't think I am conjecturing too far that the cross-examination at any rate

would have been conducted on slightly different lines. Permission was given to the amendment - it is not as if it is a matter which was arisen extra proviso. He had decided not to raise it in his Memorandum of Appeal and it is the wrong place to include it in the closing address.

JUDGE:

In my view it would be wrong in a case of this nature and importance to allow a procedural omission to deprive the appellant of the opportunity of arguing the matter which may be vital to his case. I do not say that it would be proper at a late stage in an Income Tax Appeal to allow an amendment which entails the giving of additional evidence, but here Mr. Foot's arguments must of necessity be confined to the evidence of the existence or non-existence of fraud. I therefore grant leave to make the amendment sought.

MR. DINGLE FOOT:

Now when the Court rose, I had just been mentioning the three ways in which it might prove that the assessments were excessive. My Lord, your Lordship is not inclined to attach very much importance to the third, if any at all - that is the question of percentage of turnover and so I come straight away to the first way in which, in my submission, I can show that these assessments were excessive, and that is by the examination of Mr. Easterbrook's computations. My Lord, in my submission it is material to look at Mr. Easterbrook's course of dealing with the taxpayer and his representative, Mr. Thian. My Lord, I am sure your Lordship will have no doubt, after seeing in the witness box for several days, that Mr. Easterbrook is an extremely zealous public servant. It is my submission that in dealing with this taxpayer he showed a great excess of zeal. My Lord, no doubt it is necessary for the purpose of protecting the revenue that the Department should be armed with these very Draconian powers, but My Lord it is necessary to remember that they enable the Department to behave in such a way

that even a court cannot behave, and they can make what they call a speculative assessment upon little or no evidence. They can exercise their judgment upon the most flimsy materials. They can compel the taxpayer to give any information they please in relation to his tax affairs. My Lord, it is the sort of power which we do not even permit to the Police when they are investigating the most serious crimes. All this may be out of point, but in my submission it is necessary that those powers should be used with discretion and with fairness and I submit that quite clearly on the 8th April, 1958, Mr. Easterbrook went far beyond the proper and legitimate exercise of his powers. I don't know whether he acted so on his own discretion or whether he acted on the instructions of his superior officers. My criticism is directed not so much against him, in fact not at all against him as an individual - it is represented against the Department and its representative on this occasion was Mr. Easterbrook. Your Lordship will remember that at a very early stage in the cross-examination of Mr. Easterbrook about the draft computation that he made in relation to the years 1941 to 1945 inclusive and I asked at what figure he had first estimated Mr. Rattan Singh's income, and Your Lordship will remember that I got the perfectly staggering reply that he had first estimated Mr. Rattan Singh's income from 1941 to 1945 at a total of £54,000. I did not know at that moment whether my hearing was beginning to fail and I got Mr. Easterbrook to repeat it. That figure was put forward at a time when Mr. Rattan Singh was getting a little pocket money in the first place from his father and then a small salary. He was not even in control of the business. He was simply his father's employee in what, in my view, was not a big business. Nobody suggested that it was, and yet Mr. Easterbrook put the figure in the first place at £54,000. I got him to elaborate on it and he said yes, he was having an income at that time, according to his calculations, of over £10,000 a year. Then my Lord, later on

we saw Exhibit 'F' and your Lordship will recall the figures which appeared in Exhibit 'F'. My Lord we really are now in the realm of fantasy when you have figures of this description and when we look at the sources from which those figures came. Your Lordship will recall that exhibit - that what the witness has done in each of those years is to take the amount which has been paid into the bank account in the name of Nagina Singh without putting against it any payments out for contract, wages, transport. It was in the Bank account stated to be receipts and payment on behalf of Nagina Singh. So you have that at the head. Then you have the payments on behalf of Nagina Singh, then you have the payments out, which are wholly appropriate to the business of a contractor, and all that Mr. Easterbrook does is to extract the payments in and put them in year by year. My Lord, I have just extracted my learned friend's note- in my cross-examination Mr. Easterbrook said this in answer to me he said "This draft shows the taxpayer was to get it settled, with a view to getting a settlement". My Lord, then I put the question "Are you now suggesting that he ought to be taxed on these figures". The anser was "no". Then I put the question "Do you then think he ought to be taxed on these figures" and the answer was "No, I don't think so".

My Lord, your Lordship will recall that after these figures had been shown to Mr. Thian, Mr. Thian obviously objected, and the total was reduced from £54,000 to £32,000. A little later in his cross-examination Mr. Easterbrook said: "There is no mention of the reduction in my note of interview. I don't know why not". My Lord, it does cast a certain amount of light, in my submission, on the fullness and complete accuracy of the notes of interview, when an alteration such as this is not even recorded. My Lord, later on I put to the witness this

question "Did you honestly believe that other sum represented his income" and I got this reply: "It was money handled by Mr. Rattan Singh". The money that was handled represented income. He said these are the figures on which he ought to be taxed. My Lord, in my submission it is perfectly plain what Mr. Easterbrook was doing - this draft was being used as a bluff in order to bid the taxpayer and his representatives into submission. There can, in my submission, be no other explanation of these figures, figures which Mr. Easterbrook himself did not really attempt to defend in the witness box. First of all you get one of the inflated figures, then you allow the taxpayer's representative to knock it down to what is still a very high figure and this you describe as the basis. Your Lordship will recall I asked him whether he had engaged in a similar process in 1954 and you will remember the protest that Col. Bellman made in the letter of the 30th April, 1958. Col. Bellman said this; "My client will clearly have to pay a heavy penalty for these, but from 1954 they have employed a European firm of accountants and the cost involved is considerable, and now you are proposing to ignore the figures and arbitrarily assess a Profit of $4,000 primarily based on prior hypothetic previous results having no regard to the fact that the accounts show a loss of nearly $4,000". I cross-examined Mr. Easterbrook on that. This was in answer to your Lordship. "I cannot give detailed figures in coming to the conclusion of $4,000. I had doubts about an odd 1,000/- and the jewellery transaction, plus motor car expenses". There is a good deal more but your Lordship will remember that he owed some further sums and although he started with a loss of $1,300 he proceeded to build up a blance of $1,600. Again, in my submission, there was grossly inflated figure. The significance of these exercises in the years 1941 to 1945 and later in the year 1954 is that they do show how assessments were attempted to be arrived at with Mr. Thian and occasionally with Col. Bellman, and they do show, in my submission, a tendency to greatly over-

assess the taxpayer's income, and in that respect they have a very real bearing upon what your Lordship has to consider.

Now My Lord, having said that may I come to the actual computations, the computations of his income. Your Lordship will recall that this is most important in relation to the computations, that first of all you have a balance per accounts - now these of course are Mr. Thian's figures, and I have already made my submission that these are inflated figures before ever Mr. Easterbrook starts adding any items back. Certainly if your Lordship accepts the view that was put forward in this connection by Mr. Telfourd Cook, Mr. Thian had already proceeded upon the wrong principle, that is to say he had assumed that everything which could not be shown to be spent for the purpose of the business must be regarded as a private expense, My Lord that that is so, clearly appears from Mr. Thian's figures of drawings in the second report. My Lordship has already seen it. It is the figure for 1951, when you have seen it. It is the figure for 1951, when you have these very substantial cash drawings, drawings of 3059, 24,000, 555, 5,000, 5,000 two items of 5,000 and an item of 5,807. My Lord, those have all been put down as if they were private expenses, and that exactly tallies, in my submission, with what Mr. Cook had to say in the way in which Mr. Thian had arrived at his calculations. Then Mr. Easterbrook starts to add in a number of other figures, some small, some substantial. There was one figure for Donation - a single figure in 1948 of 875/- commission. Now your Lordship will recall the question I put to the witnesss here re contractors commission - legitimately to be paid by the contractor. One does not know the circumstances, but this was in the year 1948. It must have appeared in one of the books, presumably in the cash book of the firm. Is there any conceivable reason why that should be disallowed, merely because after a lapse of

something like 10 years neither the taxpayer nor anyone on his staff could recall precisely to whom that commission had been paid. It is not even a round sum. But there it is, because an explanation cannot be furnished, perhaps because a document has been lost - it may have been a ledger which had disappeared from the office - no allowance whatever is made for what is, on the face of it, a perfectly proper and legitimate item of a sort which you would expect to find in a contractor's books; it is disallowed and added on. This one goes to the Legal Expenses. In my submission if Mr. Easterbrook had looked at the accounts he must have observed that some of these items were in relation to matters which either concerned the business or concerned the collection of rents. In my submission there is no escape whatever from that conclusion.

Now he has given the breakdown of that but if he is doubtful about any of the items it would have been the simplest matter in the world for him to invite Mr. Thian to a further interview and he could say "Well now, I want particulars as to how much of this was in connection with the business, collection of rent, and how much represented other forms". He puts the figure down, although he must know that some part of it is deductible. My Lord, that in itself, I would submit, is enough to invalidate these assessments. I know that the argument that is put is this - oh well, there were other sums which he could have added and did not and therefore the mere fact that you criticise a particular figure does not mean in any way that the assessment is excessive. My Lord, in my submission that cannot be a legitimate approach. What has to be done when an assessment is arrived at - the officer of the Department has to arrive at an assessment to the best of his judgment. The taxpayer attacks the assessment but the Department cannot then be heard to say, oh well, it is perfectly true, you have destroyed some of our figures successfully but there are a lot more we could have added on. My Lord, if that form of reasoning were to succeed it would seem

that the taxpayer could never discharge the onus of proof which lies upon him, because there would always be some unspecified items of uncertain amounts which you could say could have been added on. In the absence of very much more specific evidence in my submission that suggestion should be completely ignored. You already have an inflated figure, to which you add a figure which had been accepted by the Department, and if I can show that some of these items here should not have been added back then in my submission I discharge the onus which lies upon me. As regards medical expenses it is perfectly clear from the evidence and from the information which Mr. Easterbrook had that some part of these medical expenses must have been attributable to his staff. Knowing that, in my submission, the Department is not entitled to and these figures back in toto. Either they could insist on having more concise information from the taxpayer or they could seek to arrive, by a pure process of elimination such as they employ in other cases, at some sort of distinction between expenditure in connection with the business and private expenses. It is no good then saying that they have not got any basis on which to do it. About this time Mr. Easterbrook has been adding on figures here and there without any basis at all. It is a conjecture. Well, if the Department can use a conjecture in one case they can use a conjecture in another, and if they conjecture that you ought to add some 10,000/- here and there they can guess what would the proper definition of this item. It is not right that the whole should be added back. It is clear that some part of these medical expenses were deductable, even though there is no evidence of what that should be; these assessments are excessive.

Then I go down to the line below - all these fancy figures. My Lord, first of all the motor expenses. It is £100 a

year. The onus is that Rattan Singh lives less than a mile from his business. Then again the stock - that adjustment is a scapebag of the 55,000/-. My Lord, it may well be that Mr. Easterbrook is entitled to arrive at a sort of notional figure for the purpose of his computations, but of course your Lordship has to have regard to the evidence, which says that Mr. Rattan Singh had protested throughout that he never had at the end of any year stock to the extent of 75,000/-. He says he never had any more than about 55,000/-(?) My Lord, my learned friend made a comment this morning that Mr. Rattan Singh, as he himself said, did not jeep the books. That is perfectly true, but nonetheless Mr. Rattan Singh is a working contractor and although he did not know what went into the books he would have a pretty shrewd idea as to the amount of stock which he carried. There is his evidence. Then when one looks at the later years, where you have accounts which are not in dispute at all, one finds, even though apparently they had a flourishing business, the stock figure never reaches 75,000/-. Even though Mr. Easterbrook may have been perfectly entitled to put in this figure, I would invite your Lordship's attention, having regard to the evidence which your Lordship has heard, that the figure must be less, or at any rate the balance of probability is in favour of the figure being less than 75,000/-.

Then one goes to the Work-in-progress adjustment. My Lord, here one has the 91,000/- odd. I have already made my comment about this and in my submission you cannot really combine the two methods. They have arrived at an entirely notional figure of 125,000/- - your Lordship will remember taking those two years together, 1946 and 1947. Mr. Thian had suggested that the taxpayer should be assessed on the basis of 10% of the monies actually banked. Mr. Easterbrook did not accept that. He proceeded to start with that figure of Mr. Thian's and added various items as well. I am afraid I have not got a note of this but you will remember

that all sorts of things were put on until he reached 30,000/- in 1946 and 125,000/- in 1947. The view that Mr. Thian expressed in his letter of the 3rd May he said you are really combining two assessments - you are proceeding on your notional assessment and you are bringing in an actual figure as well.

The cost of the plot, 17,500/-, was the cost of the Parklands plot. I will avail myself if I may of an observation of your Lordship's in an earlier stage of the hearing. Supposing you have two sources of income - you make the profit from the business and you draw your rents and then you purchase the plot. Does it necessarily follow that the cost of purchasing that plot should be added in as an addition to your business profits. It may very well be that that simply represents your savings.

JUDGE:

What you really mean, Mr. Foot, is that having made £100, put it into the bank, taken it out to buy my plot - that is clearly not £100 which has to be taxed because I have already been taxed on my gross income from which that £100 came. What Mr. Easterbrook has purported to do here - assumed that the £100 came out of the business, it diminished the profits and therefore it has never been taxed. It was charged as a business expense in some way. Is not that what you were saying?

MR. DINGLE FOOT:

That is what no doubt he did assume. He is saying well this came out of the business and therefore it was not taxed in any other way. That I would submit is a poor assumption. He is either earning his living as a contractor or drawing rents or both at the end of the year. When he has made his profit he can do anything with the money which he pleases. But this is only taxable, my Lord, if it is assumed that it does not represent saving at all. It has either come

out of the business or else it comes from hitherto undisclosed sources of income.

JUDGE:

If it had come out of unidentified drawings, having added these drawings back it would seem to me he cannot add back the plot. It would be taxing the same money twice.

MR. DINGLE FOOT:

I come back to the unidentified drawings because they go very largely to making up the whole puzzle. Mr. Easterbrook could only have included this figure on the sort of assumption which I have suggested. He may be justified in doing that but it is not an assumption that Your Lordship is bound to make. In my submission Mr. Easterbrook is not on trial here and this is not an appeal from him.

I then go on to African wages on which I have already made my comment. I have already made my comment on Grogan Road, the cost of the Grogan Road plot - I make the same submission about that as the Parklands plot. Then there is the 80,000/- profit on the sale of Grogan Road. If I am right about that that is the capital transaction. That makes a very big hole in the figures for 1953. That would be quite sufficient to satisfy your Lordship that the figures for 1953 are excessive. Then one comes to wages - I don't propose to repeat myself on that, and then one comes to this item of drawings adjustment. I took 1951 as a specimen year. In that case the drawings adjustment appeared to have been over 40,000/-; between 40,000/- and 50,000/- In the drawings are the cash drawings described as cash in Mr. Thian's schedule for 1951. All of them of course could quite perfectly well have been used either for the purpose of the business or for the purpose of living expenses. My Lord, Mr. Easterbrook is not content with that. In addition to that he proceeds to add £7,000/-, in 1951.

If my Lord will look at this schedule attached to the letter of the 18th April.

These are the kind of computations on which the taxpayer is assessed. These are the figures on which the taxpayer was ultimately assessed. I have been going down the list, starting with Mr. Gian's figures and going through these various items, legal expenses, medical expenses and so forth, and then your Lordship will see that there are drawings adjustments, that is 4,000/- in 1948, 16,000/- in 1949, 17,000/- in 1950, 17,000/- in 1951, 17,500/- in 1952 and 17,500/- in 1953. Now my Lord, that makes a total of 89,000/-, and Mr. Easterbrook's explanation was, I think, that he had allowed 2,000/-. I may have got the figure wrong for education, and the rest represented some form of personal expenditure, well my Lord personal expenditure for the household expenses, will already have been allowed for in Mr. Thian's accounts. Indeed my Lord one sees that in the lists for 1951. There are various entries which obviously refer to household accounts, Tailor 800/- Oriental Dairy 432/-, laundry 48/50. My Lord, I am not really concerned with the size of the entries. It is perfectly clear that already allowance has been made for a considerable number of items - they must be expenditure incurred in the house; so first you have obviously the household items, then you have the drawings, these very, very substantial drawings, cash drawings, all of which could have been available for living expenses or for the business. Then on top of that, not content with all that, Mr. Easterbrook proceeds to add back £850 a year for drawings adjustments. My Lord, when you have all these items it is not perhaps very surprising that the figure that was suggested to Mr. Rattan Singh and Mr. Newbold for his living expenses was £2,000 a year.

JUDGE:

I don't think that it was quite that. I think Mr. Newbold's suggestion arose out of Mr. Rattan Singh's complete inability to put any figure. Mr. Newbold put one or two

figures to Mr. Rattan Singh and Mr. Rattan Singh said that the figure was in the book. He said was it £2,000 a year and he said the figure is in the book.

MR. DINGLE FOOT:

It is at the bottom of page 046.

"Q. I am asking Mr. Rattan Singh did he give his wife for household expenses more than £600 a year?
A. I have not kept any account to this effect whether the household expenses which I used to give my wife amounted to £600 or more; I have not kept any account.
Q. Could they have amounted to £2,000 a year?
A. No, it cannot be so much, it cannot be so much."

Mr. Rattan Singh was a little shocked at the suggestion. He is not talking about the books at this stage. Further up that page he is first of all saying that his father gave his wife money for household expenses, and then he says after his father died he himself gave his wife money for household expenses, sometimes 200/-, sometimes 300/-, and then he says when she used to demand money for household expenses he used to give it to her. He was giving her more than £600 a year. He said he did not keep an account, it was in the books. I was coming to that question of household expenditure. The point I am making now being on the drawings, that there can be really no justification, in the light of Mr. Thian's figures, in the light of the fact that Mr. Thian has already allowed for household expenses, there really can be no justification for adding back over the course of the years this total sum of 89,000/-.

JUDGE:

This is in addition to the unidentified drawings?

MR. DINGLE FOOT:

Certainly my Lord. One knows on whom the onus rests but I submit it is fully discharged here and I would further submit that even though an officer of the Department may be entitled to arrive at a speculative assessment, he cannot just take figures out of the air and add substantial sums which have already been accounted for, but which undoubtedly have been paid out in one way or another. Now my Lord, just to complete this document, your Lordship sees that there are the two items of 30,000/- - one in 1951 and the other 30,000/- in 1954, cash lodged in an Indian Bank account. Now my Lord, the cash lodged in the Indian Bank account is the cash about which it was said that it was part of Gian's inheritance but it had been handed over to Rattan Singh and transferred to him. I don't think he had anything to do with the Indian Bank account. There was a particular entry of 30,000/- which appears to have been credited to Gian Singh, the explanation was that the person concerned was Gian Singh Kalsi. Now my Lord, that was dropped out. Consequently there was the money which was transmitted to the two gentlemen who worked for Mr. Rattan Singh, I think one of them was Channan Singh.

JUDGE:

Is it now conceded that the gross assessment of this full period must be reduced by 30,000/- in respect of the money which was really Channan Singh's and someone else's money or is the Department still saying that that money was Rattan Singh's?

MR. SUMMERFIELD:

That sum was originally allowed. There are two sums which were left in.

JUDGE:

Where was that supposed to be - in Amritsar or in another Indian Bank or a bank in Kenya?

MR. SUMMERFIELD:

That went to a bank in India.

JUDGE:

The position now then is that the money in one of the Indian Banks, 30,000/- has at no time been taken into account in arriving at the assessment.

MR. SUMMERFIELD:

That is so.

JUDGE:

If that is so I can put that transaction completely out of my mind. So there are two 30,000/- sums which have either been properly included or have improperly been included?

MR. SUMMERFIELD:

That is so. They are the one loaned by the wife and the other one which was alleged to have been a gift from Nagina Singh to Gian Singh on account of his wedding.

MR. DINGLE FOOT:

There were originally four sums and they were in dispute. My Lord, there was this sum sent to Channan Singh, his brother - that did appear in an earlier computation but that has been omitted from this final computation. Also there was the sum which was paid to Gian Singh. Now my Lord, the point I desire to make is this - that those sums were the subject of enquiry. In each case it was possible to produce evidence which was sufficient to satisfy the Department that those transactions were what they were alleged to be. That is so, there is no question now of the

Department being misled or deceived in any way, in relation to these sums, although they were originally queried. There are then remaining two sums and I put it to Mr. Easterbrook, and he agreed, that if the Taxpayer's explanation be accepted that those two sums of 30,000/- in each year also fall to be struck out.

MR. SUMMERFIELD:

I don't think Mr. Rattan Singh gave an explanation in the books, it may have been an explanation given to Mr. Easterbrook.

JUDGE:

It does not matter. What is important is that Mr. Easterbrook, as I gather, admitted that these sums appeared in the figures on which the appellant was assessed to income tax. If they wrongly appear there then the assessable income was less in respect of the years 1951 and 1952 than that upon which the assessment was based.

MR. SUMMERFIELD:

I understood my learned friend to say that if the taxpayer's explanation was accepted they should be excluded. That is the point, not an explanation he has given in court.

MR. DINGLE FOOT:

He also gave it in court. I am looking at page 042.

"Q. Did your wife accumulate any money?
A. Yes, she accumulated some money.
Q. How did she obtain that money?
A. The money which I used to give her for her expenses, she used to save some of that money, and thus she accumulated some money.
Q. Over a short period or a long period?
A. Over a long period.
...
Q. She kept it in your house?

A. Yes Sir.
Q. In cash?
A. Yes Sir, in cash.
Q. What did she do with the money eventually?
A. She gave that money to me.
Q. And do you remember when?
A. I don't remember exactly what year.
Q. How much was it?
A. 30,000/-"

MR. DINGLE FOOT:

My Lord, it was agreed to here. That is how it came to the notice of the Department. At some stage he did give evidence also about money for Gian Singh's marriage. Yes, a bit further on, he does say some money was given by the grandfather. He said it in court, that this was money which my wife accumulated.

JUDGE:

I don't think that the money for Gian Singh's wedding came from the wife, that came from his mother, from Rattan Singh's mother.

MR. DINGLE FOOT:

I was not intending to confuse the two things. There are two quite separate items. The 30,000/- which Mr. Rattan Singh's wife had accumulated from her household savings and which she passed over to her husband, and which was credited to her in the books and then there was a further sum which was contributed apparently by Mr. Rattan Singh's mother for Gian Singh's wedding expenses. Now my Lord all I can say is this, in relation to these other sums, where it has been possible to substantiate the claim it has been discovered that there is evidence sufficient to satisfy the Department. In other words we can take it in relation to other similar sums - Mr. Rattan Singh's explanation turned out to be true. In my submission there is

not sufficient reason for rejection the evidence in this case. My learned friend, Mr. Kean, has now found the reference to the other sum of 30,000/- from Rattan Singh's mother. At the bottom of page 041, and then it goes on to page 042:

"Q. When did your mother die?
A. In 1952.
Q. What did she give you?
A. 30,000/- in cash.
Q. Did she explain what that money was?
A. She told me that was the money which was to be spent on the marriage of my eldest son, and this was the money which she wanted to spend on his marriage herself during her lifetime, but since she died it was her wish that the money should be spent on the wedding of the eldest son.
Q. Did she say who provided that money?
A. Yes she told me it was provided by my father.
Q. What did you do with the money?
A. I sent that money to one bank at Amritsar with a letter.

JUDGE:

Was that letter ever tendered?

MR. DINGLE FOOT:

Yes my Lord, I refer to it a little later. I am not sure that it has been exhibited.

JUDGE:

I don't think it was. As it went to a bank in India it was probably written in an Indian language. Unless there is a translation to it it will be of no assistance.

MR. DINGLE FOOT:

Just taking that evidence as it stands, there is no reason in my submission why it should be rejected. Your Lordship knows that in

India a great deal of money is spent on weddings. In Exhibit 17 the letter does appear. It is a copy of a letter from Mr. Rattan Singh to the Manager of the National Bank of India, Amritsar.

Just to complete these computations, there are two items, round sums debits to contracts and a round sum of creditors unexplained. You will remember one of the names in Mr. Thian's report starting with the City Garage and so forth and Mr. Easterbrook has disallowed all the round sums. Your Lordship will remember that Mr. Easterbrook was giving evidence about this and he said that he had asked Mr. Rattan Singh to provide statements from these various debtors. Mr. Rattan Singh had apparently blankly refused to do so and he said that he was not going to obtain statements from some of them and that some of the others were dead. Now it did appear that Mr. Easterbrook did not know of that. It was an astonishing statement for Mr. Rattan Singh to make, and that was a case when Mr. Easterbrook's recollection was really badly at fault. My Lord, what has been done here - it has been assumed, in my submission, that these are fictitous entries. Well now, that again may be a proper assumption for an income tax Inspector to draw but my Lord it is not an assumption which your Lordship need make.

I think it may be material just to look at one passage in Mr. Thian's first report: "We have to report that subject to the decision by Mr. Rattan Singh to engage us to undertake this work on his behalf, we have received every assistance and co-operation necessary to complete our work which, in the absence of proper books and records, has presented numerous difficulties".

Now my Lord, let me look, if I may address your Lordship on the conduct of Mr. Rattan Singh, at his set of figures. If in fact he only returned the income as

£4,000 and it was £64,000, your Lordship would be bound to draw a very unfavourable conclusion. But my Lord, the matter affords a different aspect if the figures are of the order for which I am contending. There is undoubtedly the fact that Mr. Nanda understated the rents. Unfortunately we don't know of course Mr. Nanda's mental process. It is quite clear that Mr. Rattan Singh himself was not responsible for the accounts. He did not keep them, and indeed it would have been impossible for him to have done so, and the accountancy side of the business was throughout left to someone else. Now my Lord, the chief line of criticism against Mr. Rattan Singh is the Bank accounts. That relates to two accounts, one was a dormant account in India and the other was an account in the Monbasa Branch of the Bank of Baroda, an account which was a feature in the years which are the subject of this investigation. My Lord, therefore I would submit that there is room here for misunderstanding.

Therefore if you take the whole picture together, in my submission these criticisms may be not justified in relation to Mr. Rattan Singh. If your Lordship thinks of looking at the whole of this evidence - and as I have already submitted it has been found truthful, he is on the whole a reliable witness, making allowance at every stage for the language difficulty - if that be so then my Lord in my submission it almost inevitably follows these assessments must be excessive, because one can really only justify the revenue figure on the supposition that there are undisclosed sources of income. Indeed, my learned friend in almost the last words of his address, referred to the possibility of their being bank accounts - I think he said one in the United Kingdom - a matter which was put to Mr. Rattan Singh and denied by him. They have interrogated the taxpayer and his advisors not once but many times over and it would be entirely wrong, in my

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submission, as the evidence now stands, to draw any inference of that kind whatsoever - there has been nothing to justify it.

Adjourned until 9 a.m. 24th March, 1961.

24th March 1961

9 a.m. Friday, 24th March, 1961

MR. DINGLE FOOT: (Continued)

My Lord, when the Court rose yesterday I was referring to the evidence of Mr. Rattan Singh, and my Lord, if I might complete that reference, I will recall to your recollection what Mr. Rattan Singh had to say about his personal expenses, household expenses; that is on page 075 of the Transcript, and he says this : "Do you remember answering certain questions put to you by Mr. Bellman? A. Yes....." (Reads). That is what he says about the expenses of his household. That is what he said to Mr. Bellman. The only occasion where a different figure has been mentioned is in the letter of 3rd May, Mr. Thian's letter, where the expenses are put at £1,200 a year instead of £600 a year. I think I am right in saying that Mr. Rattan Singh was not cross-examined on that figure. All that was put to him by Mr. Newbold was the suggestion that the expenses might be not £600 a year but £2,000 a year.

I will revert before I leave this aspect to the question of the drawings. Your Lordship will recollect that I addressed the Court at some length yesterday on the drawings adjustments which had been added on in Mr. Easterbrook's computations: Shs. 17,000/- in one year, Shs. 17,500/- in another year, making a total, in addition to Mr. Thian's figures, of Shs. 89,000/- over the years. When one looks at Mr. Thian's accounts, reports, one finds in those reports a number of items for United Dairy etc. which are quite clearly

household expenses. Your Lordship has also seen that there are those unidentifiable cash drawings, all of which have been classified by Mr. Thian as if they were personal drawings, and the complaint I was making yesterday was that in addition to Mr. Thian's figures, which may very well have been inflated figures because this money may well have been used either for the business or for living expenses - in addition to Mr. Thian's figures, this total sum of Shs. 89,000/- has been added on by Mr. Easterbrook. For the convenience of the Court I have had prepared a further document.

JUDGE:

Have you any objection to my seeing it, Mr. Summerfield?

MR. SUMMERFIELD:

No, my Lord, but I do not of course.....

MR. FOOT:

My Lord, if you will look first of all at the documents which are annexed to the schedule, you will see that we have extracted from Mr. Thian's drawings each year the items which are either unidentifiable cash or which are clearly household expenses: Oriental Dairy United Dairies and so forth. Those are all clearly household expenses. Going back, one sees the totals that have been arrived at and your Lordship sees firstly the total personal living expenses and net cash taken from Mr. Thian's schedules.

JUDGE:

There is one item which seems to me to require explanation. I observe that under the heading December 31st appears the item "Light and Water". Where did Mr. Thian get that item from?

MR. FOOT:

I do not know precisely where he got it from. I am instructed that that is an estimated figure.

JUDGE:

In this country it is not usual to pay for light and water in a lump sum at the end of the year.

MR. FOOT:

I observe it is the same figure at the end of the year, 1920.

JUDGE:

On 31st December?

MR. FOOT:

Yes. It looks as if it is a total at which Mr. Thian arrived. It does not affect my argument in any way. A figure has been included there for water and light which is clearly a household expense. If your Lordship will go to the first sheet, you will see that on the top line for each year there is total of what is shown in the attached schedules, and then there is added to that Mr. Easterbrook's drawings adjustment.

JUDGE:

I do not follow this at all.

MR. FOOT:

Your Lordship will see at the first sheet on the top line for each year there is total as shown in the schedule; that is the total amount for all those items which have been extracted and shown in the schedule. Those are Mr. Thian's figures in the top line; and then in the next line there is Mr. Easterbrook's drawings. My Friend, when I showed him this, observed that we described it as arbitrarily added back by the Income Tax Department. My friend demurred to the use of the term "arbitrarily". I do not mind how it is described. Your Lordship saw the totals and of course the totals are very very much greater than the figures given by Mr. Rattan Singh. I do not want to repeat myself, but it is in my submission very important in this case always to bear

in mind that if those cash items were, as they may very well have been, for business or living expenses, then of course the whole of Mr. Easterbrook's calculations are thrown out. Even supposing it was said that taxpayers are sometimes inclined in cases of this sort to under-estimate their personal expenses, even supposing that to be so in this case, and even supposing that you thought that Rattan Singh in his evidence was somewhat under-estimating his expenditure over these years - even so, there is a very wide gap indeed between the figures which are shown here and the figures disclosed in Mr. Rattan Singh's . I would therefore invite your Lordship to draw the conclusion that in this respect the computations of Mr. Easterbrook and therefore the assessments are clearly excessive.

JUDGE:

I forget. What is the nature of these things you say are arbitrarily added back. Were they further cash drawings?

MR. FOOT:

They are figures given by Mr. Easterbrook which he added in the document attached to the letter of 18th April. You will remember that it shows first of all Mr. Easterbrook's with Mr. Thian's figures, and then he adds various figures back, and in that document Your Lordship will recall there is the drawings adjustment from 1948 to 1953: Shs.4,000/- in 1948; Shs. 16,000/- in 1949; Shs. 17,000/- in 1950.

JUDGE:

What is the justification for the so-called drawings adjustment?

MR. FOOT:

It is simply a figure that Mr. Easterbrook added back for two items: firstly, expenditure for education at about Shs. 4,000/- a year, but the rest was for personal expenditure. Therefore, I do

submit that the use of the term "arbitrarily" is not misconceived.

Now that I think concludes what I have to say about Mr. Rattan Singh's evidence and about these items which have been added back by Mr. Easterbrook. I would submit that when your Lordship looks at these matters that, so far been excessive assessments. That does not conclude the matter, because one goes over to the rents.

About rents I will say this, but I will not say much. Most of the controversy in this case on rents has been to do with the rents on Grogan Road and what Mr. Easterbrook assumed in the absence of any evidence that that rents of Grogan Road had not been included in the return of rents. He arrived at a figure of Shs. 10,000/- and at the of Mr. Thian that was reduced to Shs. 8,000/- for each of these three years. Your Lordship has heard the evidence and your Lordship put certain questions to Mr. Easterbrook about the figures which were available about Imtiazali Street. Your Lordship will recall that under the heading "Imtiazali Street" you have United Dairies and Mr. Thakkar was a United Dairies tenant. He spoke for United Dairies and he said they were actually in occupation in 1951 and that the rest of the premises were unoccupied. That is a natural mistake on the part of Mr. Easterbrook. It is obvious an error was made and that under Imtiazali Street you have the Grogan Road premises as well. If that be so, the importance is this: You have United Dairies; we know they were in occupation of Grogan Road; we find them in Imtiazali Street. Therefore, there must have been an error of that description. If that be so, it follows that all the rents were recorded in the books; and there can be no justification for adding back any figure for rents over and above

the rents which were recorded by Mr. Thian. Moreover, I would submit there can be no possible justification for the figure that was given by Mr. Easterbrook when he was trying to reconcile his own assessments with those of Mr. Blackhall in the Cook, Sutton report and when he gave your Lordship the figure of Shs. 24,000/- for Grogan Road rents in the hands of advocates. Over the weekend Mr. Easterbrook worked out certain figures in order to reconcile his calculation with those of Mr. Blackhall.

JUDGE:

Which of Mr. Blackhall's documents?

MR. FOOT:

It does not really matter, my Lord. In his reconciliation, which is a document just before you (Ex.27) he puts in this figure of Shs. 24,000/-, Grogan Road rents in the hands of advocates. The evidence was to this effect, that Mr. Easterbrook, had gathered from somewhere that some rents were collected by advocates. He did not know - he made no enquiry, but he assumed because he thought all the rents had not been handed over that there was a sum of money which the advocates had retained in their possession which they had not turned over to their client. There was absolutely no foundation for such an assumption.

JUDGE:

Was that ever put to Mr. Rattan Singh?

MR. FOOT:

I do not think it was. It may have been of course that Mr. Easterbrook had not at that time instructed my friend. But, my Lord, I do submit that that was a pure assumption. Mr. Easterbrook is not entitled, in the absence of any evidence, to assume a state of affairs like this, that over a period of years the advocates

have retained a sum of money derived from rents. There is still less justification when you see this; it is in Mr. Thian's Schedule 'B', and you see at the top P.L. Maini & Patel. And, My Lord, looking at the document, it is quite clear that the figures at the top of each column are monies which have been collected by the advocates. I would submit that the inference be drawn from that entry.....

JUDGE:

Surely there is some sort of East African law list available, and surely the Court is entitled to take notice of the professional addresses of its officers. We do not want to argue about suppositions which are capable of being established one way or the other.

MR. FOOT:

Your Lordship will be entitled to infer that those figures at the top of each column are the rents collected by the advocates. If that be so, it goes further to displace the assessment made by Mr. Easterbrook that there was a sum of money which he puts at Shs. 24,000/- as being Grogan Road rents in the hands of advocates. It always was a completely nonsensical assumption.

JUDGE:

That matter can be verified by the simple process of adding up the sums. That should show whether Maini & Patel were tenants or not.

MR. FOOT:

It is conceivable that you might have these tenants paying their own rents and the other collected by the advocates. In my submission nothing really turns upon it. I am attacking two things: That the Grogan Road plot had not been accounted for, and secondly, the assumption that there was this substantial sum collected by way of rents and retained

by the advocates. My Learned friend points out that the Grogan Road premises were only built in 1950; that does not invalidate what I am submitting. I have never submitted that Maini & Patel collected the rents in relation to Grogan Road alone. It may be that they collected the rents for Imtiazali Street and for Grogan Road when Grogan Road was completed. There is nothing, in my submission, in that criticism which invalidates what I have been saying.

In both respects Mr. Easterbrook's computations were clearly excessive. Therefore, if your Lordship had these figures - the revenue figures - in front of you, I should invite your Lordship to draw the inference that these are excessive assessments. But of course it is possible to test it in another way and that is by the comparison of statement of worth. In my submission, this is the method which ought to have been adopted either in substitution for the method which was adopted by Mr. Thian and Mr. Easterbrook or in addition. If it was not used as the original method, it could be used as a check - and my Lord, it was the method which Mr. Easterbrook himself recommended at an early stage. Your Lordship will remember that in one manuscript annexure to the typewritten notes of interview he refers to it himself, and it was the method which was in fact suggested to Mr. Easterbrook on three occasions: on 17th December, 1956: it was in effect suggested by Mr. Thian in his letter of 3rd May; and finally in the letter which was signed by Rattan Singh himself in June, 1958, again in clearest terms Mr. Rattan Singh suggests what was his total worth.

JUDGE:

What is a statement of worth but a comparison of a man's capital position over a period from which it is sought to deduce what his revenue was over that period. Is not a series of balance sheets an equal method of determining his worth

at the beginning and end of the period?

MR. FOOT:

Would you not arrive at the same result, because the personal assets would not be included and also you would have to have accurate figures of stock and work in progress.

JUDGE:

Did you have those for the statement of worth?

MR. FOOT:

You can ascertain it at the beginning of a period and at the end, but in order to arrive at it year by year you have to have those accurate figures.

JUDGE:

Can you ascertain it for the purpose of a statement of worth with any greater degree of accuracy, in the absence of appropriate records, than you can for the purposes of a balance sheet?

MR. FOOT:

Where you have a balance sheet which does not have accurate figures at the beginning and end of each year one cannot arrive at an annual computation.

JUDGE:

Where one has a statement of worth which hasnot got accurate figures in them for work in progress at the beginning or end of the year, are you any better off?

MR. FOOT:

You start off with your figure of assets; then you have to get the work in progress figure at the end of the day. I was going to refer to one passage in Mr. Cook's evidence at page 111, where he deals with this matter: "Will you his Lordship ..... If you do it every year ...." (Reads). That

was Mr. Cook's evidence which I would invite your Lordship to accept.

JUDGE:

What he has said there, as I understand it, is this; the Income Tax authorities agree certain figures and therefore I can take the work in progress in respect of that year as being accepted for income tax as valid. That gives me my closing figure for work in progress. I very much doubt if the revenue affidavits have any figure relating to work in progress or stock-in-hand.

MR. FOOT:

So far as that is concerned, that had in effect been agreed. The only difference..

MR. SUMMERFIELD:

I do not think it is right to say it has been agreed.

JUDGE:

I am concerned to see why it is that I am told that this document headed "Statement of Worth" makes it more valuable than adding up the sums and balance sheets.

MR. FOOT:

It is a way of checking. It is another way in which one can check the figures.

JUDGE:

Let me see the revenue affidavit (Shown to Judge). The Stock is shown as Shs. 2,718/-. There is nothing shown in relation to work in progress.

MR. FOOT:

Supposing that there was work in progress at that time and that has been omitted from the calculations, that, my Lord, would be a mistake in favour of the Revenue.

JUDGE:

It may be, but it does not matter in whose favour the error may for the purpose with which I am concerned. I want to know why it is said that the system of preparing statements of capital worth is a more reliable guide in back duty cases than that of preparing annual balance sheets. I do not see that there is any difference.

MR. FOOT:

There is this particular difference in this case, that you have certain years for which there are no records available and they have to be taken into account, and also of course there is no complete record at the end of the period. Nor is there a complete record for the intervening years. There is only the cash book and the bank accounts. There was the ledger which disappeared from Mr. Mandavia's office.

JUDGE:

I never understood why a subpoena was not served upon Mr. Mandavia.

MR. FOOT:

The matter was taken to court. When Mr. Mandavia failed to produce the book, a summons was issued for contempt. Mr. Mandavia appeared before the court before Mr. Justice Pelly Murphy. I understand that in the first place Mr. Mandavia was not actually held to be in contempt. Apparently that view was departed from later. My Lord, my friend makes one comment. He points out that the book which has disappeared was available to Mr. Thian when he made his accounts. Of course, even Mr. Thian did not have anything like complete records. He had none for the earlier years and he did not have the ledger. Mr. Nanda was the only person who had ever seen the ledger. Therefore, you have this position, in my submission. In the first place, it is agreed, and agreed by Mr. Easterbrook, that in a case where you have no records at all, this is the only method you can adopt. Here you have a case in which

you have incomplete records, and you have Mr. Cook, who is a very experienced accountant, who says that this is the proper method to adopt in such a case as this where you have incomplete records.

Now, my Lord, I am only using this as another way of approaching the problem, and I submit that if Mr. Easterbrook's computations are out, then the figures ought to approximate. In fact they did not, unless you make the additions which Mr. Easterbrook made over the weekend and to which I will come in a moment. But let me deal first of all with the figures. Mr. Blackhall first of all arrived at a figure for 1957 and then he worked back. That method was criticised, but the matter does not arise because we have based on Mr. Thian's computations for 1953. In addition, Mr. Easterbrook has suggested that there were certain items which ought to have been added in. There are certain of those items which I would be prepared in concede, and the total figure at which I arrive, conceding certain of the items suggested by Mr. Easterbrook, is a total of £28,670. That, my Lord, is assuming that the amounts in the Indian banks are income because that was taken into account in Mr. Blackhall's shcedule B. If they were not income, that would reduce Mr. Blackhall's figures by £3,000 - that would be £25,670. Mr. Thian's figure over the years was £28,750. However that may be about Mr. Thian's figure, Mr. Easterbrook has put it at a sum of £62,000.

Now may I come to Exhibit 27, which are the figures which were suggested by Mr. Easterbrook. First of all, he suggests certain additions to the assets. My Lord, the properties, business machinery, personal jewellery, Shs. 12,000/-. That figure is taken from Mr. Thian's letter of 3rd May, 1958. I have put it to Mr. Easterbrook that there is no evidence that they were not in his possession at the beginning of the period.

Then there is the stock figure of Shs. 55,000/-, with which Your Lordship is already familiar. I have made my criticism about that already.

The retention money Moshi. It does not appear that there was any adjustment for that in later years, but that is a reduction so far as that is concerned, on the original figure of £21,500.

Then there are creditors, round sums, Shs. 55,000 and there are debits to contract. Those are all cases in which names appear in the books, but it is said that there has been no documentation to show that the loans were actually made. There again, it is simply because an assumption was drawn against Mr. Rattan Singh that these were fictitious entries. If you take the view that there is nothing to support the fact that these entries in the books were fictitious, then in my submission one cannot add these amounts.

JUDGE:

It must be more than that. I am not taking the view that there is preponderance of probability that Mr. Easterbrook was wrong in his assumption. I do not think I am entitled to say that Mr. Easterbrook had no material before him on which he could have arrived correctly at these assessments. What I mean to say is, is that the material before me is such as to establish that there is a preponderance of probability that Mr. Easterbrook was wrong - not that I can he probably was wrong, but there is no evidence before me to that effect. He is in the position of having to prove nothing. You are in the unfortunate position of having to prove everything.

MR. FOOT:

With respect, is that really so?

JUDGE:

That is the view which the Vice-President

of the Court of Appeal took and I am bound by that.

MR. FOOT:

My Lord, the headnote of the case to which your Lordship is referring is on page 409. (Reads). So far as onus is concerned, what the learned judge appears to have in mind is the onus on the appellant to satisfy the court whether it is a capital or a revenue transaction. My friend has shown me case No. 24, in which it is held again that "In respect of the years..... (Reads).

JUDGE:

I thought I was right. In case No. 56 he delivers a short judgment following on the one by the Vice-President, and he says; As the learned judge.... correct approach". (Reads). I think applying those terms to the facts of the present case I would say this: as the issue is one of importance, the taxpayer must establish that the amount assessed by the Department is wrong. In other words, I think, unless I am satisfied in relation to any particular year that the amount was in fact excessive, I must uphold it, even though I think it is open to doubt whether it is correct.

MR. FOOT:

I do not think I would quarrel with that. It does not necessarily follow that wherever an issue arises between the parties the onus is necessarily on the taxpayer. If you are left in doubt, you would have to resolve that doubt in favour of the Revenue. So far as these items are concerned, the position is this. Your Lordship will remember that Mr. Easterbrook gave evidence about this and he said that he asked Mr. Rattan Singh to obtain information and Mr. Rattan Singh refused. There was no record of that and it would be a most

amazing thing if Mr. Easterbrook did make a record because if that was said by Rattan Singh that would be a flat defiance by the taxpayer. Now it would be a very serious matter indeed if the taxpayer whose affairs were under investigation refused to produce records, and one would expect in such a case that the officer of the Department would have considered using his statutory powers. I do ask your Lordship not to accept Mr. Easterbrook's evidence on that point. I would ask your Lordship to say that if that has been actually said, at least Mr. Easterbrook must have recorded it. What one would have expected Mr. Easterbrook to do at that stage is, first, to record what had happened; secondly, to consider what action he himself should take; and thirdly, one would expect him to take advice on the matter. My friend has now found the section; it is section 61 and it says: "For the purposes of obtaining...." (Reads) Whether that would have been the appropriate action I do not know. But that this should go unrecorded and Mr. Easterbrook should not mention it to anybody until he comes out with it in evidence in this court is very difficult to explain. It was clearly a matter which should have been put to Mr. Rattan Singh. My friend says it was put; I accept that.

MR. SUMMERFIELD:

Mr. Rattan Singh was asked in one form: "Were you asked to produce them and he said he did produce them."

MR. FOOT:

Its on page 062 in your Lordship's bundle: "Do you remember Mr. Thian... I do not remember". (Reads). I concede that does put to him that he was asked whether those statements were produced to the Income Tax Department, but what is not put to him is the refusal. That is the evidence Mr. Easterbrook gave and that certainly was not put to Mr. Rattan Singh. The round sum creditors -

they are referred to in the schedule. Your Lordship will recall that one of the names recorded was Shukla. I put to Mr. Easterbrook that there was a loan from Mr. Shukla and that there was a repayment of the loan, that there was a series of transactions between Mr. Shukla and Rattan Singh, and that is one point on which it was possible to some extent to test the matter, and it appeared as if it was a straightforward transaction. So far as the other item - debits to contract - that is a reference to page 3 of Mr. Thian's first report and your Lordship will see there that there were a number of items some of which Mr. Easterbrook has allowed and some which he has not. Wherever there is a round, apparently he has disallowed it, because he does not regard that as a contract to purchase. It may or may not be contract to purchase because you have to consider the matter - consider the probabilities.

JUDGE:

Mr. Foot, I think that it is only right for me to say now that my view is at present that it is incumbent upon the appellant to establish that there is a preponderance, of probability that the assessment is wrong. He can of course do that by establishing that there is a preponderance of probability that some particular item that was taken into account is not properly taken into account, or that some particular item was taken into account for an amount which is excessive of that in respect of which that item should have been taken into account; but I do not think it is competent for me to look at the individual transactions and come to an opinion as to the view which I would have formed in relation to it. I am solely concerned, as I said, with the question, Is there a preponderance of probability that the Commissioner's view was wrong in relation to this particular item. I do not think I am entitled to say, had I been assessing these sums I would have allowed a greater

sum: I have got to be satisfied that the Commissioner was wrong in not allowing a greater sum.

MR. FOOT:

I do not quarrel with your Lordship's approach upon this, but my Lord, you have to look at the items to see how the figures in the assessment are arrived at, and if you take the view that these preponderance of probabilities were in favour of these being perfectly genuine entries in the book, then of course that would make a considerable difference to the figures which are put forward by the Revenue.

JUDGE:

Can I form any such view in the absence of affirmative evidence to that effect?

MR. FOOT:

It is not necessarily a question of calling the evidence. But your Lordship is entitled, in my submission, to look at the whole of the evidence in this case. I am not suggesting it is incumbent on the Commissioner to call evidence other than the evidence of Mr. Easterbrook, but looking at the material before your Lordship you are entitled to consider Mr. Rattan Singh's evidence and to consider the possible alternatives. The alternatives are these: that these are either genuine entries or they are fictitious. They represent some form of private drawings, but nothing to do with the business. The whole tenor of his evidence is that there has been no irregularity at all; every transaction was recorded in the book and correctly recorded. And your Lordship is entitled also to take this into account. The books of this business have at all times been available to the Revenue. Mr. Easterbrook preferred to rely largely on Mr. Thian's reports. All the documents, not only the actual cash book but the bundle of documents relating to the Moshi contract have been available to the Revenue and the documents have been in the hands of the

Revenue. An inventory of the documents was taken and the books were examined by the Revenue in the first place even before Mr. Thian came on the scene. It is a remarkable thing that nowhere in this case does it appear that there is a false entry in the books. There is nothing to show that the cash book does not contain every entry. Mr. Thian has made a false examination and there has been this very long series of interviews at which not only the taxpayer but his accountant and Mr. Thian are cross-examined at very great length, and my Lord, nowhere does it appear that there was anything in the nature of a fictitious entry. The most that can be said of these items is that documentation was not produced in respect of them, Your Lordship is entitled, in my submission, to take all that into account in assessing the balance of probabilities. If you think that the evidence that Mr. Rattan Singh has given in this Court is reliable evidence and if you take the view that there is nothing to show that any single one of these entries is not what it purports to be, then I would submit that there is quite sufficient material to enable your Lordship to say that the balance of probabilities is in the taxpayer's favour.

That will be my submission as regards these sums. Of course, they represent a number of items, and if the Revenue is correct, it will follow that all these items were fictitious items.

Again looking at Mr. Easterbrook's additions, we come next to the item of Gian Singh and the figure that Mr. Easterbrook originally gave was Shs. 142,238/-. This is what Mr. Easterbrook prepared over the weekend, and when I put it to him how he arrived at the figure, Mr. Easterbrook again looked at Mr. Thian's accounts and he then put the figure at Shs. 85,700/-. For the reason I will come to in a moment, I think that is a figure I have to concede.

I have already referred to the Grogan Road rents in the hands of advocates - Shs. 24,000/-. I say that there was no such sum in the hands of advocates, and I ask your Lordship so to hold. I submit that I have discharged the onus as far as that is concerned.

Cash overdrawn. Mr. Rattan Singh has said that was his personal money. If that is accepted, that goes.

Rents stated to be due, but not in the books, that has not been established. Therefore, the only items which I would be prepared to admit here would be business machinery and Shs. 85,700/- in respect of Gian Singh. These other items, in my submission, are very doubtful indeed.

Then I go to the next document - the second sheet in Exhibit 27; gifts to Gian Singh. I think I am right in saying that they do not appear in the original computations. My learned friend says it was allowed because it was in the drawings in the original computation. All we know about that is that something appears in the drawings. There has not been any evidence about it. I do not contest the next four items.

Court adjourns at 11 a.m. for 15 minutes.

Friday, 24th March, 1961. 11.05 a.m.

MR. DINGLE FOOT:

My Lord, when the Court rose I was just passing to the second sheet of Exhibit 27, and this is the additions which Mr. Easterbrook says should be made to the drawings adjustments, and the first item about which I was addressing Your Lordship was a gift to Gian Singh. My Lord I am just looking at the note taken by My Learned Friend, Mr. Shah, in my cross-examination of Mr. Easterbrook, and what Mr. Easterbrook said was, the gift to Mr. Gian Singh is the 30,000 lodged into the,

something or other, in 1951, which was taken out in 1950 and debited into the account of Gian Singh in 1951, and there is a confusion relating to Gian Singh Kalsi. My Lord, that is My Friend's note of my cross-examination. Now I would ask Your Lordship in this connection to look at the Cash Book, which is Exhibit 5. My Lord, one finds here that there is an entry for receipts, January 1951, Mr. Gian Singh, Loan Account, Shs. 30,000/-, and My Lord there had been earlier a withdrawal in December - I don't know that there is really any connection between the two - by Mr. Rattan Singh of Shs. 30,000/-, but at any rate there is this entry on the receipt side, received from Gian Singh in his Loan Account Shs. 30,000/- January, 1951. Now, My Lord, what I say about that is this; we only have this entry in the Cash Book to identify this sum of Shs. 30,000/- with Gian Singh. My Lord, we know that there were two Gian Singhs - there was Mr. Gian Singh who is the eldest son of Mr. Rattan Singh and there was Mr. Gian Singh Kalsi to whom reference has been made. Your Lordship remembers there was a transaction with him involving Shs. 30,000/-. We have had evidence about that. My Lord, the date here is important. My Lord, this was January, 1951. Mr. Gian Singh was then in the United Kingdon. He was sent there, Your Lordship will remember, for his education, 1949 - I think he said he didn't return until 1955. He was born in 1931 - that appears from his evidence at Page 078 - so that at this time he was just - born in August 1931 - so at this time he was 19 years of age. My Lord, there is no conceivable reason one can imagine why he should lend his father Shs. 30,000/- even if he had the money to lend, My Lord, from the rents which were due to him, but he didn't handle the money - all the money he had were the remittances which were sent to him for his education and maintenance in England about which he has given evidence, My Lord.

He certainly didn't have Shs. 30,000/- when he was away in the United Kingdom to put into the accounts of the business. My Lord, all that is being depended upon here is this entry.

Now My Lord, one finds later on another entry in which Gian Singh is referred to. My Lord it is at Page 87 of the Cash Book. My Lord the earlier entry was at Page 48, in case Your Lordship wishes at any time to look at it, but My Lord at Page 87 of the Cash book one finds this, it is an entry for the 14th October, 1952, and it reads, "Gian Singh Loan Account. To Loans refunded 15,000" and then the next entry is "Gian Singh Loan Account. To Loan refunded 15,500". Now those are payments.

JUDGE:

What is the date of the second one?

MR. DINGLE FOOT:

My Lord it is the same date, both the same date, both the 14th October, 1952. One follows immediately after the other.

JUDGE:

Mr. Gian Singh gave evidence, did he not, Mr. Foot?

MR. DINGLE FOOT:

Yes.

JUDGE:

Mr. Rattan Singh gave evidence.

MR. DINGLE FOOT:

Yes.

JUDGE:

Did either of them give evidence in relation to these particular entries?

MR. DINGLE FOOT:

This particular sum?

JUDGE:

Yes.

MR. DINGLE FOOT:

No, my Lord. I am not sure.

MR. SUMMERFIELD:

Mr. Rattan Singh said these were sums paid to Fakir Singh and the other - the two sums adding up to Channan Singh and Fakir Singh.

MR. DINGLE FOOT:

Those were sums remitted to India. This has nothing to do with it. My Lord, I am merely looking at the Cash Book and I am saying that you have these entries, Gian Singh Loan Account refunded. Well how can one possibly link up those sums with remittances to India. He never gave evidence to say that sums which were recorded in the Cash Book as Gian Singh Loan Account payments were the same sums as the sums which he remitted to India, Mr. Fakir Singh and Mr. Channan Singh.

JUDGE:

There is a surprising feature to my mind, that while Shs. 30,000/- was borrowed, Shs. 30,500/- was repaid apparently. Now there are two possible explanations of the Shs. 500/-, the one being it represented interest on the loan, the other being that it represented exchange charges, and I should have thought that if it was alleged by the taxpayer that this sum had been wrongly treated by Mr. Easterbrook as being paid to the taxpayer's son, that there would have been specific evidence in relation to that matter, because the taxpayer has been in the box and his son has been in the box but his book-keeper has not.

MR. DINGLE FOOT:

My Lord, no doubt evidence would have

been given if the matter had arisen at that stage. My Lord this alleged gift to Gian Singh, the son, did not appear in Mr. Easterbrook's computation. My Lord, if that had been so, of course it would have been dealt with. My Lord it only arises at this stage because of Mr. Easterbrook's attempt over the weekend to arrive at a calculation which will adjust, so to speak, Mr. Blackhall's report.

JUDGE:

I thought earlier this has been shown as included in one of Mr. Easterbrook's documents. I thought it had been shown as one of the items added, Shs. 30,000/- gift to Gian Singh. I may be wrong, of course.

MR. DINGLE FOOT:

My Lord it isn't my recollection. I will have it checked. My Lord, all I am saying is this, that one has here this entry in the Cash Bock and the Loan Account and what I am concerned with here, so far as the Cash Book is concerned, is the identity of the Mr. Gian Singh concerned.

JUDGE:

Quite.

MR. DINGLE FOOT:

We know there was another Mr. Gian Singh and there was evidence My Lord - I will try and check it a little later - there was evidence that at one time there was confusion between Gian Singh and Gian Singh Kalsi. There was another item - I think this is may be what Your Lordship is thinking of - there was another item of 30,000 which turned out, and the explanation offered, according to my recollection, offered to Mr. Easterbrook at the time he was making the investigation, and the explanation which I think was accepted, was that that money related to Mr. Gian Singh Kalsi but not to Mr. Gian Singh.

JUDGE:

I thought that there was in fact four sums of Shs. 30,000/-.

MR. DINGLE FOOT:

Yes, My Lord.

JUDGE:

One represents money in an Indian Bank which was sent there by Mr. Rattan Singh as being the money which he had been given by his mother for Gian Singh's wedding expenses.

MR. DINGLE FOOT:

Yes.

JUDGE:

The second was the Shs. 30,000/- which concerned, according to Mr. Shaffie at an interview, Mr. Gian Singh Kalsi.

MR. DINGLE FOOT:

Yes.

JUDGE:

The third was the Shs. 30,000/- which concerned Mr. Channan Singh and someone else.

MR. DINGLE FOOT:

Yes.

JUDGE:

And the fourth was the sum of Shs. 30,000/- which was alleged to be a gift to Mr. Gian Singh, Mr. Rattan Singh's son.

MR. DINGLE FOOT:

Yes.

JUDGE:

That was impression. There were those four sums and that those were the conversations in relation to then, and I think I am right in saying that in comparatively early documents Mr. Easterbrook indicated that this sum

would have to be added back as being a gift to Gian Singh, Mr. Rattan Singh's son. That is my impression. Imay be quite wrong.

MR. DINGLE FOOT:

My Lord I cannot charge my recollection with that but I will - My Learned Friend is looking to see if there is anything in the transcript about it - I wonder, therefore, if we can find any passage in the evidence which deals with this, if I could return to it later.

JUDGE:

Yes, certainly.

MR. DINGLE FOOT:

It may be that my memory is at fault on this.

My Lord, I am still dealing with this document,and My Lord one comes here next to "Personal expenditure charged to contracts as per schedule D of 2nd Report". My Lord, I don't think I can contest that, but now one comes to the iten of "Presents and gifts", and My Lord there is the sum of Shs. 30,000/-. Now the explanation which the witness, Mr. Easterbrook, gave in answer to me is that he has got that sum from Colonel Bellman's questionnaire. If Your Lordship will just look back at that a moment. My Lord it is in the bundle of correspondence at Page 10, and I think it is at Page 4.

JUDGE:

Colonel Bellman's questionnaire, yes.

MR. DINGLE FOOT:

Just looking for it - oh yes, My Lord, it is the last item of all on Page 4 of Colonel Bellman's questionnaire - "Income Tax, Gifts and various expenditure not of a household nature" - and My Lord the figure given there is Shs. 40,000/-.

JUDGE:

I haven't got a Page 4 to Colonel Bellman's questionnaire.

MR. DINGLE FOOT:

My Lord I think the same thing must have happened because in my copy the page was missing - there must be a missing page. I am very sorry, My Lord. There is a copy here.

JUDGE:

Yes.

MR. DINGLE FOOT:

Does Your Lordship see....

JUDGE:

I have got it.

MR. DINGLE FOOT:

...."Income Tax, Gifts and various expenditure not of a household nature". Now that Mr. Easterbrook has done there is that he had deducted 10,000 for income tax leaving 30,000 for gifts, and My Lord in my submission one cannot charge the whole 30,000 because Colonel Bellman's questionnaire covered a period of 10 years. My Lord this is a period of 8 years, so one must, I submit, make a reduction in that respect.

My Lord, then one comes to - and My Lord, in addition to that in Schedule 'C', in Mr. Blackhall's Schedule 'C', to which Mr. Easterbrook is now suggesting additions Shs. 7,000/- is included for donations, and My Lord in my submission these are the same items and therefore one has to make a further deduction, so My Lord one donation. My Lord the figure at which in fact Mr. Blackhall has arrived is 16,895. Then My Lord, the "Drawings schedule" - that is Shs. 1,200/-. I don't contest that. That is in respect of a specific item for liquor. Then My Lord one comes to this

further item. "Further household and living expenses, holidays, entertainment, cost of remittances to Indian Banks, annual cost of undeveloped Mombasa plot etc., 8 years @ 11,000/-". Now Your Lordship will recall that I cross-examined Mr. Easterbrook at some length about that iten. I asked him about the cost of remittances to Indian Banks. He didn't know what the cost was. I asked him what figure he had in mind for entertainment. Apparently he had no figure in mind. I asked him if he knew where this family spent their holidays. The only information that he could give was that apparently on one occasion Mr. Surgit Singh had told him that he had been to the United Kingdon, didn't apparently know the date of the journey and didn't know whether the visit to the United Kingdon was for a holiday or for business. My Lord I asked him if he knew the annual cost of the undeveloped Mombasa plot - in fact Your Lordship asked him about that - and I think he agreed that could only be a very small sum. My Lord, then one has further household and living expenses. Now, My Lord, the total at which Mr. Easterbrook arrives is Shs. 88,000/-. My Lord this is precisely, I would suggest, the same item that he included in his computations on which the assessments were made because his drawings adjustments, what we call, the document as seen this morning, the arbitrary add back, the drawings adjustments in his computations of the 15th April, 1958, were Shs. 89,000/- and My Lord this is Shs. 88,000/-. My Lord, I have already made my submission about those drawings adjustments. I have submitted that they were quite unjustified in the original computation and I submit that they are quite unjustified here. So, My Lord, having gone through these various items, now one comes to the Accounts adjustments and these also Mr. Easterbrook says should be added. My Lord, he is doing the same thing again. "Legal expenses per accounts, Less amount included by Cook Sutton & Co. - 36,506". Does

Your Lordship see? My Lord, firstly there is the "Commissions" about which I have made my comment. That is precisely the same item.....

JUDGE:

Yes, I have got it.

MR. DINGLE FOOT:

.....as before - 875. Secondly there is the legal expenses 36,000 - that is precisely the same amount we had before for legal expenses. Your Lordship will remember all the argument about Messrs. Khanna's account. So Mr. Easterbrook is just adding that back again. I am not going to repeat myself on that. "Depreciation" - I don't think that is disputed. "Accountants' charges". Then there is the "Motor expenses estimate for personal use" - £100 a year, and the African wages estimate". I am not going to go over that ground again because Your Lordship is in possession of my submissions about those items. My Lord, supposing I am right in the submissions that I made earlier, then the legal expenses ought to go, the demolition - motor expenses ought to go - the demolition should either go or be a much smaller sum, and the African wages should go.

Now My Lord, looking at Mr. Easterbrook's last sheet, that is sheet "D" of Exhibit 27, one sees that he arrives at a total figure of Shs. 1,276,208/- or £63,810. which is a little short of his original figure. My Lord, of course that has now to be reduced because of his admission over the Gian Singh rents. I think there is another 2,000 of course has to be deducted in round figures which brings it down in round figures to £61,000. which he now says is the correct figure.

JUDGE:

And the assessed figure was .....

MR. DINGLE FOOT:

64,000. I am dealing in round figures. Of course he can only get back, so to speak, to this figure of over 60,000 by adding in all these items some of which I have submitted to Your Lordship several times are wholly unjustified. Now, My Lord, for convenience I have added up the figures. I can of course go through them verbally, but perhaps it will be more convenient to have them on paper.

JUDGE:

Yes.

MR. DINGLE FOOT:

My Lord the total income for 8 years per amendments to the report is 593,000. My Lord that is the 6th June. Then we are adding on - you see we have been put to Mr. Blackhall in cross-examination - My Lord then we add these various other items which are suggested by Mr. Easterbrook, the ones which we are prepared to accept. My Lord the figure then would be - you add 85,000 for Gian Singh's rent, Estate Duty paid, Payment to M.L. Hedjee, Payment to Architect, Fares to India, Personal expenditure, Presents and gifts, Depreciation allowance, and Accountants' charges. My Lord, the reason why we add in Gian Singh's rents is that Gian Singh had been put in as a creditor in 1953 in Mr. Blackhall's computations for 85,700 and therefore we must add that back before we make the deduction of his rents. My Lord, what we have done in Mr. Blackhall's computations, as Your Lordship will see in, I think it is, Exhibit 26, is to deduct the whole amount of Mr. Gian Singh's rents, but as he has been put in as a creditor we have to allow this sum of Shs. 85,700/- My Lord, then Your Lordship will see the other items and Your Lordship will see the way in which we reduce the figure for gifts from Colonel Bellman's original

40,000 and arrive at a total figure of Shs. 16,895. My Lord, approaching the matter in that way we arrive at a total of £28,670.

JUDGE:

Yes.

MR. DINGLE FOOT:

I would submit that that is about as near as one can get to the correct figure but of course one has to make a deduction from that in respect of the amounts in the Indian Banks, two sums of 30,000 in the Indian Banks which were taken into account in Mr. Blackhall's Schedule 'B' My Lord. That would reduce it to 25,600.

JUDGE:

That is the Channan Singh business and the Shs. 30,000 from Gian Singh's grandmother.

MR. DINGLE FOOT:

Of course it would depend on the view Your Lordship takes of that transaction.

JUDGE:

Quite.

MR. DINGLE FOOT:

In my submission there is no dispute about Channan Singh and his brother, therefore there ought to be a deduction of £1,500. Whether there should be a further reduction of £1,500, depends on the view Your Lordship takes of the evidence. I have made my submission about that. So, My Lord, I would submit that the nearest figure at which one can arrive in this case - nobody suggests that precise accuracy if possible - but the nearest figure at which one can arrive is the figure of £25,670. My Lord, that would compare with - I

am dealing now in round figures - that would compare with an income originally returned of 14,000 odd pounds.

JUDGE:

What is the adjusted figure?

MR. DINGLE FOOT:

The adjusted figure is 25,670, the figure I have just given. The figure which was returned over the years was £14,000. Of course Your Lordship will see here that I am excluding, for the purposes of this total, Grogan Road and Gian Singh's rents, My Lord. That of course is what I have been arguing throughout, My Lord. I am saying they should be excluded in arriving at this 14,000 originally returned and it compares with the Revenue figure of 64,000. Of course the Revenue figure does include Gian Singh and it does include the capital profit of Grogan Road. These would reduce the gap by Shs. 189,000/-.

JUDGE:

What is the total amount claimed by the Revenue authorities, Mr. Summerfield including the penalty.

MR. SUMMERFIELD:

£65,000.

MR.DINGLE FOOT:

£65,000.

MR. SUMMERFIELD:

Including penalty.

JUDGE:

I see, yes.

MR. DINGLE FOOT:

My Lord, it is a little more than the income.

JUDGE:

Yes, I follow.

MR. DINGLE FOOT:

64,000 is the assessment of income, My Lord. In order to make it comparable one would have to deduct nearly £9,000 from the revenue figure of 64,000; that would be 55,000 compared with this figure of £25,000. My Lord that is in very round figures. It is not necessary to be exact for this purpose precisely because all I am concerned with is the gap between the two figures.

JUDGE:

Yes.

MR. DINGLE FOOT:

Now, My Lord, I have made my criticisms in detail of the various items which Mr. Easterbrook has sought to add back in his original computations and also in the homework which he did over the weekend, My Lord, in order to try and adjust, so to speak, his assessment of this method with the results arrived at by Mr. Blackhall. Now it all depends on whether you think my criticisms of Mr. Easterbrook's additions are justified. My Lord, if it be so, and Your Lordship thinks these additions ought not to have been made and that they are not justified, My Lord, then I would invite Your Lordship to say that this figure, in round figures, 25,000 is as near as one can get in this case, but My Lord I make this submission that here again this is simply a way of testing whether the assessments are excessive. I have already examined in detail the Revenue's own figures and I have submitted purely on examination they are excessive. They are excessive in the first place because a mistake was made about Gian Singh and Grogan Road, and really that would be sufficient for my purpose, if your Lordship were with me, on those issues, to show that the assessments were excessive.

JUDGE:

Yes.

In the Supreme Court

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Counsel's Addresses 24th March 1961 Continued

MR. DINGLE FOOT:

My Lord, My Learned Friend desires me to say - and I am perfectly willing to leave it to Your Lordship - that the amount of 25,000 would include rents over the period. I don't think from that at all, and I said first of all in trying to show that the assessments are excessive I rely upon the matters of Gian Singh and Grogan Road. Grogan Road is only one year, 1953, but Gian Singh's rents go right through, and that is enough for my purpose in the first part of my task which is to show that these assessments are excessive. My Lord I go further than that; I say that a great many of the additions which Mr. Easterbrook made, and particularly such matters as the drawing adjustments amounting to 89,000 are not justified on any view. My Lord, I would further submit - this is summarising my submissions about it - that if Your Lordship accepts the evidence of Mr. Cook about the Thian reports, that Mr. Thian's figures themselves are probably too high - certainly there were doubtful items, so to speak: the cash drawings Mr. Thian has regarded as personal drawings when they may very well be nothing of the kind - and therefore on that question, simply having regard to Revenue's own figures, the figures they have adopted from Mr. Thian and the figures which they have added on, I submit all these assessments are quite clearly excessive. But, My Lord, applying this other test it supports the same conclusion. Now My Lord, supposing that was so, of course it would be necessary - My Lord it would follow in my submission that quite clearly each of these assessments is excessive in each year - and Your Lordship of course by some process I suppose will need to arrive at a figure for each year. I don't quite know how Your Lordship is going to resolve that.

JUDGE:

I have told you, Mr. Foot, if I have

to do that I will direct that Mr. Summerfield and Mr. Kean jointly compute the income for each year.

MR. DINGLE FOOT:

My Lord, if I may say so, I am extremely content that it should be left to them. My Lord, all I say is this, that in Mr. Blackhall's report he did suggest a method of allocation. My Lord, it may not be the perfect method but he is bringing in the question of weightage. My Lord all that he is doing there is to say that the rate of profit was probably greater in one year than in another. I am not asking Your Lordship, if the matter is to be dealt with ultimately in the way Your Lordship suggests, I am not asking Your Lordship to say precisely what this should be, but in my submission it would be proper to take account of the evidence that has been given about the different years; the evidence that was given by Mr. Rattan Singh himself and the evidence by Mr. Ogilvie was both to the effect that earlier years were good years, that is 1946 and 1947. My Lord, the number of Contractors was restricted which made life, I suppose, more pleasant for those Contractors who were in business. My Lord, as the conditions of the free market were restored you had the normal years, 1948 and 1949, and 1950, and I think 1951, and then My Lord the evidence was that 1952 was not such a good year and 1953 was a very bad year. Mr. Easterbrook seemed rather reluctant to admit it. My Lord all the evidence is to the same effect. My Lord the matter has a bearing in this way, Your Lordship will have to consider of course each year, or somebody will have to consider each year, and Your Lordship will have to consider particularly, I submit, the year 1953 because in relation to the year 1953 the income returned was £3,402. It is now assessed at 10,914. There is an additional tax on basic tax of £4,911. and the penalty which has been imposed is 8,821. Now My Lord so far as that is concerned Mr. Thian shows a loss in 1953. My Lord I know the comment may be made that in fact the taxpayer returned a profit, quite

substantial profit. My Lord one simply doesnIt know how that arose, but I would ask Your Lordship to say of course one cannot rely on any of these figures that were returned. If Your Lordship thinks that Mr. Thian is right in saying that there was actually a loss in 1953, it ties up entirely with the evidence that Your Lordship has heard about the emergency. Mr. Ogilvie gave evidence that during the emergency life was very difficult for Contractors in Nairobi because labour was scarce, naturally enough, and what there was was of very poor quality and therefore the rate of profitability almost inevitably fell in 1953. Then My Lord I also put certain statistics to Mr. Easterbrook, and My Lord this is a Public document, therefore I think I am entitled to refer to it. It is issued by the East African High Commission. Your Lordship is entitled to look at it. This is building completed for private ownership, monthly average, and My Lord it shows a considerable fall in 1953. My Lord, residential building in 1952 was 39; in 1953 was 25. Non-residential in 1952 was 17 and non-residential in 1953 11. The total, 1952 - 55: 1953 - 36. Then My Lord the figure is given for Nairobi - I don't follow this - My Lord I think it must be Nairobi is shown separately because the figure is given for Nairobi residential as 101, 1952; 64 in 1953; non-residential 78 - there appears to be an increase there - but the total goes down from 179 to 144.

JUDGE:

Which was the year of the Meshi contract?

MR. DINGLE FOOT:

My Lord, the Meshi contract was 1952/3.

JUDGE:

And the building of, was it, the County Hall?

MR. DINGLE FOOT:

My Lord that I think was 1953.

JUDGE:

You see, what I have in mind is this, while it may be, and no doubt is, incontestible that a Contractor would find it more difficult to obtain work in 1953, shall I say, then he would have in 1949, would it also be incontestible, though the margin of profit in work in 1953 was smaller owing to emergency conditions than it would be in 1948, shall I say, nonetheless, if a Contractor were fortunate enough to obtain in 1953 two major contracts such as the Moshi contract and the County Hall contract, his actual profit for 1953 might be greater than that for any previous year? It just depends on how much these contracts were worth.

MR. DINGLE FOOT:

My Lord I appreciate that. Of course his actual receipts might be very high. That is one thing. His turnover might be very high. It doesn't in the least follow his profitability would be very high.

JUDGE:

No, You see I don't think one can press those figures that you cited to what would appear at first sight their logical conclusion - all Builders did worse in that particular year. It just depends on what I call his state of share in that business.

MR. DINGLE FOOT:

I appreciate that. I hope I wasn't putting it too high. It may well be that this particular contractor was an exception to the general rule.

JUDGE:

He had some exceptional contracts. County Hall contracts are not usually given out twice a week shall I say.

MR. DINGLE FOOT:

I concede at once that during this period he was fully employed both in Nairobi and Moshi My Lord. Therefore I am not for a moment suggesting he had no work to do, but nonetheless I would submit the evidence is material, and I ask Your Lordship to accept it, that it was much more difficult for a Contractor to make a profit so far as Nairobi - it doesn't apply of course in Tanganyika: No emergency in Tanganyika at that time but the greater part of the work he did, 4,000 against 2,000 according to Mr. Easterbrook's estimates at any rate, was in Nairobi at that time. My Lord I link that up with this; according to Mr. Thian he made a loss on his business in 1953. My Lord I am reminded of this, and I don't know that it makes very much difference, the Moshi contract only started in June 1953. My Lord of course that is something I have to return to in a moment when I come to the question of fraud and gross neglect, because if Your Lordship thinks that Mr. Thian's figure was the right one and that he actually made a business loss in 1953, Your Lordship may think at any rate that if the taxpayer had made a mistake in the return he made, he made a mistake against himself. My Lord, if I might just go back for the moment before I leave the question of the assessments, you have these figures, if Your Lordship is disposed to accept them; you cannot really reconcile this gap of Shs. 30,000/- between the one figure and the other and you cannot justify the additions which were made to Mr. Thian's figures by Mr. Easterbrook, all these cases, round sums at which he arrived for drawings and stock and the rest of it; in fact you cannot justify the Revenue figures at all except on the assumption that Mr. Rattan Singh has some concealed source of income about which we know nothing. £30,000 it was. I am sorry.

If Your Lordship will go to the transcript once more - it was in Mr.

Bellman's evidence - at Page 092, and there is a passage there which is material on this issue.

JUDGE:

Yes.

MR. DINGLE FOOT:

And Mr. Bellman says - it is about halfway down 092:-

"Q. There were no records of day by day entries in the Cash Book.
A. No, Sir.
Q. .....
.....
A. I think he has come to my conclusion about the importance of that factor because I keep on telling him about it, but even up to this 1959 year I have not still had the entries made in the Cash Book. I cannot do more; it is in my report to the Income Tax Authorities under Section 81 and 82".

My Lord, then over the page:

"Q. That leaves it quite open to the Return of Income being inaccurate based on such records as you have, being inaccurate one way or the other, isn't that so?
A. The possibility is there, no doubt at all.
.....
.....
Q. Yes, I didn't come into it till 1957, so 1954 was the first year, though I would not give much as to the accuracy of the Accounts."

Now My Lord, I don't say that takes me all the way, but that is in my submission some evidence, the evidence of Colonel Bellman on that point, as showing it is unlikely in this

type of business that there were payments by cash, but My Lord this matter was very thoroughly gone into. Your Lordship may recall that Mr. Rattan Singh went twice into the witness box. The second occasion was when I put to him all his bank accounts my Lord, and I again make a comment that there has been an extremely thorough enquiry over a long period of time. My Lord there is no ground whatever, I would submit, for the assumption that Mr. Rattan Singh has other sources of income or ever had other sources of income which have not now been disclosed. My Lord, that being so, I would submit that the conclusion follows almost inevitably that these assessments must be excessive.

JUDGE:

Must be...

MR. DINGLE FOOT:

Excessive.

JUDGE:

Oh, sorry.

MR. DINGLE FOOT:

Must be held to be excessive. Now, My Lord, I come to the question of law which arises in this case, and the first question is a matter which I raised in my Opening address last year and that was the question as to whether these proceedings were pending.

My Lord, Your Lordship will recollect that the procedure is laid down in Section 74 of the 1952 Act, Section 74, sub-section 1:-

> "The Commissioner shall cause to be served personally on, or sent by registered post to, each person assessed....."

And then,

"If any person dispute the assessment he may apply to the Commissioner ..... to review and to revise the assessment made upon him."

That is the next stage of the proceedings.

"On receipt of the notice of objection....."

I don't think that matters. Then 4:-

"In the event of any person assessed, who has objected to an assessment made upon him..... the assessment shall be amended accordingly..."

And then one comes to the proviso to 4:-

"Provided always that in the event of any person who..... and the right of appeal under the provisions of this Act against the assessment made upon such person shall remain unimpaired".

Then in Section 76 there is the provision for appeals to the Local Committee. Section 77 and Section 78 apply to appeals to the Court. Section 78:-

"Any person who, being aggrieved by an assessment made upon him.... .....may appeal against the assessment to a judge upon giving notice in writing to the Commissioner within sixty days....

My Lord indeed in the notice which is served on the taxpayer he is informed and this taxpayer was informed on the notice, that he had sixty days in which to appeal. Then Your Lordship will recollect - My Lord I dealt with all this, but I am reminding Your Lordship of it.

JUDGE:

It is all in the transcript, Mr. Foot, I hope.

MR. DINGLE FOOT:

My Lord, it is. Then Your Lordship will recollect that we did appeal but I think our appeal was lodged on the 3rd January. My Lord, at that time the 1958 Act was in operation and there for the question which Your Lordship has to consider is whether I can bring myself within the transitional provisions of the 1958 Act, Schedule 5 to the 1958 Act, which replaces certain of the section of the material Section of the 1952 Act. Your Lordship sees the proviso to Section 1 of the 5th Schedule, Page 233.

> "Subject to this Schedule, the repealed enactment shall, notwithstanding its repeal.....
> .....
> shall be prejudicially affected by this paragraph".

Now My Lord, Your Lordship will recall that the question which has been canvassed before you is whether legal proceedings by or against the Commissioner were pending on the date when this Statute was published - I think that that is on the 30th December. At that stage what happened was that the assessment had been made, we had objected to it, and we had received from the Commissioner a notice of refusal under the proviso to sub-section 4 to Section 74, notice of refusal to amend the assessment. My Lord, that was dated the 4th December. Now Your Lordship last year expressed some doubt about this, as to whether the proceedings could be said to be 'pending', and the submission I Make now is that legal proceedings are pending as soon as the law is set in motion. Here you have a process laid down by the Statute; the assessment, the objection by the taxpayer, the failure to agree, the notice of refusal, and

the appeal either to the Local Committee or to the Court. My Lord, there are two authorities which I would like to cite. The first is the King against O'Connor. I did cite this before. It is 1913, 1 King's Bench, Page 557. My Lord the Headnote reads:-

> "By Section 3 of the Criminal Law Amendment Act 1912 any male person who is convicted.....
> .....and that there was no power to impose the sentence of whipping."

My Lord, then the judgment of the Court, or rather - if Your Lordship would go to Page 559 - judgment of Mr. Justice Ridley:-

> "The question is whether the proceedings in this case were pending
> .....
> Therefore by Section 8 there was no power to impose a sentence of whipping."

My Lord, then he goes on to the question of imprisonment and sentence. My Lord, there is an authority for the view, in my submission, that in a criminal case at any rate proceedings don't commence with the charge or the indictment, the formal charge in Court. When a man is arrested on a charge is when proceedings begin, and from that moment they are pending. But My Lord, there is another authority which I did not cite to Your Lordship on the last occasion, which I think takes the matter somewhat further and it is Delbert-Evans against Davies and Watson, My Lord. It is reported at 1945, 2 all. England Reports, at Page 167. My Lord, I am afraid I haven't got a spare copy.

JUDGE:

Go on, read it, Mr. Foot. Time is of importance.

MR. DINGLE FOOT:

> "The applicant for a writ or attachment to the Editors of two London newspapers for contempt of Court was tried and convicted....
> .....
> might justifiably give rise to proceedings of contempt of Court."

Then I don't think the rest is material, but My Lord, going to Page 169, this is in the judgment of Mr. Justice Humphreys - this is at Page 169 at (d) :-

> "After argument and after a number of cases had been cited, and in the course .....
> .....and so it is that this matter has come before us."

My Lord, therefore of course I pray that in aid. I say that you can apply the same thing here and that proceedings were clearly pending because, although we had not appealed at the material time, by the 30th December or 31st December whenever it was that the new Act came into operation, nonetheless the law had been set in motion and there was the opportunity for appeal. My Lord, if Your Lordship were in doubt about this matter, I submit the doubt ought to be resolved in favour of my client. My Lord, my client is given 60 days to appeal under the 1952 Act: under the 1958 Act the period is limited to 45 days. Now My Lord, supposing that he had lodged his appeal after the 45 days but before the 60 days had expired, then it means that if the 1958 Act governed the case then he would have been deprived of his right of appeal which he was told he had and which the legislature clearly intended him to have. My Lord, Your Lordship might of course be driven to that conclusion. My Lord, in my submission the Court would struggle against such a conclusion as that, that somebody should

be deprived by legislation of a right which he already has, that is, the right to appeal within 60 days. My Lord, therefore I make my submission that these proceedings were pending at the time the 1958 Act came into operation and that therefore Your Lordship has to consider the application of the Act of 1952.

My Lord, of course I will come a little later to what the position would be if the case were governed by the 1958 Act, but Your Lordship will recollect of course that it makes a very big difference in the matter of penalties, not only are the rates of penalty different - you have treble under the 1952 Act, double penalties under the 1958 Act - but Your Lordship will also recollect that under the 1952 Act Your Lordship has a discretion in the matter of penalties; at least that has been the view taken by the East African Court of Appeal, and indeed that discretion has been exercised on occasions, whereas under the 1958 Act Your Lordship has no discretion, Your Lordship can only consider whether there has been fraud or gross neglect. My Lord, if Your Lordship finds that there has been no fraud or gross neglect, then the penalties are remitted in toto, but this is the only issue which Your Lordship can consider under the 1958 Act. Under the 1952 Act it is for Your Lordship to consider, in the light of Your Lordship's findings on excessiveness, whether the penalties imposed have been proper.

Now, My Lord, assume for a moment that I am right in my submission and that the 1952 Act applies, My Lord the first matter which Your Lordship will have to consider, I submit, is whether there was fraud or wilful default under Section 72 in respect of each year, each of the earlier years, 1946 to 1950 inclusive. My Lord, unless there was fraud or wilful default of course there is no power to assess after seven years, and therefore not only would the penalties go but the assessments as well.

Now, My Lord, of course a great deal depends, in considering this question of fraud or wilful default upon the view Your Lordship takes as to the excessiveness of the assessments. My Lord, of course I don't dispute for a moment my friend's argument that if in fact the figure which he should have been assessed over the years was £64,000, and he only returned £14,000, as he did, that there is irresistible inference that there was fraud or wilful default on the part of somebody. It doesn't have, of course, to be on the part of the taxpayer himself, because what the Section says is:-

> "Where any fraud or wilful default has been committed by or on behalf of any person in connection with or in relation to tax for any year of income..."

But, My Lord, I have already submitted under this Section, as indeed under the 1958 Section, the onus of proving fraud or wilful default would rest upon the Department. It is for the taxpayer to prove that the assessment is excessive, but My Lord that doesn't apply to this question under Section 72. My Lord one applies the ordinary rule, in my submission, that where fraud is alleged the onus, and a very heavy onus, must rest upon the person who alleges it. If Your Lordship were in doubt on this issue in respect of any year, then My Lord, in my submission, that doubt should be resolved in favour of the taxpayer.

Now, My Lord, what is said here is that the figure of rent was much too low throughout the period, and I concede that My Lord, except in one year, the only rent which is put in is the Blenheim Road Rent, and that is £375. and that figure recurs year after year. We are in this difficulty, of course, that Mr. Nanda has disappeared. We don't know where he is. We have been unable to find him and we don't know why it

was that he included that figure. My Lord, it may be - one simply doesn't know - that Mr. Nanda made a mistake and that he attributed to business earnings some part of what should be attributed to rent, but My Lord I refer particularly in this connection to the year 1946. Now in 1946 the taxpayer in fact returned an income of £1,168. Now Mr. Thian estimated his business income. You see it has to be the case - I am taking Mr, Thian's case for this purpose - Mr. Thian estimated business income at £750. My Lord, I am just looking at the figure of rents that he gave. My Lord I am so sorry, I thought I had the figure written down. It is the first report. Your Lordship saw it yesterday. My friend is handing me this document - 1946, in the returns rent is given as 557 and the profits at 516, whereas the profits in Thian's second report....

JUDGE:

What were his rents?

MR. DINGLE FOOT:

His rents were returned as 557. In fact they were £1,049. His business income was returned at 557 and estimated at 757, so he had an income of about, according to this second report, of about 1,750 and he returned an income of just over 1,050. My Lord, of course there is a gap there but it is not a gap of the order, in my submission Your Lordship might wish to consider whether the Revenue have established that there was fraud or there was wilful default. Then, My Lord, I say at once that other figures, the figures in the later years are perhaps rather more difficult to justify, but My Lord a good deal depends of course upon the weightage. My Lord, if Your Lordship would go - it is Exhibit 26 - this is the further figures which were put to Mr. Easterbrook as re-calculated by Mr. Blackhall, and it is on the fourth page Your Lordship sees the figures are set out. Your Lordship sees 1946, 1,168: Total as calculated as above is 1,700. That comes almost precisely the same as Mr. Thian's figure. Then

it is 867 - 3132: 887- 3034: 938 - 1733. My Lord, I admit of course that in 1947 and 1948 there is a considerable discrepancy on these figures. Then if one goes to 1950 one has 1,600 whereas the total calculated as above is 2,400. Then My Lord that is not outside the boundary I would submit of possibly an innocent error. Then there is 1,244: should have been 2,721. That I concede is a greater discrepancy. Then one comes, of course, to the later years, My Lord, to which different considerations apply, but in relation to those years, 1946 to 1950, Your Lordship, in my submission, must consider in each year whether fraud or wilful default has been established, and My Lord, in relation to 1946 at least, and in 1950 I should say these figures certainly are not sufficient to support an inference of fraud or wilful default. It is at any rate possible that there might have been an innocent error in relation to the other years.

Now My Lord, when one comes to the last three years within the seven year period, 1951, 1952, and 1953, then of course the proviso to Section 72 does not apply. They are within the seven years and one goes back to Section 40. Now Section 40(2) reads:-

> "If the Commissioner is satisfied that the default in rendering the return or any such omission was not due to any fraud or gross or wilful neglect.....
> .....as he may think fit."

And My Lord the submission which I have already made, and which I don't think is disputed, is that Your Lordship is entitled to review the decision of the Commissioner of that respect, but of course the position is different in Section 72 because my submission has been under Section 72 that the onus

rests upon the Commissioner to show that there was fraud or wilful default, whereas of course under Section 40 the Commissioner has to be satisfied, so presumably the onus rests upon the tax-payer. Although the onus is different it is still a matter for Your Lordship to consider, having regard to the figures and having regard to all the circumstances of the case, whether Your Lordship is satisfied that the omission was not due to fraud or gross or wilful neglect.

Now My Lord, going back to these figures prepared by Mr. Blackhall, one finds the figures for 1951 - £1,200. returned; 2,760 was the total calculated as above. My Lord, in 1952 the income returned is 3,800, and the total calculated as above is 4,200. My Lord, that is a very small gap indeed, and in 1953, according to these calculations the income has been over-stated. My Lord, that is the conclusion which Mr. Blackhall arrives at, and My Lord it is also the conclusion apparently which Mr. Thian arrives at, because Mr. Thian concluded there was a business loss in that year. How such an error came to be made we don't know: It is extremely unusual: but when you find these gentlemen arrive at the same conclusion in relation to this rather peculiar year, if I may so put it, 1953 My Lord, in my submission it is a matter which Your Lordship can accept, and therefore in relation to 1952 certainly, and in relation to 1953, I would invite Your Lordship to say that Your Lordship is satisfied that the default, if default there was, was not due in those years to any fraud or gross or wilful neglect.

My Lord, of course it would follow, if that were so, that the whole of the penalties should be remitted for those years. My Lord those are very substantial amounts, because the penalties - 1951, 2,912; in 1952 13,165; and in

1953, 8,821. My Lord, of course it would also be for your Lordship, if Your Lordship were not prepared to say there was no fraud or gross or wilful neglect, Your Lordship could exercise the discretion which is given under Section 40 sub-section 2, and you could make a further remission if Your Lordship thought fit.

Now My Lord, as regards the rate of penalty, if Your Lordship should arrive at that point, again it would depend on the view Your Lordship takes of the figures, but My Lord this rate of penalty - I think my Friend said that it was 151% - is that right? 152 - I beg your pardon. 152% throughout the years. This rate of penalty was thought appropriate because the Commissioner believed that there had been non-disclosure of something like 550,000. The income returned was 14,000 and the Commissioner's figure was 64,000. My Lord, If Your Lordship should reach the conclusion that the true figure is very much nearer what I have suggested, the true figure is somewhere around 25,000. My Lord, even if Your Lordship thought that there was fraud or gross neglect, whatever it may be, My Lord, in my submission the rate of penalty should be very considerably lower than the Commissioner has thought fit to impose.

Now My Lord, there is one other matter to which I have to refer in relation to Section 72, My Lord. That is the question as to whether - on which Your Lordship has already been addressed - as to whether in any event under Section 72 there is power to impose penalties. My Lord it is a matter on which My Learned Friend, Mr. Summerfield, addressed you, and of course it turns, as Your Lordship will recollect, on these words:-

> "....for the purpose of making good to the Revenue of the Territories any loss of tax attributable to the fraud or wilful default..."

And I have already submitted that some effect had to be given to those words, and that the only way in which you can give effect to them is to say that you can only recover basic tax after seven years.

JUDGE:

What was the Section Mr. Summerfield, to which I drew your attention?

MR. DINGLE FOOT:

Section 40(3) My Lord. I am just coming to that.

JUDGE:

Yes, certainly. Go on.

MR. DINGLE FOOT:

There were really two arguments which were put by, or rather, put against me, In the first place My Learned Friend argued that was an absurdity, where you have fraud or wilful default established, that it should not be possible to impose penalties, and I think at one stage Your Lordship was a little inclined to share his view and say that could hardly be the intention of the legislature, My Lord, when one examines it in my submission and looks at the whole Section, it is not so absurd as would appear at first sight. My Lord, it was clearly, the opening part of the Section before one comes to the proviso, the intention was clear enough, it was intended that here should be a wholly exceptional procedure. It isn't one that one can invoke at any time: it is a sort of supplementary procedure that was held by the Privy Council in the Mandavia case, and it is clearly intended to prevent in one respect, that is, when you have been assessed once under Section 71 you still remain liable to assessment, but you shall not be assessed after 7 years; after 7 years you are perfectly free, whatever has happened, unless you come within the proviso, and then in the proviso it says:-

"Where there is any fraud or wilful default has been committed..."

Well the legislature was obviously concerned here, as I say, to give a certain degree of protection and they may very well have had it in mind that, even where it was thought there had been fraud or wilful default, it would be unfair to penalize the citizen after the lapse of seven years. It would be unfair to the Revenue of course that the citizen should be able to get away with it because of the lapse of seven years, but they may have said, "We don't think the penalty procedure should obtain at all after seven years". My Lord, I am the first person to say the legislature don't do absurd and ridiculous things at certain times. This is not so absurd. I would suggest it is in the concept of the whole Section. The point which Your Lordship put to My Learned Friend, and with which I have to deal, is Section 40, sub-section 3, which says:-

> "The additional amounts of tax for which provision is made under this Section shall be chargeable..... .....or any part thereof is determined from returns furnished."

And what is put against me is that that apparently shows the intention that the Commissioner can assess the penalties at any time. My Lord, in my submission, that Section is not really consistent with the interpretation of Section 72, the proviso for which I am contending. My Lord, within the 7 years the Commissioner can charge the additional amounts of tax. If it were not for the inclusion of sub-section 3 in Section 40, there might be some doubt about that. To remove the doubt that where you have an additional assessment made under Section 72 it can attract penalties as well as the taxpayer having to pay the basic tax, this sub-section 3 is

included. My Lord in my submission that doesn't really affect the proviso 1 as to give effect to those words. It cannot really be contended that they are really surplusage put in for no reason at all, and in my opinion it is impossible to give them any other effect than the one I am contending. My Lord, if My Learned Friend is right, and if you can impose penalties after the lapse of 7 years, then it would have been quite unnecessary to put in those words at all. It would simply read, "Where any fraud or wilful default has been committed in connection with any loss of tax for any year of income, the Commissioner may assess that person at any time." Perfectly straightforward. But the legislature has thought it necessary to put in these words, and the governing words in my submission are "for the purpose". He may assess him for that purpose and not for any other purpose, and the purpose is, "making good to the Revenue of the Territories any loss of tax attributable to the fraud or wilful default".

JUDGE:

Mr. Foot, assume that a taxpayer is fraudulent in relation to concealing a part of his income...

MR. DINGLE FOOT:

Yes, My Lord.

JUDGE:

....and is innocent in relation to failing to disclose - innocent and wholly blameless in relation to failing to disclose some other part of his income in the same year, and this is discovered more than 7 years later; prima facie of course it would seem to me that the Commissioner could only assess in relation to so much of the concealed income as had been concealed from fraudulent motives, and the rest - although it is, I admit, difficult to envisage such a case -

the Court would say, "Well, this was inadvertently omitted from your return; 7 years has run, but you are not liable for it as there was no fraud or wilful default". Is that not a possible construction, and in such a case would there be any need to say that sub-section 3 of Section 40 did not apply to the part which had been fraudulently omitted? In other words, he is assessed in relation to that, and then the effect of his being so assessed automatically attracts the penal provision.

MR. DINGLE FOOT:

My Lord, I see, I think, what Your Lordship is putting to me, but of course in opening this case last June I did envisage the case of a person with two sources of income and guilty of a fraud in relation to one source but not to the other although there had been an omission in each case.

JUDGE:

Yes.

MR. DINGLE FOOT:

My Lord, in my submission, the position where you sort of split it up - you have got a fraudulent element in relation to one source of income and not in relation to the other - My Lord, even that, in my submission, doesn't get us round the difficulty which these words create. My Lord, whether you are dealing with the whole of the income or only part of the income, the Commissioner can only assess at all after 7 years, whether it is, so to speak, innocent income or guilty income, if I may put it that way; he can only assess after 7 years in any event if he thinks there is fraud or wilful default, and My Lord, you still of course have to meet the words, "for the purpose of making good to the Revenue of the territories any loss of tax attributable to the fraud or wilful default". My Lord, of course, assuming that I am wrong, you can split it up under that Section; I

concede that. You can say, "Well, we distinguish between one source of income and the other because we think there has been fraud in one case and innocent mistake in the other", but one is still left with the words, "for the purposes of making good to the Revenue..."

JUDGE:

That is the loss from the fraud.

MR. DINGLE FOOT:

Yes.

JUDGE:

He says, you see, there is no question of assessing to a penalty or assessing to additional tax, as I understand it. He is authorised to assess for the purpose of making good the loss to the Revenue from the fraud, and the effect of his having so assessed attracts the penalty. At least that is the other construction, the construction Mr. Summerfield contends.

MR. DINGLE FOOT:

I appreciate that, My Lord, of course there are two consequences that follow if I am wrong; one is that the penalty can be imposed, or rather one is that basic tax is imposed, and the other is that the penalty is imposed. My Lord he can assess in those circumstances for the purpose of making good the basic tax but not for any other purpose. My Lord, that I submit, is the only consequence that can follow, that the taxpayer has to pay the basic tax which he has omitted to pay in the first place.

JUDGE:

Well, go on.

MR. DINGLE FOOT:

My Lord, that is my submission, and My Lord, all that of course is on the footing that this case falls under the

1952 Act.

My Lord, supposing I am wrong about that, and Your Lordship holds that proceedings were not pending in this case on the 30th December, My Lord then of course one goes over to the 1958 Act, and under the 1958 Act, Section 101, there of course Your Lordship powers, as I have already said, are very much more limited. In Section 101(5) it says:-

> "Notwithstanding anything in Part XIII, where in any appeal against any assessment which includes additional tax.....
> .....then the whole of the additional tax so charged shall be remitted."

My Lord, there of course Your Lordship has no discretion at all in relation to the amount of penalties. Your Lordship has simply to decide whether there was fraud or any gross neglect. My Lord, I have made my submission about that and the same submissions apply as I made in relation to Section 72, the onus of proof and in relation to the last few years, except that in this case of course it would be the same in all the years. Your Lordship the same considerations will apply. My Lord, my submission is this, that if Your Lordship is applying this Section, then the onus of proving fraud or gross neglect rests upon the Commissioner, Your Lordship will have regard to the figures as Your Lordship ultimately finds them to be, and if Your Lordship finds that those figures are very much lower, as I suggest, then again I invite Your Lordship, as I did a little earlier in relation to the 1952 Act, to consider whether that onus has been discharged in relation to each of the years. Of course Your Lordship will have to arrive at a finding in relation to each year.

Now My Lord, those are my submissions upon the law and that really concludes I think what I have to say to Your Lordship at this stage. My Lord, I submit in the first place that the Gian Singh rents and the profit on the sale of the Grogan Road Property should be excluded, and that on those grounds, in the first place, these assessments must be held to be excessive, secondly I submit that whichever approach you adopt, whether you adopt the approach which was adopted by the Revenue or that which had been suggested on behalf of the taxpayer - that is, comparison of the statements of worth coupled with estimates of expenditure - these assessments have been shown to be excessive. My Lord, thirdly I submit that the nearest figure at which one can arrive is either, in round figures, 28,000 or 25,000 according to the view Your Lordship takes about the monies banked in India. Fourthly I submit that there were proceedings pending and that the Act of 1952 applies; that under Section 72 the Revenue have not discharged the onus of showing there was fraud or wilful default in relation to the years 1946 to 1950 and in relation to the remaining three years it should be held that there was no fraud or gross or wilful neglect. Next I submit that if I am right, either about the quantum - rather, if Your Lordship is against me on the fraud and wilful neglect, even so, if I am right about the quantum, then the rate of penalty should be reduced, and lastly My Lord I submit that if this case falls under the 1958 Act the Revenue have not discharged the onus, at least on my figures, have not discharged the onus of showing that there was fraud or gross neglect in respect of each of the years.

JUDGE:

Yes.

MR. DINGLE FOOT:

Now My Lord I don't know whether there is any other aspect of the case on which I can be of assistance.

JUDGE:

I can think of none at the present, Mr. Foot. Mr. Summerfield, I will hear you on the authorities cited by Mr. Foot after lunch.

Court adjourned at 12.50 p.m.

24th March, 1961 2.30 p.m.

MR. SUMMERFIELD:

May it please you, My Lord, I have very little to say in reply to those two authorities. I hoped possibly that I could have dealt with them at the time. First of all on the King against Timothy Patrick O'Connor, Kings Bench Division, Vol. 1 1913, page 557, was put by my learned friend in opening, so I really did have an opportunity of commenting on it in my closing address. I did not do so but my learned friend does permit me to raise the matter now. My Lord, the facts are - a person accused of an offence under S.2 of the Act was arrested and charged before, and tried and convicted after, the commencement of the Act in 1912. He was sentenced to be whipped under Section 3 of the Act. First of all that is a criminal case and where criminal statutes give harsh penalties there is a tendency on the part of the courts to construe them in favour of the subject. That is a very different matter here.

JUDGE:

Don't you think the penalties are harsh in this case?

MR. SUMMERFIELD:

This is a procedural matter and it is not of itself tied to penalties. There is this important difference, and the

effect of this difference I would say is no more than this, my Lord - once a person has been arrested and charged then proceedings have commenced. Now I don't think there is anything very startling about that, because I think your Lordship observed as long ago as last June, the arresting and charging of a man is a preliminary to bringing before a tribunal or before the court. It is a step to bring the matter before the court and very properly, irrespective of the fact that it is a criminal matter, it is very properly treated in my submission as pending legal proceedings.

JUDGE:

If someone has been formally charged can he then be exonerated from the charge otherwise than by being brought before a court?

MR. SUMMERFIELD:

There are two ways. You arrest a man and you are obliged to bring him before the court within 24 hours. The other way of course is to proceed by way of summons - once the summons is issued by the court nobody can interfere with it, only by the court. You can go back and ask the court to withdraw the summons. Under the normal process there is no alternative but to bring him before the court.

JUDGE:

My Impression in criminal law of England is that proceedings there are initiated in one of two ways - by the laying of information which is upon oath or by the making of a complaint which is otherwise than on oath, and that so soon as any complaint has been made or an information has been sworn, the court is seised of the matter, and that from then on the only way of terminating the matter is either by an order of the court or by non acquitur.

But as I say I don't think so far as I recollect that an information, if sworn to, can be just torn up.

MR. SUMMERFIELD:

With respect I agree entirely, and there is the other alternative, arrest without warrant. My recollection is very hazy, my Lord. I must confess my recollection is not as clear as it ought to be on the matter. The position out here substantially follows the position in England. An alternative way of laying a complaint is for a man with power to arrest a man without a warrant and then he is obliged to bring him before the court within 24 hours.

JUDGE:

But does not he have to make a charge?

MR. SUMMERFIELD:

He has to charge, but that is not done by the Court.

JUDGE:

No, he lays a charge against him.

MR. SUMMERFIELD:

He brings him before the court by way of a charge but he is obliged to do that within a certain period, but he could drop the charge before bringing him to court and release him if the man satisfies him that no offence has been committed. The same as if the appellant puts in a Notice of Appeal or lodges his Memorandum of Appeal, he can always abandon it. It is a stop to bring the matter before the court.

And then turning to the other case, my Lord, which is Deldert-Evans v Davis & Watson, 1945 All England

Reports, and the passage quoted by my learned friend there, page 169, Vol. 2.

> "We are inclined to give you leave to move upon your submission which has been clearly made: proceedings are pending at any time where there is an opportunity for appeal".

It is important to determine what the Court is deciding when it invoked that principle. The question before that, my Lord, was the question of determination of the Court of:

> "... whether the publication of any matter which would amount to a contempt of Court if it had been published before the applicant was tried by the jury, could be said to be calculated to interfere with the due course of law and justice, i.e. calculated to prejudice the fair hearing of the applicant's appeal by the Court of Criminal Appeal"

and it was held:

> "(1) during the time between the conviction of an accused person on indictment and his appeal to the Court of Criminal Appeal the case was still sub judice and any improper statements published in the interval might justifiably give rise to proceedings for contempt of court".

The matter is still sub judice, and at that period the legal proceedings are still pending. I don't quarrel with that at all. Once a matter has been seised by the lower Court and disposed of by the Privy-Council, any stage between those two events I would say that legal proceedings are pending. That is a very different matter from the case before your Lordship. The case had not been seised by any Court. The first steps to bring it before a court had not been

taken, and that first step is the issue of a notice of intention. Up to that stage my Lord, nothing had occurred which was outside the administrative field. The completion of a process - which commences with the notice for the return, the making of the return, the assessments, the objection and then either the amending notice or notice of refusal. My Lord, my learned friend did pray in his submission the fact that there are 60 days' notice given in the 1952 Act and only 45 days under the new Act. There is no real distinction if the matter is looked at carefully because under the 1952 Act it is within 60 days after the service upon him of a notice of amended assessments or refusal. In the 1958 Act it is 45 days after notice of such a decision has been served on him and there are 14 days between the period of distributing the notice and its receipt. I don't think I can assist your Lordship any more.

JUDGE:

Judgment will be reserved.

NO. 51

Judgment

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

CIVIL APPEALS NOS. 4 - 11 OF 1959.

RATTAN SINGH S/O NAGINA SINGH APPELLANT

v e r s u s

THE COMMISSIONER OF INCOME TAX RESPONDENT

JUDGEMENT

By these appeals, which were consolidated by consent of the parties, the appellant, who is a builder, appeals against additional assessments to income tax raised or purported to be raised upon him on the 21st day of May, 1958, in relation to the years of income 1946 - 1953 (both inclusive).

It is convenient immediately to summarise in broadest outline the history leading up to the making or purported making of the relevant assessments and to the institution of these appeals, insofar as that history is not in dispute.

The appellant's father, Nagina Singh, carried on business as a builder for many years up to the time of his death on the 11th January, 1946.

For a considerable portion of this period the appellant, who at all material times lived with his father under the "joint family system, worked for his father but on his own showing instead of being paid a regular salary was, according to his own evidence which has not been sought to be contradicted, given small sums from time to time to meet his personal expenses. It should, however, be observed that he was credited in a journal with Shs. 900/- per month.

On the death intestate of Nagina Singh the appellant was his sole heir and obtained letters of administration to his estate. According to the estate duty affidavit sworn to by the appellant in the administration of his father's estate, the gross value of that estate was Shs. 289,844/34 and the

net value slightly in excess of Shs. 200,000/-. The latter figure, however, in my view, for reasons hereinafter referred to, is manifestly an under estimate of the true net value of the estate.

From the time of his father's death the appellant continued to carry on his father's business on his own account although still in his father's name until the year 1955, when he took into partnership, or purports to have taken into partnership, his three sons. With this partnership I am in no way concerned as it was entered into after the end of the relevant period, and expression used hereafter to connote the period to which relate the assessments the subject of these appeals.

Throughout the relevant period the appellant made, although belatedly, returns of his income for the purpose of income tax and was assessed to income tax upon those returns. The income returned by the appellant varied substantially from year to year as appears from the following table, the figures are, however, only approximately applicable to the relevant period:

Year of Income	Date of Return	Business Income	Income Returned
1946	16.9.1949	£557	£1,168
1947	4.4.1949	£375	£ 867
1948	26.3.1950	£375	£ 887
1949	26.3.1950	£375	£ 938
1950	4.2.1952	£375	£1,621
1951	13.4.1952	£375	£1,244
1952	23.7.1954	£375	£3,888
1953	26.11.1954	£375	£3,402

According to the appellant's evidence he in fact had no personal knowledge of the contents of any of these income tax returns, his practice being to sign the return in blank and then to give it to his auditor, Mr. Nandha, who filled it in and forwarded it to the income tax authorities. Conduct of this nature might well be regarded as wholly incredible in the case of anyone carrying

on business in his own country. In the instant case, however, it must be borne in mind that the appellant claims to be able to do little more than to sign his name in English and although, to judge by the nature of some of the building contracts upon which he was engaged, he is an expert builder in a substantial way of business, it is by no means impossible that his lack of knowledge of English resulted in his placing far greater reliance on his accountant and paying far less personal attention to the financial side of his business than would otherwise have been the case.

Early in the year 1956 the investigation department of the income tax Department became interested in the appellant's affairs. Thereafter there were a number of interviews with officers of the department and Mr. Shaffie, who kept the appellant's books at the material time, and one or other of the appellant's sons. For one reason or another most of these interviews were not attended by the appellant himself. Ultimately Mr. Thian of Thian and Bellman, Chartered Accountants was instructed to investigate the appellant's affairs with a view to making a report.

In due course Mr. Thian submitted a report dated 15th November, 1956. This report related only to the years 1948 to 1953 but disclosed that the appellant's aggregate income for that period was some £8,000 in excess of the income returned by him for the period 1946 to 1953.

Discussions ensued between Mr. Thian on the one hand, and upon some two or three occasions his partner, Colonel Bellman, as representing the taxpayer, and officers of the department on the other. In the course of these discussions the appellant was required to sign and did sign a certificate of full disclosure, which made specific reference to his having disclosed all of his bank accounts. Subsequently, however, it became apparent that the appellant had omitted to disclose a bank account with the Mombasa Branch of the Bank of Baroda and with a bank in India.

Thereafter as Mr. Thian's report was regarded by the Income Tax authorities as unacceptable in a

number of respects, which in no way however reflect upon either Mr. Thian's integrity or efficiency, he was instructed to prepare a second report. This second report was submitted in October, 1957, and bears the date "7th October". It related to the years of income 1940 to 1953. It is unnecessary, however, for present purposes, to make any reference to the years 1940 to 1946 (both inclusive) inasmuch as although they are referred to frequently in the notes of interview, which were by consent of the parties treated as evidence in this case, in fact no assessments were ultimately raised in relation to those years.

It should be observed at once that the profits shown in Mr. Thian's report for the years 1946 and 1947 were admittedly estimated profits only inasmuch as there were virtually no records at all for those years. Nevertheless Mr. Thian's aggregate income figures for the period 1946 to 1953 was £35,000.

After the submission of Mr. Thian's second report further discussions took place and ultimately the department forwarded to the appellant's advisers schedules setting out the figures upon which it was then proposed to assess the appellant. Those schedules were prepared by Mr. Easterbrook, an accountant who was concerned in the investigations of this case from 1956 and whose evidence seemed to me to be given in a frank and convincing manner. The system adopted by Mr. Easterbrook was to take Thian's income figures and to add to them items contained in the schedules to Thian's reports which did not appear to Easterbrook to be deductible for the purpose of income tax. Mr. Easterbrook also added to Thian's figures, figures which he thought appropriate in relation to matters as to which Thian's report was silent or, in his view, inaccurate. After further discussions in the course of which I am satisfied by the evidence of Mr. Easterbrook, which in this respect I accept, the figures submitted by the department were agreed to by Mr. Thian with certain specific exceptions, to which reference is made hereafter.

Thereafter, the appellant objected to those assessments, but they were confirmed. Subsequently

Notice of Appeal was given on the 31st day of December, 1958.

The first contention of Mr. Foot, who appears for the appellant, is that although, as already observed, the Notice of Appeal was given on the 31st day of December, 1958, these appeals fall to be determined under the provisions of the East African Income Tax (Management) Act, 1952, hereinafter referred to as the Act of 1952, not the East African Income Tax (Management) Act of 1958, hereinafter referred to as the Act of 1958. This contention is of importance for two reasons.

First, it is common ground that although both the Act of 1952 and of 1958 make provision whereby if a taxpayer omits from his return, income, and additional assessment may, subject to certain qualifications into which it is unnecessary immediately to enter, be raised upon him, and, in that event, in addition to the tax which would have been payable upon the income so omitted had it been duly returned, additional tax becomes payable at a rate specified in the relevant Statute, there is at least one major distinction between the material provisions of the Act of 1952 and that of 1958. That distinction is that, while the provisions of both Acts require the commissioner to remit the additional tax if he is satisfied that the omission was not due to fraud or, in the case of the Act of 1952, wilful default, or in that of the Act of 1958, gross or wilful neglect and empowers him, if he thinks fit, in any case, to reduce the additional tax. The Act of 1952, unlike Act of 1958, confers a similar power upon the Court. Mr. Foot contends that the circumstances of this case are such that if additional tax were properly exigible, which is not admitted, a substantial portion of that additional tax should be remitted.

Secondly, the commissioner is required to raise an additional assessment if he has reason to believe that any taxpayer has been under-assessed. This power can, however, only be exercised within six years of the termination of the year of income to which the additional assessment relates, unless the under-assessment was due to fraud or gross neglect or wilful default. The relevant provision

of the Act of 1952, however, contains words which do not appear in the corresponding provision of the Act of 1958, the effect of which the appellant contends is to limit the power to raise an additional assessment more than six years after the termination of the year of income to which it relates in cases where there has been fraud or wilful neglect to a power to raise such an assessment in relation only to income which has been omitted in such circumstances as to amount to fraud or wilful neglect. To illustrate this by a simple example, according to the appellant if A omitted from his return £200, of which £100 was omitted fradulently and £100 was omitted by some error which could not be construed as amounting to gross or wilful neglect and the omission was not discovered until more than six years after the relevant year of income there would only be power to raise an additional assessment in relation to the £100 which had been fraudulently omitted, not, as the respondent contends, a general power to raise an additional assessment in relation to the entire sum which had been omitted.

The argument that the provisions of the Act of 1952, not those of the Act of 1958, are applicable to these appeals rests upon the transitional provisions made by sub-section 1 of section 152 of the Act of 1958 and paragraph 1 of the fifth schedule thereto. It will, therefore, be necessary to consider those provisions in detail. If the result of that consideration is that the Act of 1952 is held to apply it will be necessary to consider the question of whether or no the Court ought to exercise the discretion admittedly enjoyed by it under the Act of 1952 to remit or to reduce the quantum of additional tax. As, however, the propriety or otherwise of remitting or reducing a statutory penalty where the Court has a discretion as to whether or no to do so, must depend on the circumstances of the particular case in which the exercise of the distinction is sought, the consideration of that question, should it arise, ought to be postponed until the facts have been gone into.

The second contention of the appellant - that under the Act of 1952 additional tax is exigible only in respect of monies which were omitted from

the taxpayer's return by reason of fraud or wilful default - being a question of pure law - can be considered immediately after the determination of the question whether the Act of 1952 or of 1958 is applicable irrespective of which those Acts is held to apply.

I turn, therefore, to the consideration of whether the Act of 1952 or of 1958 is applicable. Section 152 of the Act of 1958 repeals the Act of 1952 and all amendments thereto subject to the provisions of the fifth schedule.

Paragraph 1 of the fifth schedule, so far as material, is in the following terms:

" FIFTH SCHEDULE

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 -

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

The effect of this provision may so far as material for present purposes, be summarised as being:-

(a) To continue in force the Act of 1952 in relation to income tax chargeable, leviable and collectable up to the years of income 1957,

(b) Subject to the qualification expressed in (c) hereunder, to engraft upon the Act of 1952 as continued in force certain provisions contained in the Act of 1958. The Provisions so engrafted include the provisions relating to the raising of additional assessments, imposing additional tax, and providing for the remission or mitigation of additional tax; and

(c) Excluding the provisions engrafted on the Act of 1952 by the Act of 1958 from applying to matters in relation to which legal proceedings by or against the commissioner were pending on the 30th day of December, 1958 - the date of publication in the Gazette.

Mr. Foot's contention is that although the notice of appeal was not given until the 31st December, 1958 nonetheless legal proceedings were pending when the Act of 1958 was published in the gazette on 30th December, 1958. In effect, therefore, the question of whether the Act of 1952 or of 1958 is applicable to these proceedings depends upon the meaning of the phrase "pending legal proceedings".

No authority expressly in point has been cited to me. Mr. Foot's argument appears to be that as the giving of a notice of objection to an assessment and the failure to agree with the commissioner are necessary antecedents to giving of notice of appeal, legal proceedings must be regarded as pending at least from the time of the giving of the notice of objection. In support of this contention he referred to the powers of the commissioner to require the attendance of witnesses to take evidence on oath and to compel the production of documents with a view to determining an objection to an assessment. He further stressed that the Court must be reluctant so to construe any Statute as to abridge the rights which the taxpayer enjoyed in relation to past transactions up to the commencement of that Statute in so far as it is alleged to affect those rights. Although Mr. Foot argued that by reason of the powers of the commissioner upon the hearing of an objection to an assessment, already referred to, the objection proceedings themselves

are a form of legal proceeding, it seems to me that even if objection proceedings are a form of legal proceedings, a matter as to which I refrain from expressing a concluded opinion although I incline to the view that they are not - those proceedings cannot be proceedings to which sub-paragraph (a) of the proviso to paragraph 1 of the fifth schedule applies in as much as that sub-paragraph is applicable only to legal proceedings by or against the commissioner and it is trite law that no-one can be judge in his own cause and therefore an objection, the determination of which rests with the commissioner, cannot be a legal proceeding by or against the commissioner.

Furthermore, it appears to me difficult to hold that legal proceedings are pending from the time of the taking of an objection to an assessment in as much as it is not the refusal of the commissioner to agree to that objection but the original assessment which is appealed against. That it is the original assessment that is appealed against is manifest from many provisions of the Acts of 1952 and 1958. It could hardly be said that legal proceedings were pending from the time of the making of an assessment in as much as in that event legal proceedings would be pending in every case in which a taxpayer is assessed to income tax until the expiry of the time within which he is permitted to give notice of objection.

If A. libels B it would seem to me to be an abuse of language to say that legal proceedings commenced to "pend" at the moment that B first became aware of the publication of the libel upon him. In my view, therefore, legal proceedings are not pending unless and until some act is done which sets in motion the process of a Court to determine the matter in dispute. From this it follows that as the notice of appeal was not given until after the publication of the Act of 1958, the provisions of the Act of 1958 engrafted by the first part of the proviso to paragraph 1 to schedule 5 of the Act upon the Act of 1952 apply to the instant case.

Hence, in my view, the Court has no power to remit or mitigate any additional tax properly

exigible under the Act of 1952 read in conjunction with the provisions of the Act of 1958 engrafted thereon.

For the same reason it seems to me that any difference between the provisions of the Act of 1952 as in force immediately before the publication in the gazette of the Act of 1958 and those of the Act of 1958 relating to the circumstances in which and the extent to which an additional assessment can be raised and additional tax becomes exigible is immaterial in as much as the provisions relevant to the determination of these matters are, in my view, those engrafted upon the Act of 1952 by the Act of 1958.

Nevertheless, in case this conclusion should be wrong, I propose to consider the matter as if I had held that the provisions of the Act of 1952, as in force prior to the publication of the Act of 1958, were applicable to the instant case. The relevant provisions are those of section 40(1)(b) and of section 72, omitting paragraph 5 of the proviso to that section, both of the Act of 1952.

Those provisions are as follows:

"40.(1) Any person who -

(a) ...

(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."

"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 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 that person at any time;"

The purview of section 72 in terms confers power to raise an assessment or an additional assessment in the circumstances contemplated by the section at any time within seven years of the end of the year of assessment to which such assessment or additional assessment relates. Paragraph (a) of the proviso to section 72 in terms confers power to raise an assessment or additional assessment in the circumstances contemplated by the purview to the section at any time in the event of there having been committed fraud or wilful default in relation to tax in respect of the year of income to which the assessment or additional assessment relates. Reading the purview and the proviso together it is manifest that although couched in positive form the section is negative in effect in that it restricts the right to raise an assessment or additional assessment more than seven years after the end of the year of income to which such assessment or additional assessment relates, to cases in which there has been fraud or wilful default. The proviso, however, on the face of it, specifies the purposes for which in the event of there having been fraud or wilful default in relation to tax an assessment or additional assessment may be raised after the expiration of the seven year period as being the purpose of making good to the revenue the loss of tax attributable to

the fraud or wilful neglect. As there is no general power to raise an assessment or an additional assessment after the expiry of the seven year period, any such assessment or additional assessment can only be raised under the proviso. The proviso, however, only authorises the raising of an assessment or an additional assessment for the purpose specified therein, that is to say, the making good to the revenue of the loss consequent upon fraud or wilful neglect. Hence, in my view, had the provisions of the Act of 1952 as originally in force, applied to the instant case, there would have been no power to raise additional assessments in relation to any year of income anterior to the year of income 1953 except in relation to monies which were omitted from the taxpayer's return by reason of fraud or wilful default and no additional tax could have been exacted in relation to monies omitted from his return otherwise than by reason of fraud or wilful default.

At this juncture it is convenient to deal with a subsidiary contention of Mr. Foot's, that as the power to raise an additional assessment at any time under paragraph (a) of the proviso is confined to a power to raise such additional assessment for the purpose of making good the loss to the revenue consequent upon fraud or wilful default, there is now power to exact additional tax in relation to monies which are taxable by reason of there having been omitted from the taxpayer's return by fraud or wilful default. The argument is that as, had the monies omitted from the taxpayer's return by reason of fraud or wilful default been included in that return no additional tax would have been exigible in respect of them. Hence, the loss to the revenue attributable to the fraud or wilful default could not include anything by way of additional tax but is confined to the tax which would normally have been exigible had those monies been duly returned.

This argument is, I think, fully disposed of by the provisions of sub-section 3 of section 40 which are as follows :

" The additional amounts of tax for which provision is made under this section shall be chargeable in cases where tax has been assessed by the Commissioner under the provisions of section 72 as well as in cases where such income or any part thereof is determined from returns furnished."

I turn next to the consideration of the provisions of the Act of 1958 which are, in my view, relevant to the validity or otherwise of the additional assessments raised or purported to be raised upon the appellant.

These provisions are contained in section 101(1), paragraph (b) of Section 105 (both of the Act of 1958) which, so far as material, are as follows:

"101. 1. Any person who -

(a) ...

(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.

105. (1) 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:

(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."

Here again the power to raise an assessment or an additional assessment more than seven years after the year of income to which it relates is restricted. Under the Act of 1958, however, the circumstances which permit of the raising of an assessment or additional assessment more than seven years after the year of income to which it relates are not, as under the Act of 1952 where there has been fraud or wilful default, but where there has been fraud or gross or wilful neglect in relation to tax in the year of income in relation to which the assessment or additional assessment is raised.

Although sub-section 2 of section 105 of the Act of 1958 expressly precludes the raising of the question whether an assessment has been made within time otherwise than on an objection under section 109 or upon an appeal consequent thereon, and under paragraph (c) of section 113 in any appeal the burden rests upon the appellant to prove that the assessment is excessive, it seems to me that in determining whether an assessment or additional assessment is or is not made timeously, the question in issue is not whether the assessment is excessive but whether there was ever a valied assessment or additional assessment at all.

The assessments appealed against having been made in May, 1958, each of them which relates to a year of income prior to the year of income 1951 is prima facie statute barred.

Section 101 and section 103 of the Indian Evidence Act, which apply to this Colony, are in the following terms:-

> "101. Whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.
>
> When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."
>
> "103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person,"

The respondent desires judgment to be given that he had in 1958 a legal right to assess the appellant to tax in respect of years of income prior to the end of the year of income 1951. So too, it is the respondent who wishes the Court to believe that fraud or wilful neglect was committed in relation to tax in respect of each of the years of income prior to the end of the year of income 1951. From this it seems to me to follow that the burden of proving fraud or gross or wilful neglect rests upon the respondent.

Income tax appeals, being civil proceedings, the requisite standard of proof is that of a preponderance of probability. It must, however, be observed that, as was pointed out by Denning L.J. as he then was, in Bater v. Bater, (1950) 2 All E.R. 458 at 469, the degree of probability requisite to establish fraud is, although not so high as that requisite to establish criminal liability, nonetheless higher than that which would suffice to establish negligence in a civil action.

In C.A. 19 of 1960, after reviewing at p.33 and 34 of my judgment, certain authorities in relation to expressions cognate to "wilful neglect" I, at page 35, ventured to define wilful neglect as being, for the purpose of section 105 of the Act of 1958:

> "The intentional abstention from doing something in relation to income tax which the abstainer knows he is under a legal obligation to do."

The taxpayer has maintained throughout these proceedings that he signed his income tax returns in blank and gave them to his then auditor to fill in for him. At page 44 of the record he said, in cross-examination, that he did not see his returns after they were filled in. He likewise signed the accounts which accompanied his return and, at page 47, after saying that the accountant had made him sign the accounts accompanying the returns, explained that the accountant used to ask him to sign them and he used to sign. In answer to the Court, when asked if he had ever asked his accountant what was in the returns he said:

> "The only thing I used to ask him was if the particulars were correct according to the books and he used to say 'Yes' (vide p. 51 of the record).

The returns are now admitted to be inaccurate, at least in that they contain a claim in respect of the maintenance of the appellant's son, Gian Singh, who was according to the appellant, in receipt of a substantial income of his own. I find it difficult to believe that anyone who was conducting a business which was as successful as that of the appellant, as revealed by his returns, could possibly be so uninterested in his own affairs as never to seek to ascertain what sum has been returned as his income for income tax purposes. The appellant's indifference to financial matters, however, went even further if he is to be believed because in answer to the Court at page 71, when asked:

"Did you ever ask Mr. Nandha how the business was doing, whether it was making a profit or making a loss?"

He replied:

"I never asked him this question",

and, when subsequently asked:

"Did you know during that period of seven years whether your business was running at a profit or loss?"

his reply was:

"The only thing that I know was that the business was not running at a loss."

This appears to me wholly incredible.

The discrepancies between the income returned by Nandha for the relevant years and the income for those years as revealed in Thian's first report (which was for the reasons hereinafter apparent, in my view far short of the true income), but which were insofar as the years 1948 to 1953 both inclusive are concerned, based on figures audited by Nandha, are far too great in my view to be attributable to a genuine mistake.

Similarly, although the omission of the rentals, which, according to the appellant, ought to be regarded as Gian Singh's income, not the appellant's, from the appellant's return may be capable of being explained away on the ground that there was a genuine mistake as to the necessity or otherwise of returning those rents as part of the appellant's income, even if there had been such a mistake there could have been no honest claim for an allowance in respect of Gian Singh's maintenance and no honest declaration that Gian Singh had no income.

Hence, as I do not believe that the appellant was in fact ignorant of what Nandha was doing on his behalf, and do not believe that Nandha would have made fraudulent returns on behalf of the appellant without the appellant's complicity,

it follows that in my view the appellant committed fraud in relation to tax in respect of each of the years of income 1946 to 1953, both inclusive.

If I am, however, wrong in disbelieving that the appellant entrusted his affairs wholly to his auditor it seems to me that his failure to take any steps other than, if he is to be believed, making a general enquiry of Mr. Nandha, to check the accuracy of his income tax return in itself constitutes gross neglect in relation to income tax.

Furthermore, it must be observed that the power of the commissioner to raise an assessment or additional assessment beyond the statutory seven year limitation arises whenever there has been fraud or gross or wilful neglect in respect of tax in relation to the relevant year of income on the part of any person, not necessarily on the part of the taxpayer. The declaration that the appellant was entitled to an allowance in respect of Gian Singh must have been filled in by Nandha either in the light of information derived from the taxpayer or, in the absence of any information of an authoritative nature in relation to the subject. If, contrary to his protestations, the appellant gave information to Nandha as to Gian Singh's ownership of property, Nandha was clearly either fraudulent or grossly neglectful in making a claim for an allowance in respect of Gian Singh. If the appellant again, contrary to his present protestations, falsely told Nandha that Gian Singh had no income, the appellant was fraudulent in relation to tax. If Nandha filled in the part of the return relating to the appellant's eligibility for children's allowances without seeking to obtain from the appellant information as to the circumstances of his children, Nandha was clearly acting in a grossly negligent manner in so doing.

Nor do I consider that, if my opinion that the Act of 1958 applies is wrong, the respondent's assessments would be statute barred under the Act of 1952. Under that Act the right to raise an additional assessment more than seven years after the end of the year of income to which

it relates arises when there has been fraud or wilful default in relation to tax in respect of that year.

Everything to which I have referred as warranting the conclusion that there was fraud either by Nandha or by the appellant or both of them in relation to tax, would apply with equal force irrespective of whether the question of the existence or otherwise of fraud arose to be determined under the Act of 1952 or under that of 1958.

In re Young and Marston's Contract, 31 C.D. 168 at p.174, Bowan L.J. said in relation to the meaning of the phrase "wilful default":-

> " Default is a purely relative term, just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances - not doing something which you ought to do, having regard to the relations which you occupy toward the other persons interested in the transaction.
>
> The other word which it is sought to define is 'wilful'. That ... word ... implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and is a free agent."

It seems to me impossible to hold that conduct of the nature which the appellant professes to have been his in the instant case, that is to say, the signing in blank of an income tax return and permitting it to be filled in by someone else without making any attempt to check the accuracy of the figures so filled in or of the declarations made therein, is not wilful default within the meaning of Bowen, L.J's definition.

Similarly, if Nandha filled in either the declaration that Gian Singh had no income or that the appellant was entitled to an allowance in respect of Gian Singh's education without consulting the appellant, Nandha must in my view have been regarded as committing an act of wilful default.

For the foregoing reasons I consider that the respondent has established, not merely that degree of preponderance of probability which is sufficient to discharge the onus of proof in civil proceedings but, beyond a reasonable doubt, that there was fraud or gross or wilful neglect or wilful default on the part of the appellant and Nandha in relation to tax in respect of each of the years of income in respect of which Mr. Foot contends that the assessments were out of time. Hence, I hold that each of the assessment, the subject of these appeals, was made timeously.

The next matter for consideration is the evidence for the appellant, whether oral or documentary, directed to establishing that the assessments, the subject of these appeals, are excessive. Evidence of this nature falls logically into two categories which are not, however, capable of being dealt with wholly separately. The first of those categories is evidence which, while its acceptance would, if it is wholly necessary, lead to the conclusion that the assessments complained of, or at least some of them, are excessive is directed to establishing what was in fact the appellant's aggregate income over the entire period and possibly his income in relation to each year of that period. The second of those categories is evidence solely directed to establishing that whatever may have been the appellant's true income over the relevant period, the assessments complained of were excessive.

Before entering upon the examination of this evidence it is desirable to make certain general observations.

Paragraph (c) of section 113 of the Act of 1958 is in the following terms:

> "113(c) the onus of proving that the assessment objected to is excessive shall be on the person assessed."

In the light of the foregoing provision it seems to me that, while the income tax authorities frequently find it convenient and sometimes no doubt necessary when negotiating figures upon which a taxpayer is to be assessed in relation to a number of antecedent years, to resort to compromise in relation to certain items and to compute the income of the taxpayer for any particular year by averaging his aggregate income over a period, nevertheless where an appeal is lodged against an assessment the ultimate question before the Court is not how was the amount at which the taxpayer was assessed arrived at, but has the appellant proved that the income upon which he was assessed for that year was in fact greater than his assessable income. Nor, in my view, is this proposition of law affected by the fact that a number of appeals relating to different years have been consolidated, in other words, if X were assessed to tax for four successive years on the basis that his income in each of those years was £5,000 and, upon appeal proceedings he were to succeed in establishing that his aggregate income was only £18,000, but gave no evidence which was accepted by the Court as to his income in any particular year, there would be no alternative but to dismiss the appeal in relation to each particular year in as much as although his aggregate income over the period was such as to establish beyond any doubt that he had not in fact earned £5,000 per annum for each year, it would nonetheless be possible that in the particular year in relation to which there was no evidence, his income was £5,000 and that in some subsequent year or years his income was sufficiently less than £5,000 to account for the discrepancy between his actual aggregate income over the relevant period and the aggregate figure of £20,000 arrived at by adding together the individual assessments of £5,000.

In this regard I would also observe that while considerable stress was laid upon the fact that in back duty cases at the negotiatory stage it is invariable for there to be a considerable amount of give and take, either in the form of the advisers of the taxpayer advancing one figure, the revenue authorities advancing another, and a compromise being arrived at or in the form of one

side accepting or disregarding some particular item of a debatable nature, in consideration, if I may use that phrase loosely, of the other side accepting or disregarding some other figure of a debatable nature, the Court cannot adopt a similar approach but must endeavour to give credit to the taxpayer for the full amount of any sum which it thinks was improperly taken into account in arriving at the assessment and, having done so, to ask itself whether the sums for which credit has been given to the taxpayer are such as to establish that the assessment was excessive. In determining whether the assessment was excessive the Court must have regard to all sums which were omitted from the assessment by reason of a compromise of the nature above referred to, but which could properly have been included in the assessment, and also in some cases at least to the possibility of there being other undisclosed income of which the income tax authorities know nothing.

One other matter of a preliminary nature to which it may beconvenient to refer is that, while as I said in relation to the consideration of the question of whether the assessments were or were not intra vires at all, the standard of proof requisite in income tax appeals, as in other civil appeals, is that of a proponderance of probability, nevertheless, the degree of proof necessary to establish that any particular assessment is excessive is far lower than that which would be required to establish that there had been a fraudulent omission of income in relation to that year of assessment.

I turn next to the grounds upon which it is sought to attach the assessments. Mr. Foot's primary contention in this regard is that they must be set aside because the mode of arriving at the assessments was not one proper to be adopted in relation to the instant case. In essence, the argument was that the proper method of approach to back duty cases in which full records are not available is that which may best be described as being a comparison of Statements of Capital Worth. This system, which I am satisfied

alike by the evidence of Mr. Cook - an accountant to whose evidence for the appellant's reference is made subsequently, and by the stress which was laid upon the desirability for its adoption by Mr. Easterbrook of the income tax department in the course of his negotiations with Messrs. Thian and Bellman, the accountants then acting for the respondents, is a method commonly adopted in back duty cases in which there are incomplete records may, in the light of the evidence, be summarised as follows: First the gross capital value of all the assets of the taxpayer at the inception of the period in relation to which it is sought to compute income tax is ascertained. Next, an attempt is made to compute as accurately as possible the gross capital value of the assets of the taxpayer at the end of that period; assets which remain the possession of the taxpayer throughout the tax period being taken at the same value at both the beginning and the end of the period.

Next, the increase or decrease in the capital value of the taxpayer during the relevant period is determined by subtracting the gross value of those assets at the inception of the period from their gross value at the end of the period. To the figure thus arrived at is added such sum as is determined was expended by the taxpayer for personal purposes. The figure thus arrived at represents the gross income of the taxpayer during the relevant period.

Section 104 of the Act of 1959 is in the following terms:

> "Where the Commissioner considers that any person has been assessed at a less amount, either in relation to the income assessed or to the amount of tax payable, than that at which he ought to have been assessed, the Commissioner may, by an additional assessment, assess such person at such additional amount as, according to the best of his judgment, such person ought to have been assessed."

Manifestly that section merely requires an assessment by the respondent to be an assessment to the best of his judgment and does not require it to be made in any particular manner. I do not think, therefore, that the failure of the income tax authorities to adopt a capital worth system of estimation of the appellant's income necessarily invalidates that assessment, moreover, I very much doubt whether the capital worth system would have been at all satisfactory in the instant case. Manifestly, in relation to matters which are not vouched by records everything must depend upon the thoroughness and efficiency with which the accountant by whom the statement of worth is prepared extracts information from the taxpayer and upon the reliability of the information so extracted. Mr. Blackhall, the accountant who prepared the statement of worth put forward by the appellant as affording more accurate representation of his income during the relevant period than the respondent's assessments, did not impress me as being at all likely to conduct such an examination with thoroughness or efficiency at least in relation to matters in respect of which it would be to his client's advantage not to be meticulously cross-examined. Even the most thorough of cross-examining accountants would, in my view, have found it extremely difficult to obtain an accurate assessment of the appellant's personal expenditure from the appellant himself. That this is so is manifest from the evidence and answers of the appellant in cross-examination in relation, inter alia, to the matters hereunder set out.

The appellant's father died in 1946. At that time the appellant's children were aged respectively 15 years, 12 years, 9 years and 4 years. They were shown in the estate duty affidavit sworn to by the appellant as creditors of his father's estate in respect of the several sums Shs. 1,612/-, 48,00/-, 4,550/- and 3,928/-. While it is possible that the eldest son may have performed some services to his grandfather's estate, I cannot help but wonder what circumstances could have led to children aged anything from 4 - 12 years of age being creditors of their

grandfather's estate. These sums cannot be regarded as legacies because the grandfather died intestate. Hence, in the absence of any explanation, and none was advanced, the revenue affidavit would appear to have been in itself false. Indeed, it was put to the appellant in cross-examination that at a meeting at which Mr. Thian, the accountant then acting for him, and himself and Mr. Easterbrook were present, Mr. Thian had said in the appellant's presence that the appellant had sworn a false estate duty affidavit. To this the appellant replied:

"He might have said so".

Thereafter, when asked if it was correct that he had sworn to a false estate duty affidavit the appellant said:

"I was told that the account which was given to me was correct and on that amount I swore that affidavit because I had not prepared the accounts."
(Vide p.71 of the record).

Too much importance must not be attached to the foregoing in as much as, according to Mr. Cook, whose evidence I accept in this regard, the accuracy of the opening statement of worth is not of very great importance so long as the same figures are used in relation to the same assets in the closing statement of worth. If the opening statement of worth is set at a lower figure then the true figure, and the closing statement of worth is set at the true figure, the effect will be to inflate the appellant's income in respect of the intervening years. Nevertheless, people who either consciously swear to false revenue affidavits or omit to check the accuracy of the figures in those affidavits are not people upon whose word as to their expenditure over a number of years great reliance can be attached.

I have already dealt with the appellant's professed ignorance as to details of his financial position throughout the relevant period. If he is prepared to swear falsely in Court that he knew little or nothing about his financial position he certainly is not likely to have been willing to give a true picture of that position to an

accountant out of Court. If he was telling the truth when he professed virtual ignorance of his financial position he certainly would not have been capable of giving detailed information to an accountant out of Court as to his expenditure for purposes which, although related to his business, were not deductible expenses in that business.

As regards his personal expenditure during the relevant period there was put forward on behalf of the appellant a schedule of estimated household expenses and personal expenditure during the period 1946 - 1957 - schedule "C". In chief the appellant testified that he had examined this document and it accurately set out his household and personal expenses for that period. He estimated his household expenditure was about Shs. 900/- per month. In cross-examination he said that he commenced to give money to his wife for household expenses after the death of his father - theretofor he had lived in his father's household, his father having borne the household expenditure. When asked how much money he gave his wife for household expenses he replied:

> "It was not a fixed amount, it was not kept in writing, sometime Shs. 200/-, sometime Shs. 300/-".

He was then asked whether this money was paid per day, per month or per year; his answer was:

> "Sometimes after a week, sometimes fortnightly, when my wife used to ask for money."

Next, the question was put to him:

> "I want to know how much it was, particularly how much you were giving a month."?

In answer:

> "I have not kept any account to that effect."

The next question was:

"Were you giving her more than £600 a year?"

To this he replied:

"I have not kept any account, but it is in the books."

To this answer he adhered in reply to further questions, saying at one stage:

"I have not kept any account to this effect, whether the household expenses which I used to give to my wife amounted to £600 or more; I have not kept any account."

Next he was asked if they could have amounted to £2,000 per annum:

"No, it could not be so much, it could not be so much."

On being asked whether he seriously contended that he could not say how much money he gave to his wife for household expenses his reply was:

"No, I do not remember."

Mr. Newbold then enquired how, if he did not know how much money he had given to his wife, he could say in evidence that the drawing figures were accurate, to which he replied:

"I had to rely on the accounts which had been submitted and they are accurate; I take them as accurate."

Quite obviously his answers in cross-examination are wholly irreconciliable with his having any real knowledge as to the accuracy or otherwise of the figure of Shs. 900/- per month which, in examination-in-chief he had said was the accurate figure.

By reason of the matters to which I have called attention it seems to me to be quite impossible to place any reliance upon the appellant's own version as to his personal expenditure. Manifestly, if a taxpayer's estimate of his

personal expenditure is unreliable, a statement of capital worth based upon information from him must also be unreliable.

That brings me to the consideration of the evidence relied upon by the appellant to the effect that his aggregate income over the relevant period was only either approximately £17,000 or approximately £23,000+ not, as appears from the assessments, approximately £55,000. The reason for the alternative figures advanced by the appellant is that in relation to one transaction concerning the sale of a house it is conceded by the appellant that the figure of approximately £17,000 should be increased by £6,000 if that transaction was not as he contends realisation of a capital asset.

There were two principal witnesses called by the appellant with a view to establishing his actual income. Those witnesses were Mr. Cook and his partner, Mr. Blackhall, to both of whom reference has already been made. Mr. Cook is the principal partner in the firm of Cook, Sutton and Company, which practises as chartered accountants both in England and Kenya. Ordinarily the principal partner, Mr. Cook, practises in the United Kingdom and Mr. Blackhall practises in Kenya. The investigation by Messrs. Cook, Sutton and Company was conducted under the general direction of Mr. Cook, but at the material time he was in England and, upon his own showing, only arrived in Kenya a few days before he gave evidence in this case. He was not responsible for the detailed work in relation to that investigation. Over and over again in cross-examination he said in answer to questions:

"You must ask that of my partner."

Hence, while I have no doubt at all as to Mr. Cook's professional ability and veracity, I do not think that most of his evidence in relation to matters of detail can be regarded as any more than hearsay, being dependent entirely upon investigations made by his partner or employees of the firm at most under his direction.

Mr. Blackhall submitted two reports upon the appellant's business activities and in the second of these reports estimated the appellant's income for tax purposes in each of the relevant years at the following figures:

Total assessable income according to Blackhall, excluding Gian Singh's rents.

1946	Shs.27,273
1947	55,607
1948	51,307
1949	31,734
1950	40,252
1951	51,096
1952	69,097
1953	26,520

In respect of the years 1946 - 1947 no books were available to Mr. Blackhall. No cash book was available to Mr. Blackhall for part of the year 1952 or for the whole of the year 1953. It may be convenient at this stage to say that a ledger which might have been of considerable assistance in this investigation was unfortunately stolen from the office of Mr. Nandha. Moreover, the missing cash book disappeared in somewhat unusual circumstances. Before the appellant consulted his present advocates he had retained Mr. Mandavia. According to the appellant the cash book was delivered with other books to Mr. Mandavia; when the appellant changed his advocate Mr. Mandavia re-delivered to him his books with the exception of the cash books. Mr. Mandavia maintains, however, that he never had the cash books. It is not for me to seek to determine whether the appellant or Mr. Mandavia is correct as to this book ever having been in Mr. Mandavia's possession. I refrain from drawing any inference from the non-appearance of the cash books, but wholly beyond his control, to produce evidence which would tend to support his case does not entitle the Court to

infer that had that evidence been produced it would have supported his case. The absence of these books must have considerably handicapped Mr. Blackhall's investigations, the more especially as in relation to some years he had only some but not all of the appellant's cheque stubs.

For these reasons Mr. Blackhall found it impossible to prepare statements of capital worth in relation to each individual year and, therefore, on the advice of Mr. Cook, prepared a composite statement of capital worth in respect of the entire period 1946 - 1957, the reason for the selection of the year 1946 was that that was the year of the death of the appellant's father, upon which death the appellant became proprietor of the business. The reason for the selection of the year 1957 as the closing year of the period was that in 1954 or thereabouts the keeping of the appellant's books was taken over by one of the appellant's sons and from 1955 onwards the income tax department have, in fact, accepted the accounts submitted by the taxpayer. Mr. Blackhall's first task was to assess the increase in the appellant's capital worth during this period.

In this task he was manifestly labouring under a major handicap by the absence of the books already referred to. At p.152 of the record he is recorded as saying:-

> "In 1946 and 1947 we had bank pass sheets, we had no cash books. We had certain cheque stubs to guide us but they were not complete".

So too, although there was a cash book in respect of the period January, 1948 to October, 1952 the cash book from the 1st November, 1952 to the end of 1953 was missing and, therefore, in respect of that period he had to act upon the bank statements alone. Another book to which reference was made by Mr. Blackhall was a ledger written up by Mr. Thian in the course of his investigation, to which reference will have to be made later. That ledger contained references to a journal presumably also written up by Mr. Thian,

that journal was not available to Mr. Blackhall. At the outset of his task Mr. Blackhall attempted to balance Mr. Thian's ledger up to the end of 1953, but it failed to balance, (vide pp.152 and 153 of the record).

Despite these difficulties Mr. Blackhall prepared a comparison of capital worth over the period 1946 - 1957. Those comparative statements of capital worth showed a total increase in capital worth between 1st January, 1946 and 31st December, 1957 of Shs. 256,000/-. To this sum Mr. Blackhall added Shs. 414,000/- as representing Mr. Rattan Singh's personal expenditure during the twelve year period, thus arriving at a total income figure for that period of Shs. 670,000/-. From this sum he deducted Shs. 86,000/- as representing the income for the years 1954 - 1957, for the last three of which he had audited figures and for the first of which he adopted the figures at which the appellant was assessed to income tax. This gave a figure of Shs. 584,000/- as representing total income during the relevant period, 1946 - 1957. From this Mr. Blackhall deducted Shs. 67,000/- in respect of the surplus upon the sale of the Grogan Road property, to which reference is made hereafter, upon the ground that this was a capital transaction. Next, he deducted Shs. 325,650/- as representing rents received, thereby arriving at a figure of Shs. 191,450/- as the net trading income for the relevant period. To this he added Shs.150,650/- in respect of overhead expenses during that period thereby arriving at the figure of Shs.342,000/- which Mr. Blackhall then maintained represented the gross trading income of the respondent. If, however, being manifestly impossible owing to the absence of records for 1946 and 1947 accurately to distribute this hypothetical gross trading income over the relevant years merely by averaging, Mr. Blackhall proceeded to compute the income of each year by reference to the ratio of profit to turnover arrived at by the application of certain weightings, which are set out under:

Year	First Weighting	Second Weighting
1946	25	30
1947	75	72½
1948	50	70
1949	25	25
1950	45	45
1951	70	70
1952	110	100
1953	50	30

The determination of these weightings was in part at least arrived at in the light of information as to the relative profitability of various years derived by Mr. Blackhall from, inter alia, an architect, Mr. Ogilvie. I confess to having experienced considerable difficulty in understanding how Mr. Blackhall arrived at his percentages. He said in cross-examination that 1950 was taken more or less as a mean year; the earlier years were taken as good years and the later years were taken as bad years, owing to the Emergency.

There was, however, evidence that in 1946 and 1947 building activities were to some extent handicapped by restrictions pursuant to the control over and shortage of building materials. Mr. Blackhall seemed to me quite incapable of explaining how he had calculated his weights, although he maintained that he had done so in the light of information derived from Mr. Ogilvie, the architect and a quantity surveyor.

The variations between the weights set out in the first report of the 3rd of June and those set out in the second report of the 6th June were attributed to additional information which he received from Mr. Ogilvie during that period. It would seem from Mr. Ogilvie's evidence that that information related to two contracts of which Mr. Ogilvie had been informed and which related to the period enterior to 1950.

Furthermore, the discrepancy between some of the weights set out in the first table and the corresponding weights set out in the second table seems to me to be wholly inconsistent with there having been any system of increasing or decreasing weights by a constant amount in the light of additional information received by Mr. Blackhall during the period 3rd - 6th June. The validity of the results obtained by this system must depend in large measure on the reliability of the figures from which the gross turnover is ascertained and upon the accuracy of the weightings applied in distributing the profitability of that turnover over the years. As regards the former factor it seems to me that as the figures upon which Mr. Blackhall worked were in large measure derived from books audited by Mr. Nandha, it would be unsafe to assume that those figures were wholly reliable. In this regard I would add that although Mr. Nandha was the auditor, the books were throughout the relevant period kept by a Mr. Shaffi who was one of the appellant's representatives at most of the interviews with the respondent's representatives. I should have thought that Mr. Shaffie could have given evidence in support of the entries in the books which were known to the appellant to be questioned by the respondent. Mr. Shaffi, however, was not called.

As regards the second factor it must be noted that, according to Mr. Ogilvie, an architect who gave evidence for the appellant, there is a wide variation between the margin of profit in relation to small contracts and that in relation to large contracts, the latter being considerably smaller. During the relevant period the appellant had at least three contracts which would fall within the category of major contracts; to build an African housing estate, to build a bank and to build the County Council buildings. There was no evidence, however, as to what properties of that turnover in any year was referable to contracts of this nature and what propertion to contracts in relation to small jobs. That he certainly did some small work is established by the fact that an item was added back in relation to repairs to a house belonging to a relative. Mr. Blackhall said in general terms that he had had regard to the nature of the work done by the

appellant, but it seems to me that for weightings based upon the relative profitability to turnover in any particular year to be reliable it would be essential first to determine with considerable precision what proportion of the turnover was attributable to contracts yielding a high rate of profitability and what proportion was attributable to contracts yielding a low rate of profitability. Moreover, while no doubt average rates of profitability can be ascertained over a period, those average rates are presumably not strictly accurate in relation to any particular builder, some builders may have facilities for obtaining materials at slightly below their normal cost, other may be more efficient in effecting economies in the performance of their work and, therefore, where large sums of money are concerned, an average rate of profitability may not result in an accurate determination of the actual profit during a given period of a particular builder.

I should have thought that while the ratio of profit in relation to any activity over a given period may be determined upon a proportionate basis with a considerable degree of accuracy by properly determined weightings, the actual profit made in any particular year must vary according to the volume of business in that year and, therefore, that even if the weightings were selected with the utmost care, the income arrived at by the use of those weights could at most be a very approximate figure.

A further factor indicative of how little reliance can be placed upon Mr. Blackhall's testimony is that as a result of questions put to him in corss-examination he was forced ultimately to agree that even upon his basis of computation his estimate of income must be increased by some £7,000.

So too, Mr. Blackhall's general demeanour under cross-examination was unimpressive. In relation to the rent account he admitted that it had been prepared by him from an analysis of rents banked, without any effort to ascertain

whether any of the rent had not been banked or, possibly, had not even been collected. In this regard he said that the only effort which he had made to ascertain the total rental was that he had asked to see the leases but, on being told that there were no leases, had done nothing more. Similarly, as regards drawings Mr. Blackhall admitted that whenever the appellant had disputed these figures he had accepted the appellant's version without further enquiry. For these reasons I do not consider that any reliance can be placed upon Mr. Blackhall's conclusions either as to the turnover of the appellant or the proper weightings to be applied in determining the appellant's income in relation to any year or upon Mr. Blackhall's determination of that income.

I am completely satisfied that the documentary material at Mr. Blackhall's disposal was inferior to that at the disposal of Mr. Thian and I am further satisfied that no reliance at all can be placed upon information derived from Mr. Rattan Singh, I have no hesitation in concluding that the computation of income advanced on behalf of the appellant in this case is wholly unreliable alike in relation to the entire period and in relation to each year included therein.

I turn next to the examination of the method adopted by Mr. Easterbrook in arriving at the assessments which were ultimately raised. Mr. Easterbrook worked upon the figures set out in Thian's report. Those figures he adjusted by adding back for income tax purposes sums shown in those accounts, but as to the deductibility of which for income tax purposes he was not satisfied and certain other sums which did not appear in the accounts but which, for one reason or another, he assumed had accrued to or had been received by the appellant.

The appellant sought to attach the computation thus arrived at upon a number of grounds and in relation to a number of particular items.

The general grounds upon which Mr. Easterbrook's computations were challenged were that not only were the additions made by him to Thian's figures -

to which reference will hereafter be made - unjustified, but also that Thian's figures themselves were unreliable. The allegation that Thian's figures were unreliable was based on the assertion that he had treated all expenditure which could not be proved to be living expenditure, as being personal expenditure - an approach which Cooks and Blackhall both considered to be wholly wrong.

In spite of Mr. Cook's evidence in this regard it seems to me that where the books of a business reveal drawings or expenditure, but do not reveal the purpose for which those drawings were made or that expenditure was incurred, it is not unreasonable to assume, until some other explanation is advanced, that they were made for personal purposes, using that term to cannote not only strictly personal expenditure but expenditure which is not allowable as a deduction from business profits for the purpose of income tax. Hence, I do not regard Mr. Thian's approach to the matter as in any way unreasonable. In this view I am fortified alike by the conclusion at which I have arrived that no reliance at all can be placed upon the explanation of expenditure given by the appellant himself except insofar as those explanations can be corroborated by independent evidence and by the fact that as in proceedings before the Court an assessment to income tax is deemed to be right until it is proved to be wrong, an accountant who is conducting an investigation with a view to the making of a full disclosure of his client's affairs must approach his task from the standpoint that expenditure which cannot be proved to have been business expenditure is likely to be treated by the income tax authorities as personal expenditure.

The first of the particular items with which I propose to deal is that Gian Singh's rents.

The appellant contends that the aggregate assessments over the relevant period can be shown to be excessive by the sum of at least Shs.109,155/- by reason of the inclusion therein of rents which did not form part of his income but that of his son, Gian Singh.

According to Gian Singh, when he was a child he visited with his grandfather a plot upon which work was in progress and was told that the house which was then being constructed was being constructed as a gift to him. At the time Gian Singh would have been not more than ten years of age. So too, the appellant maintained that his father had purchased a plot upon which a house was constructed as a gift to Gian Singh, the appellant's son and, therefore, the appellant's father's grandson. If the plot was in fact the property of Gian Singh the rentals derived therefrom manifestly ought not, subject to the qualification hereinafter expressed, have been treated as they undoubtedly were treated by the respondent as forming part of the appellant's income. The qualification above referred to may be stated in very general terms as being that provision is made in the Income Tax Act whereby the income from property given to minor children by one or other of their parents is to be deemed to be the income of the appellant during the minority of the child.

The rent from the plot alleged to be Gian Singh's was apparently lumped together with his father's rentals and entered in the books as if it formed part of the appellant's income. Moreover, in his income tax returns, the appellant declared in cash of the relevant years that Gian Singh had no income of his own and claimed an allowance in respect of Gian Singh's education. The story that the plot was provided for Gian Singh by his grandfather is not borne out by the conveyance of the plot in as much as from that document, which was signed by Rattan Singh, the appellant, it appears that the donor of the plot to Gian Singh was the appellant. No explanation of this was given other than that of the appellant who said that he was asked to sign, so signed. It seems to be most unlikely that any advocate could have so misunderstood his instructions as to insert as the donor of valuable property someone other than the donor and equally unlikely that, had an advocate made such a mistake it would not have been discovered at the time that the document was executed as presumably, if it were read over to the appellant the appellant would have noticed that he was mentioned as the donor. For these reasons, while I do not exclude the possibility that the plot may in fact have been bought by

the grandfather for Gian Singh, it seems to me impossible to hold that the appellant has established that there is a preponderance of probability that it was not bought by him for the benefit of Gian Singh and, therefore, in my view, the rents from this property are properly chargeable to income tax as forming part of the appellant's income. A similar conclusion can, I think, be arrived at in quite another way.

Even assuming that the donor of the property was not Rattan Singh but Gian Singh's grandfather, Nagina Singh, it appears clear from the occurance in Rattan Singh's books of entries in relation to Gian Singh's income and from the fact that Rattan Singh returned Gian Singh's income as nil and claimed an allowance in respect of the expenditure which he incurred upon Gian Singh's education, that Rattan Singh at all material times dealt with Gian Singh's income as if it were part of his estate. If a trustee chooses to convert to his own use the income of the beneficiary he can hardly be heard to say in income tax proceedings that the income so converted did not form part of his income.

I turn next to the transaction which, as appears from a note to Mr. Blackhall's report, was excluded from the computation made by Mr. Blackhall solely upon the grounds that it was debatable whether it was a revenue transaction or a capital transaction. That transaction is conveniently referred to as the sale of the Grogan Road premises.

The appellant bought a plot on Grogan Road. On half of this plot he erected a house for himself, beneath which there are certain shops or storerooms. In 1953 on the other half of this plot the appellant erected shop premises. The whole of the cost of the plot and of the building erected thereon was debited to the capital account of Nagina Singh and Sons.

The appellant maintains that his intention was, when he commenced to build the premises to which this dispute relates, i.e. those in which he did not live, to rent out those premises. According to him,

however, before the premises had in fact been rented he had obtained, and this is not in dispute, two major contracts, the one to construct the County Council building, the other to construct a bank at Moshi. Both of these contracts required the making of a deposit, totalling some Shs. 140,000/-, or thereabouts. To find the money for this deposit he decided to sell the business premises upon Grogan Road and in fact sold them for the sum of Shs. 193,000/-. The respondent maintains that this transaction constituted the carrying on of a business in the sale of land and, therefore, that the profit therefrom was taxable as income. The appellant maintains contra that the profit from the sale of the building was a capital profit. There is undoubtedly a presumption in England that the sale by a builder of a building constructed by himself is a revenue transaction. This presumption rests, I think, in large measure, upon the fact that the speculative builder who builds with a view to sale is a common phenomenon in England. How far the speculative builder is an equally common phenomenon in Kenya is quite another matter. There was no evidence on the point and I, therefore, do not express a concluded opinion upon it and attach relatively little importance to it in arriving at my conclusion, but I should have thought that in Kenya a builder was in general a person who built pursuant to a contract to erect buildings for the benefit of some other person upon lands belonging to that other person. If this is so, the mere fact that the builder of a house which is subsequently sold is a builder by occupation does not in itself afford any evidence that the sale of that house was a revenue rather than a capital transaction. The respondent relied upon the fact that the appellant has built and sold other houses as affording an indication that the sale of this house constituted the carrying on of a business. In fact, according to the appellant's evidence, which was not sought to be contraverted in this respect, although he has built upon three plots, i.e. two in Grogan Road and one at Parklands Avenue, the only houses which he has sold were the Grogan Road business building and a building in Parklands Avenue which he sold in 1960. The transaction in 1960 cannot be craved in aid as tending to establish that the sale of the Grogan Road building was the

carrying on of a business. I am frankly very dubious as to the truth of the explanation that the Grogan Road sale was motivated by the necessity for finding money to make deposits in as much as those deposits were respectively, according to the appellant's evidence, Shs.80,000/- and Shs.60,000/-, while in fact of the price for which the Grogan Road building was sold he received only Shs.93,000/- at or about the material time and the payment of the deposits was never in fact enforced. If, as I have said, the presumption that the sale of a house built by himself by a builder is a revenue transaction rests upon the fact that in England builders frequently build houses with a view to sale, it seems to me that there must also be a presumption that in the absence of evidence to the contrary a person who has a substantial income from the rental of houses, when he causes a house to be built, does so with a view to renting it rather than selling it. The appellant is not only a builder but also a landlord. It, therefore, seems to me probable that, having more land in Grogan Road than he required for his own purposes, the appellant built this house with a view to enhancing his rental income but subsequently, for one reason or another, decided to sell it. I therefore hold that the sale of the Grogan Road premises constituted a capital, not revenue, transaction.

This conclusion, however, is not favourable to the taxpayer in as much as if I am right in holding that this was a capital transaction, the entire cost of the plot upon which the Grogan Road business building stands and of the construction of that building ought not to have been deducted from the gross profits of Nagina Singh (Builders), that this is so is manifest when it is remembered that while monies expended for the purpose of earning income are deductible expenses, monies expended for the purpose of acquiring an asset which will, in turn, be used for earning income are not so deductible. This may be illustrated by a simple example. If a boot manufacturer buys leather for the purpose of making the boots which he sells, clearly the cost of the leather is an expense incurred in the manufacture of the boots and is therefore a deductible expense from the proceeds of the sale

of the boots. If, however, he uses the proceeds of the sale of the boots to buy another factory with a view to making still more boots, the cost of the new factory is no more a deductible expense than would have been the cost of war loan had he preferred to invest his surplus from the sale of the boots in that form of Government security. Hence, although the profit derived by him from the transaction, that is to say, the sum which represents the difference between the price for which he sold and the price which it cost him to acquire the plot and to build the building is a capital profit, the cost of the plot and of the building must be added back for income tax purposes.

The appellants also challenge the propriety of an addition by Easterbrook to Thian's figures of income of the sum of Shs. 8,000/- per year in respect of "undisclosed rents".

The facts in relation to this item are that the figures set out in Mr. Thian's schedule relating to rents were manifestly inaccurate in that they did not appear to include any rents in respect of the Grogan Road premises the upper portion of which was occupied by the appellant.

According to Mr. Easterbrook, whom I believe in this regard, the appellant told him that some of his rents had been collected by an advocate and were still in the hands of the Advocate. Mr. Easterbrook was also informed - although he did not specify by whom and, therefore, I attach no importance to the truth or falsity of the information but only refer to the fact of information having been given to Mr. Easterbrook - that an advocate had in hand for the appellant Shs. 9,000/-. In the light of the appellant's admission already referred to and of this information Mr. Easterbrook proposed to assess the appellant on the basis that Shs.10,000/- per annum in respect of rents had not been shown in his books. Thian was unable to contradict this figure but in the course of the "give and take" in the negotiations Easterbrook reduced it to Shs.8,000/- per annum.

The appellant contends that no sum should have been added in respect of the undisclosed rentals. Thian's records can now be shown to be inaccurate in that there are there credited certain rents under the heading of Gulzaar Street" in respect of a dairy rented by a dairyman who gave evidence for the appellant. According to the dairyman the premises which he occupied were not in Gulzaar Street but in Grogan Road. From this it follows that some at least of the Grogan Road rentals were erroneously entered in the books as relating to the Gulzaar Street premises.

According to Blackhall's testimony his analysis of rents related solely to rents banked. Rental income derived from the rental of the whole of one or more large buildings to one or more individual tenants is probably paid by cheque and probably banked. From the material before the Court, however, it is manifest that at least a considerable portion of the appellant's rental income was derived from the rental of relatively small shops or rooms to a number of tenants. Rentals of this nature are, in my view, not unlikely from time to time to be paid in cash. Hence, the sum banked by way of rental is not necessarily an indication of the total sum received by way of rent. Furthermore, as has already been observed, the appellant admitted to Easterbrook that some of his rentals were collected by advocates. In these circumstances I do not consider that the appellant has established that there is a preponderance of probability that the sum of Shs.8,000/- per annum added back by Easterbrook in relation to undisclosed rentals ought not to have been so added back, and indeed I think that the probabilities are, in view of Thian's agreement to this figure, that it is an under estimate.

The sum of Shs. 5,000/- only is shown in the accounts as expenditure incurred on the demolition of the house in Imtiazali Road was added back by Easterbrook to profits. This house was occupied by the appellant during his father's lifetime and until he built his house in Grogan Road. After the appellant moved to Grogan Road

the Imtiazali Road house continued to be occupied by the appellant's mother until her death. No reason was advanced at any stage of the hearing for the destruction of the house after the death of the appellant's mother. It is inherently probable in general houses are pulled down by their owners either because they are dangerous or because it is desired to use the plot for some more lucrative purpose. I do not see how the costs of the demolition of a house for either of the two foregoing purposes could possibly be deductible as a revenue expense for the purposes of income tax.

The next item to which attention should be directed is that of Shs.10,000/- added back in respect of African wages. The muster rolls in respect of African employees were not complete and, therefore, monies shown in the cash book available to Thian in respect of African wages did not tally with those shown in the muster rolls. Thian, therefore, proposed quite arbitrarily to reduce the profits by Shs.10,000/- in respect of payments to African labour for which there were no records. Easterbrook rejected this proposal and added back the Shs. 10,000/-. No doubt some sum was paid to African labour in respect of the period for which there were no adequate records. It is quite impossible, however, to say what sum was so paid, from which it follows that although some sum ought to have been allowed by Easterbrook it is impossible to say whether the sum which ought to have been allowed should have been Shs.1,000/- or Shs. 10,000/-.

Similarly, Easterbrook added back the sum of Shs. 7,000/- in respect of monies allegedly expended on medical attention for African labourers. The appellant maintained that it was impossible to produce details of this expenditure and it was, therefore, disallowed. I am not certain that even if the appellant's books had no record of the expenditure a record would not have appeared in the books of the doctor or doctors by whom the medical attention was provided. Again, it must be reiterated that the burden of proving that the assessment is wrong rests upon the appellant. To discharge that burden it is not sufficient to suggest that certain items ought not to have been

included unless it can be proved that the expenditure to which those items relate was in fact incurred and constituted a deductible expense for the purpose of income tax. I am not satisfied that there is a preponderance or probability that any portion of the sum of Shs.7,000/- was in fact incurred upon the medical expenses of African employees, or if so incurred that such allowances are additional expenses.

The sum of Shs. 44,000/- was added back by Easterbrook in respect of "lumpsum contracts". This contracts were shown in the books in round figures without any details being given as to their nature or as to the parties. Easterbrook requested the appellant or his advisers to supply statements from the other contracting parties that these monies were in fact due to them; According to his version he was informed by the appellant that he did not intend to ask the contracting parties for statements because some of them were dead and he had no intention of paying the others. This statement of Easterbrook is not borne out by the notes of interview which were, by consent, treated as evidence. Nevertheless, it seems to me that a remark of the nature attributed by Easterbrook to the appellant either must have been made or represents a deliberate invention of Easterbrook's. The only possibility of a statement of this nature being wrongly attributed to the appellant in error seems to me to be that of a remark to this effect having been made by some other taxpayer in relation to some other investigation to Easterbrook and Easterbrook having wrongly, but innocently, attributed it to the appellant. In the light of the impression which I have formed of Easterbrook I am quite certain that he would not have intentionally invented this remark and I think it most unlikely, having regard to the care with which his evidence was given, that he would have mistakenly wrongly attributed a remark made by some other taxpayer in relation to some other investigation to the appellant. The fact, if it be a fact, that the appellant had no intention of paying creditors would in itself deprive the sums due to those creditors of their character of deductible expenses as it

would be a novel doctrine that monies could be deducted for the purpose of income tax as revenue expenditure when in fact there was no intention of incurring that expenditure. Quite apart from the foregoing, the failure of the appellant to justify these sums seems to me to indicate that the preponderance of probability is that the liability to which they relate was never in fact incurred and that these sums were fictitious entries in the books.

In the foregoing conclusion I am fortified by the entry of Shs. 30,000/- in respect of monies advanced by the appellant's wife to the business. According to his statements of full disclosure and according to his original returns, the appellant's wife had no property of her own. The statement of full disclosure was made at a time when there was in his books an entry showing that she had lent to the business Shs.30,000/-. The appellant explained the inconsistency between that entry and his statement that she had no property of her own by saying that he did not understand that property included money. Mr. Blackhall said that when he had enquired as to this Shs. 30,000/- he was told that it represented money which the appellant's wife had inherited or had saved; he did not appear at all clear which. According to the appellant the money represented savings made by his wife from monies given to her for household purposes. He also said that his father had given her money during his life time. Having regard to the evidence of the appellant that he gave to his wife Shs.900/- per month for housekeeping it would seem that, for her to have saved this sum solely from monies given to her by the appellant during the relevant period, she would have had to have saved rather more than one third of the monies given to her. Nor does it seem to me that this conclusion can be explained away on the ground that she was given money for housekeeping prior to the death of the appellant's father in as much as during that period as the appellant and his family were, according to his own evidence, living in a joint family with his father, the housekeeping money would presumably have been given by his father to his father's wife, not to the appellant's wife

The next item in dispute was the addition of £100 per annum in respect of the use of the appellant's vehicles for private purposes. No figures were produced on either side in relation to this sum but the contention of the appellant was that it was an excessive estimate in as much as he lived within a mile of his place of work. I do not think that the distance between an appellant's place of work and his home necessarily affords any indication of the distance over which during the course of a year business vehicles may have been used for purely private purposes. Moreover if, as was suggested in cross-examination to Mr. Easterbrook, the appellant's business vheicles, or at least some of them, were garaged at his Grogan Road house, journeys made by the appellant from his home to his place of work in these vehicles would not necessarily be journeys which were disallowable for income tax purposes in as much as the purpose of the journey might well be for the vehicle to go to the place of work and the fact that the appellant travelled upon it would be merely ancillary to that purpose. Nevertheless, in the complete absence of figures as to what private travelling, if any, was done by the appellant or by members of his family upon vehicles used for the business, it seems to me impossible to say that Mr. Easterbrook's estimate under this head was wrong.

I turn next to a substantial item added back by Easterbrook in respect of stock in hand or work in progress which was hotly contested. Work in progress is, as I understand it, the heading under which is included work which either has been done but in respect of which an architect has not issued his certificate or in relation to which, if a certificate has been issued, payment has not yet been made and work in the course of being done and materials on site with a view to being used thereafter. There were no stock sheets. From this it follows that there were no accurate records of what stock the appellant had at any particular time. He himself said that he never had on hand more than Shs. 5,000/- worth of stock. For the reasons which I have already advanced I do not think that any reliance can be placed upon any figure which rests solely upon the appellant's evidence. Mr. Ogilvie

an architect who testified on behalf of the appellant, said that in general builders did not carry large stocks. During the years 1946/47 building materials were in short supply and building operation were the subject of some measure of control. While no doubt the existence of control would discourage builders from laying in large stocks, the fact that building materials were in short supply might cause a builder who had the opportunity of obtaining supplies to lay in larger stocks than he otherwise would have done by way of precaution against there coming a time when he could not obtain stocks which he might then really need.

Three of the contracts held by the appellant during the relevant period were contracts in relation to the building of an African housing estate for the City Council at a figure substantially in excess of one million shillings; the building of a bank at Moshi in Tanganyika and the building of the County Council Buildings in Nairobi. It would seem to me that it is highly probable that contracts of this nature for their proper fulfilment might result in the carrying of considerably heavier stocks than are usually carried by builders engaged upon work of a smaller nature such as the building of private houses. In these circumstances, while I consider that Mr. Easterbrook's estimate in relation to work in progress may be excessive, I am by no means confident that it is vastly excessive and have no material before me from which I could determine by how much if at all it is excessive in relation to any particular year.

The appellant claims a deduction of Shs. 36,000/- in relation to legal expenses. No particulars of this deduction were given at the negotiatory stage, although in the very closing phase a statement of account from Messrs. Khanna and Khanna was produced. Messrs. Khanna and Khanna's account contains some items which must, I think, relate to legal expenses which would for income tax purposes be regarded as deductible expenses, thus on page 4 there appears under the date 21st February an item of Shs. 250/- in respect of inclusive fee "R.C.B. re K.B.Seth" - an item which

if, as I think R.C.B. means Rent Control Board would almost certainly have been a deductible expense. On the other hand it was admitted that at one stage the appellant had litigation with his step-mother which would not be a deductible expense, but for the most part it seems to me impossible to say whether the matters to which Messrs. Khanna and Khanna's fee list relates were deductible expenses or not. Thus there are many such entries as "To letter of demand - Mohamed Esmail, Court Fee C.C. 399/48 Mohamed Esmail; Letter of demand to Arya Niwas on a dishonoured cheque; Letter of demand to Hirji Lalji; To our fee re R. Cross as agreed; To Court fee C.C. 3325/48 - A.S. Karmali." I therefore think that it would have been impossible for Mr. Easterbrook in the absence of further information to say what sum ought properly to have been allowed in respect of legal expenses, as indeed it is for the Court to do so.

The final figure to which attention is directed is that in relation to the Moshi retention money. Of this all it is necessary for me to say is that in re-examination Mr. Easterbrook admitted that his figure should be reduced. The amount of his error was, however, in relation to the aggregate income over the relevant period upon which the appellant was assessed wholly trivial.

Although, as I have said in relation to some of the foregoing items, I think that Easterbrook's estimate may have been excessive, I have before me no figures which I can regard as affording a clear indication of how excessive Mr. Easterbrook's estimate was in relation to any particular item in any purporting year. My task, as I understand it, is not to determine whether there is a preponderance of probability that the figures which Mr. Easterbrook took into account in raising his assessment in relation to any particular year were right, but rather to determine whether the appellant has established in relation to any particular assessment that that assessment was excessive having regard to his actual assessable income for that year.

Regard must be had to the possibility that items have escaped Mr. Easterbrook's attention which might properly have been taken into account. This possibility is all the greater having regard to the absence of the original ledger, the original cash book, stock records of any sort and some of the cheque stubs, the absence of which may have resulted in monies shown in Mr. Thian's accounts having been treated as deductible expenses which, had full records been available, would not have been so permitted to be treated, or in the omission from Mr. Thian's schedule of items which ought to have been included there. In this regard it must be noted that in re-examination Easterbrook maintained that he had excluded from his computation sums as to the deductibility of which he was not wholly satisfied, to an amount in the aggregate of over £20,000. Furthermore, for any appellant to succeed in an income tax appeal it is necessary for the Court to be satisfied ultimately that the preponderance of probability is that the taxable income of the appellant from all the sources is less than the sum upon which he has been assessed. This entails in general of necessity that the Court is satisfied that there has been a full disclosure of all the appellant's sources of income. I introduce the qualification "in general" advisedly because there may be cases where the amount of the assessment is so much greater than the amount which the appellant maintains to have been his true income that the Court thinks it unlikely that he could in fact have derived from undisclosed sources sufficient income to make up the difference; thus if an appellant were assessed upon an income of £20,000 per annum and produced accounts which showed that his income was only £500, the Court might, even if not satisfied that his income was only £500, nonetheless consider that it certainly was less than the £20,000 upon which he was assessed. In the instant case, however, even if I am right in relation to the matters in respect of which I have indicated that I think Mr. Easterbrook may have somewhat over-estimated the sums to be added back, and even if in no case has Easterbrook under-estimated the amount so to be added back, the difference would not be very great. The appellant was, in my view, lying intentionally in relation to a number

of matters. Figures derived from the appellant's books must be regarded as open to grave suspicion, not merely by reason of their incompleteness at present but also by reason of the fact that the only audit of them in respect of the relevant period was that undertaken by Mr. Nandha whose returns made on behalf of the appellant were, in my view, fraudulent returns. Moreover, the allegation, in my view, put forward falsely an allocation that his wife had lent to the business the sum of Shs. 30,000/- and concealed, even after giving a certificate of full disclosure, two bank accounts. In these circumstances I am not satisfied that the preponderance of probability is that the appellant did not have and, indeed may not still have, other sources of income which have not been taken into account at all.

For these reasons in my view the appellant has failed to establish in relation to any year comprised in the relevant period that his assessment to income tax was excessive. Each of these appeals will, therefore, be dismissed with costs. Before concluding this judgment I desire to place upon record that this case has afforded, in my view, a further illustration of the desirability in the public interest of there being established in this jurisdiction some body with exclusive jurisdiction to consider income tax appeals insofar as they refer to questions of accounts; a task for which the Court is not fitted.

HENRY MAYERS,

JUDGE.

Nairobi.
31st July, 1961.

NO. 52

Decree

In the Supreme Court

No. 52

Decree
28th
September
1961

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI

CIVIL APPEALS NOS.4-11 OF 1959 (Consolidated)

RATTAN SINGH APPELLANT

versus

THE COMMISSIONER OF INCOME TAX RESPONDENT

In Court this 31st day of July, 1961.

Before the Honourable Mr. Justice Mayers

DECREE

THESE EIGHT APPEALS coming on for hearing on the 6th, 7th, 8th, 9th, 10th, 13th, 14th, 15th and 16th days of June, 1960, and 13th, 14th, 15th, 16th, 17th, 20th, 21st, 22nd, 23rd and 24th days of March, 1961 in the presence of Dingle Foot, Esquire, one of Her Majesty's Counsel, P. Rowland, Esquire and M. Kean, Esquire, Counsel for the Appellant, and C. D. Newbold, Esquire, one of Her Majesty's Counsel, J. C. Summerfield, Esquire, Counsel for the Respondent, when it was ORDERED that the said appeals be consolidated AND IT WAS FURTHER ORDERED that these appeals do stand for judgment and the same coming up for judgment on this day IT IS ORDERED AND DECREED:-

(a) that these appeals be and are hereby dismissed and accordingly:-

In the Supreme Court

No. 52

Decree 28th September 1961

Assessment No.B.90011 for year of income 1946
Assessment No.B.90012 for year of income 1947
Assessment No.B.90013 for year of income 1948
Assessment No.B.90014 for year of income 1949
Assessment No.B.90015 for year of income 1950
Assessment No.B.90016 for year of income 1952
Assessment No.B.90017 for year of income 1951 and
Assessment No.B.90018 for year of income 1953

be and are hereby confirmed;

(b) that the Appellant do pay to the Respondent the costs of these appeals to be taxed and certified by the Taxing Master of this Court.

Given under my hand and the Seal of the Court at Nairobi this 31st day of July, 1961.

Issued this 28th day of September, 1961.

Sd. ..... D.J. Devine

Deputy Registrar
SUPREME COURT OF KENYA

NO. 53

Order

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA
AT NAIROBI

CIVIL APPLICATION NO. NAI.42 of 1961
(In the matter of an Intended Appeal)

BETWEEN

RATTAN SINGH s/o NAGINA SINGH APPLICANT

AND

THE COMMISSIONER OF INCOME TAX RESPONDENT

(Intended Appeal from Judgment and Decree of H.M.'s Supreme Court of Kenya at Nairobi (The Honourable Mr. Justice Mayers) dated the 31st day of July,1961 in Civil Appeals Nos. 4 - 11 of 1959 (Consolidated).)

B E T W E E N

RATTAN SINGH s/o NAGINA SINGH APPELLANT

A n d

THE COMMISSIONER OF INCOME TAX RESPONDENT

In Chambers on the 16th October, 1961

Before the Honourable Mr. Justice Crawshaw, Justice of Appeal.

O R D E R

UPON READING the Notice of Motion and affidavit in support filed by the Advocates for the Applicant on the 7th October, 1961, and with the consent of the Counsel for the respondent as evidenced by his letter dated the 12th October, 1961, pursuant to rule 9(3) of the Rules of this Court, THIS COURT DOTH ORDER THAT:

(a) Leave to file appeal out of time be granted. Time to file the appeal is extended by 100 days from the date hereof;

(b) Costs of this application to abide the result in the intended appeal;

(c) Liberty to apply for further extension is granted.

GIVEN under my hand and the Seal of the Court at Nairobi this 16th day of October one thousand nine hundred and sixty-one.

BY THE COURT

ISSUED on this day of one thousand nine hundred and sixty-one.

REGISTRAR
H.M. COURT OF APPEAL FOR EASTERN AFRICA
AT NAIROBI

In Court of Appeal

No. 54

Order 27th January 1962

NO. 54

Order

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA
AT NAIROBI
CIVIL APPLICATION NO. NAI.5 OF 1962
(In the matter of an Intended Appeal)

BETWEEN

RATTAN SINGH s/o NAGINA SINGH APPLICANT

AND

THE COMMISSIONER OF INCOME TAX RESPONDENT

(Intended Appeal from Judgment and Decree of H.M's Supreme Court of Kenya at Nairobi (The Honourable Mr. Justice Mayers) dated the 31st day of July,1961 in Civil Appeals Nos.4-11 of 1959 (Consolidated).)

B E T W E E N

RATTAN SINGH s/o NAGINA SINGH APPELLANT

AND

THE COMMISSIONER OF INCOME TAX RESPONDENT

In Chambers on the 27th January, 1962

Before the Honourable Mr.Justice Crawshaw, Justice of Appeal.

O R D E R

UPON READING the Notice of Motion and affidavit in support filed by the Advocates for the Applicant on the 22nd January,1962 and with the consent of the Counsel for the respondent as evidenced by his letter No.LS/IT.7/59 dated the 7th February,1962, pursuant to rule 9(3) of the Rules of this Court, IT IS ORDERED THAT:

(a) The time for lodging an appeal herein be further extended up to and including the 20th February, 1962 and that

(b) The costs of this application be costs in the intended appeal

GIVEN under my hand and the Seal of the Court at Nairobi this 27th day of January, One thousand nine hundred and sixty-two.

BY THE COURT

ISSUED on this day of one thousand nine hundred and sixty-two.

REGISTRAR
H.M.COURT OF APPEAL FOR EASTERN
AFRICA AT NAIROBI

NO. 55

In Court of Appeal

No. 55

Memorandum of Appeal 20th February 1962

Memorandum of Appeal

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA
AT NAIROBI

CIVIL APPEAL NO. 17 OF 1962.

B E T W E E N

RATTAN SINGH s/o NAGINA SINGH — APPELLANT

A N D

THE COMMISSIONER OF INCOME TAX — RESPONDENT

(Appeal from a Judgment and Decree of H.M.'s Supreme Court of Kenya at Nairobi (The Honourable Mr. Justice Mayers) dated the 31st day of July, 1961 in Civil Appeals Nos. 4 - 11 of 1959 (Consolidated).

BETWEEN

RATTAN SINGH s/o NAGINA SINGH — APPELLANT

A n d

THE COMMISSIONER OF INCOME TAX — RESPONDENT

MEMORANDUM OF APPEAL

RATTAN SINGH s/o NAGINA SINGH the Appellant above-named, appeals to Her Majesty's Court of Appeal for Eastern Africa (the prescribed period for lodging the Appeal having been extended by this Honourable Court) against the whole of the judgment and Decree above-mentioned on the following grounds namely:

(1) That the Learned Judge misdirected himself and erred in law in holding that the provisions of the East African Income Tax (Management) Act 1958 (hereinafter called "the 1958 Act") applied to the facts and circumstances of these Appeals to the exclusion of the provisions of the East

African Income Tax (Management) Act 1952 (hereinafter called "the 1952 Act");

(2) That the Learned Judge misdirected himself in holding that in the circumstances of these Appeals and having regard to the facts proved in the proceedings the Respondent was entitled to raise assessments for a period beyond six years after the termination of the year of income to which such assessments relate;

(3) That the Learned Judge erred in the interpretation of the provisions of the Fifth Schedule of the 1958 Act and in particular the provisions of paragraph 1 thereof in that he:

(a) misdirected himself as to the meaning of the expression "pending legal proceedings";

(b) failed to give any or alternatively the correct effect to the provisions of proviso (b) of the said first paragraph;

(c) concluded that by reason of the provisions of the said first paragraph he had no power to remit or mitigate any additional tax.

(4) That the Learned Judge misdirected himself as to the true meaning of the provisions of Section 40(1) and Section 72 of the 1952 Act and as to the true meaning of the said provisions with special reference to the meaning of the proviso of Section 72(a) and the meaning of "the making good to the revenue of the loss consequent upon fraud or wilful neglect" and of the meaning of the provisions of sub-section 3 of Section 40;

(5) That the Learned Judge misdirected himself in defining the concept of "fraud or wilful default" and/or "fraud or gross or wilful neglect" as contained in the 1952 Act and the 1958 Act and misdirected himself in applying these concepts to the facts before him;

(6) That the Learned Judge misdirected himself in holding that in any event, that is to say, whether or not the 1952 Act applies to the Appeals before him the Respondent was entitled to maintain assessments which were prima facie statute barred;

(7) That the Learned Judge misdirected himself in evaluating the evidence adduced at the hearing with particular reference to:

(a) the completion of Income Tax Returns;

(b) the entrusting of all accountancy matters to what appeared to the Appellant at the time to have been competent and reputable accountants;

(c) the acceptance of Mr. Thian's reports in part to the extent to which they were favourable to the Respondent and the rejection of such reports to the extent to which they appeared to favour the Appellant.

(8) That the Learned Judge did not draw the correct inferences from the evidence adduced before him relating to the method of estimating the Appellant's income known as "the capital worth system" and in holding that the Respondent was right in not paying heed to that system when assessing the Appellant and in disregarding the methods of calculation put forward by the Appellant's expert witnesses which were consonant with common sense and with the preponderance of probabilities;

In Court of Appeal

No. 55

Memorandum of Appeal 20th February 1962 (Continued)

(9) That the Learned Judge misdirected himself in rejecting in toto the evidence of the Appellant and in preferring against that evidence the calculations of the Investigating Officer of the Respondent which were based on mere conjecture, unrelated to reality and contrary to common sense and against the preponderance of probabilities;

(10) That the Learned Judge misdirected himself in accepting each and every item of assessment calculated by the Investigating Officer of the Respondent, even when concluding that such assessment may have been excessive and/or unreliable and, in particular, in accepting a computation of stock figures which bore no relation to reality;

(11) That the Learned Judge erred in law and on the facts before him in not remitting the whole or part of the additional sum imposed by way of penalty on the Appellant.

WHEREFORE the Appellant humbly prays to this Honourable Court that the Judgment of the Supreme Court and the Decree drawn pursuant thereto and sealed therein be set aside in toto or such an order be made as this Honourable Court may deem fit and that the Appellant be awarded costs before this Honourable Court and in the Court below or such other relief be granted as this Honourable Court may deem fit and just.

DATED AT NAIROBI THIS 20th DAY OF February,

ONE THOUSAND NINE HUNDRED AND SIXTY-TWO.

M. KEAN

for KEAN & KEAN
ADVOCATES FOR THE APPELLANT

Drawn & Filed by:-

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To:-

The Honourable, the Judges of
Her Majesty's Court of Appeal
for Eastern Africa.

The Legal Secretary,
E.A. High Commission,
P.O. Box 30005,
NAIROBI.

FILED THIS 20th DAY OF February ONE THOUSAND NINE HUNDRED AND SIXTY-TWO AT NAIROBI.

Sgd. ?
for Registrar,
H.M. Court of Appeal
for Eastern Africa.

In Court of Appeal

No. 56.

Judge's Notes 15th July 1963

NO. 56

Judge's Notes

IN THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

CIVIL APPEAL NO: 17 OF 1962

BETWEEN

RATTAN SINGH s/o NAGINA SINGH APPELLANT

AND

THE COMMISSIONER OF INCOME TAX RESPONDENT

(Appeal from a judgment and decree of the Supreme Court of Kenya at Nairobi (Mayers J.) dated 31st July, 1961.

in

Civil Appeals Nos:4-11 of 1959 (Consolidated)

B E T W E E N

RATTAN SINGH s/o NAGINA SINGH APPELLANT

and

THE COMMISSIONER OF INCOME TAX RESPONDENT

NOTES TAKEN BY THE HON.SIR TREVOR GOULD

15.7.63. Coram: Gould Ag.P.
Crawshaw Ag. V.P.
Edmonds J.

Roy Borneman Q.C., O'Donovan Q.C. and Winayak with him for appellant

Thornton, Treadwell with him for respondent.

Thornton mentions a preliminary point which he will take in the course of arguments.

Borneman does not object and opens:

Taxpayer's appeal. Profits of trade 1946-53 (inc.) All additional. Several issues of law and mixed law and fact. Returns were made. Assessments folld. - investigation additional assessments. Dated May 1958, 1952 and 1958. Both have stat. time limits. 7 yrs. In both provisions at any time in certain circs. - provided they prove fraud & w.d. (52) or gross neglect (1958). We deny that there was any fraud etc. Alternatively submit the assessments were excessive and that the judge mis-applied the stat. provision and that he applied the wrong ones. All assessments relate to years of the 1952 period.

There are many rel. differences.

1952 Sect. 72 our starting point.

There are various provisions in that Act can claim the benefit of.

Crown claims 1958 Act applic.

Record is very long. I will summarize. Appellant speaks and writes very little English. Gave evidence through interpreter.

Father died 1946. Joint family. Sole heir. Business 1946-1955 on his own. In 1955 took 3 sons into partnership - not relevant. He had no personal knowledge of contents of returns Audit. sent them in - common practice.

Comm. then started inquiries. A number of interviews. A Mr. Thian I.A. was asked for a report. On 15/11/56 made a report 1948-53.

p. 1414 record. Further report asked 7/10/57 2nd 1940-53

Discussions. Schedules. General approach was to take Thian's figures. Add on items. Some justified - some hit or miss.

Later Blackwood of Cook Sutton & Co.made a report dated 6/6/60. Record p.1534.

In Court of Appeal

No. 56

Judge's Notes 15th July 1963 (Continued)

Thian's figures I suggest to be a strange approach. There is a well recognised approach - the capital worth.

Find c.w. at opening date.

" c.w. at closing date.

Gives you a starting figure.

There is an assumption that the dif.will be accumulated income.

The must look at the dif. for capital receipts. Deduct. Add living expenses, presents, adjust. That is the acknowledged and safest way. In ct. In law adjusted even those figures. Their figs. showed a liability over the years very close to Mr. Thian's.

They are widely different from Mr. Easterbrook's suggestions. So many errors and omissions. We will submit excessive assessment. We will show several points from which conclusion can be drawn. White record a mass of detail.

Law

Special provisions for assessments and coming to court. Legal process starts with assessment - notice of objection - appeal - hearing. Went straight to judge in this case.

The two acts are the same.

Sect. 78 (10) 1952) Mixed law and fact.
Sect. 113 (h) 1958)

Memo of Appeal 1, 2,
3, Under 1952 Act court had power to review the penalty.

In 1958 that power is taken away. Comm. left as final arbitrator. One of our complaints is we can't have thatright takenaway.

4, We are not pursuing this
5, 5,

7, 8, 9, 10, 10. Strong words. We will support them

One or two basic submissions.

1. We submit the 1952 Act is to be applied. 1952 Act.

s.8 Tax charged. Exemptions. Allowances.

pl.7 Rates 8.Who assessable.

9. Information to Comm. Pl. 10, 11, 12.

s.40 in Part 7 (1) - (4) That subn. was invoked.
s.1 (b) Made additional assessments. Charged the lds. Added on penalties vary from year to year. Something like 150% Tax. £1 £1.10.0.

Sect.71
Sect.72 Proviso.

It was strange to find so early in Act. 71 & 72 normal administrative provisions. 7 years. Unless can allege and show it.

Sect.74 Enable taxpayer to see law in motion to contest. So far only a unilateral administrative act.

21 May, 1958, Assessed. 30/9/58 we gave notes of objection.

s.4 Proviso.

4/12/58 Com. served on us a notice of refusal. At that date the issue was proved. Assessment - notice of objection 30/9. 2 parties then at issue - may agree - but rights are preserved - notice of rejection 4/12.

Sect. 78

Ss.5 Onus = Common law.

Ss.6 That is the s.section giving judge power to review the penalty. (Notice of Appeal 31/12/58)

In Court of Appeal

No. 56

Judge's Notes 15th July 1963 (Continued)

We say at latest by 4/12, legal proceedings were pending with us and the Comms.

There was a strange adjustment of date. On 30/12/58 the 1958 act was published in the Gazette.

Can be no doubt that all assessments of 1946-53 income were subj. to 1952 Act. Would expect legn. to preserve rights of both sides in terms of 1952 Act. Basic principal of tax law is that the persons within purview shall be treated on same basis. A. assessed in 1948 for 1947. B. in 1963 for 1947. Should be same.

Every consolidating act always preserves that position. Here because this notice was given a day later than Act of 1958. It is said position is different. Law never takes away rights accrued. To re-inforce my submission that 1958 is virtually consolidating it merges all the amendments.

Same form
The Act follows closely.
cf.40/50 & 101/58
Doubt in lieu of
ss. 5 & 6 are right. Part XIII (Objection appears).
These are remarkable provisions. Takes away power of ct. All left to Coomsr. Under 1958 however excessive the penalty ct. can do nothing.

Sec.104

S.105 S.72 of 1952 Close correspondence.

Proviso slightly changed. Subtle. Can prove less than he had to do before.

52 Fraud or wilful default.
58 Gross or wilful neglect.

We submit that in 1946-53 income the 1952 Act should apply - not a test more favourable to the revenue.

s.109 similar to '52.

s.110 same powers to Commsr.
s.111 s.113 But 113(d) is subject to limitation of 101(5) and (6) Court can't review penalty.

Fifth Schedule. Para.1 Proviso.

We say we had proceedings pending. Those are all the relevant sections.

Can it be said no legal proceedings were pending by or against the Commsr.

On 4/12 or probably in May when assessed there were proceedings pending. May, Sept. 4/12. Assessment, objection, rejection are all steps in due procees of law from which further proceedings may eventuate. It is part of process of determination of the legal rights. Not much authority.

Re Vexatious Acts Act (1915) 1 K.B. 21

Refer with hesitation. must regard context.

p.33 "I proceed ...

This is about the only case in Act considered. is there held "legal proceedings must be considered in the particular context. Cannot mean the same thing every time. Context.

Our construction must be in context of the 1952 and 1958 Acts. What else can the legislation have meant than it covers people already in opposition.

(To Crawshaw: Would continue to find after a judgment until the time for appeal had expired).

In other case

Rumerman v. Smyth (1904) 20 T.L.R. 625

"Process taken to enforce the rights". Facts don't help. p.626 judgment. Reluctant with those authorities. Don't know others.

1. Assessment 2. Objection 3. Rejection. Every one of these are steps in law and legal proceedings. Whole legal process started with the assessment. Perhaps can't say proceedings when unilateral.

The objection then brings the powers together. Then they find. Rejection another step. Smith v Williams (1922) 1 K.B. 158 was referred to below.

p.163 "I am unable ... 10
1. 1952 Def. fraud & wilful default
2. Right to review the penalty.

Commsr. really has gone too far. All history must be considered. 15% is at least excessive.

Suppose commsr. is against me on this and must consider all on basis of 1958 Act. My burden is

s.101 (1)(b) But the Commsr. has alleged this in terms of the 1958 Act. That is as it looks 20 to me. He alleges gross neglect etc. a fraud. A lighter task. That allegation must be kept in mind all the time.

Fraud and gross neglect. As matter of onus it is on the Commsr. to discharge it. Common law and statute "excessive" onus is on the taxpayer. But it can shift. At end of day has taxpayer succeeded. But he who alleges fraud or w.d. has the burden of sustaining it.

I propose to read judgment almost in full. 30 As prelim. one and two exhibits for general picture. Then specific points.

A.5-12 Confirmation of assessment.

A.13 Not sure how it got there.

1st one was 31/12

A.13 can only be the bare essn. Not needed.

A.24

None of those dated. But they are the series.

A.26 Statement of facts. Also similar m/a vary somewhat.

A.59 amendments 46-50

A.60 Amdt. to all "total worth"

A.61 " " " fraud.

A.62 Rents All

A.63 Grogan Rd. capital question.

A.64 Percentage profit. a cross check.

Adj. to 2.30 p.m.

T.J.G. 15/7/63.

On resumption Bench & Bar as before.

Borneman continues:-

(a) Is there fraud or w.d. (or gross neglect)

(b) Are the assessments excessive

(c) In all the circs. is it right to reduce the penalty of jurisdiction.

Those will be the points in mind.

Fraud or w.d.

Onus on Commissioner. Person alleging. All the returns in fact made were signed in blank. Auditor filled in. Couldn't speak or write English. Normal inference - if employ competent auditor nothing wrong in that - if figures would mean nothing. Record pp.122-123 Rattan Singh evidence.

Since Sirjan Singh kept the books the figures have been accepted.

Judge said even if wrong in disturbing R.S. it was still gross neglect - and wilful default.

Submit too high.

Hundreds of thousands leave such matters to auditors. If Crown proved had a fraudulent auditor and know it that is another thing.

But merely leaving to professional adviser is not by itself Judge too early assumes these turpitudes.

To introduce (2) 2 excessive".

I submitted that the capital worth approach was appropriate.

Cook Sutton & Co.

p. 1541 Schedule A. 11/1/46

p. 1542 31/12/56

But A & B A ppty. had been bought in New Delhi.

p.1543 Sched. C. Living costs for those 12 years.

p.1540 Last column are the figures as assessed.

The actual assessments I understand are last. I can hand in the additional assessments. The 1953 one.

£ 3,402)
£ 10,914) Shs. 98,233 Penalty 176422

(Marked CA Exhibit A etc.)

This report is clear and factual.

There was a lot of evidence given below. Eventually Blackhall adjusted those figures. Can give details if needed. p.1537 l.8 529,000/-. That figure later amended to 593,000/-. p. 1517 reflects the result. Adjustment.
It increases the total figure on last page of p.1540 of £17644 to £21,027. By any normal test that is the approximate figure to be taken.

Easterbrook says 3 times that amount.

Look shortly at Thian's 1st and 2nd reports. Easterbrook accepted them to lean on. At end of day the figure came close to p.1446-1454.

p.1414 2nd report 1940 '53 7/10/57

pp.1429-1430 Adjusts 1st report

pp.1433-1434

Two approaches

Easterbrook's workings are not on the record, Part of them show way mind working. Perhaps the got in but is not part of records. p.1443 Easterbrook saysin court below he put the whole thing in. We can get copies by tomorrow morning. Ask to hear it all tomorrow morning.

He will be making 6 submissions.

1. Judge wrong in law on this reasoning.

2. Not reasonable to give no credit to R.S. for anything on the evidence.

3. Having regard to the lack of English it is not right to say either fraud, wilful neglect or w. default - in not seeing returns were filled up before signing.

4. Wrong not to reduce the penalties. Held he couldn't.

5. On the evidence can be no doubt that the assessments of Easterbrook were grossly excessive. Wrong inference from facts. Not a q. of fact.

Judgment p.1254
p.1260 l.7.

In Court of Appeal

No. 56

Judge's Notes 15th July 1963 (Continued)

p.1262 Judge here takes matter out of context. Forgets part of a whole legal process.

1.35 Quite right. But they do find when such an act is done.

1.38 It does not follow.

Judge's view that when parties are engaged in due process of law to settle their difficulties. That is our view.

p.1265 1.11
p.1265 1.44 We agree with this.
p.1268 1.32 Denning L.J. did say there 1950 2 All E.R. at 459 was higher for fraud than negligence. Not so high as crime. Commensurate with the occasion.

p.1269 1.7 I can't criticise these words.

p.1270 He says Nandha must have been fraudulent and R.S. must have known. Scant evidence. p.1271 1.4-11 I challenge this out of hand. If right 99% of tax payers are guilty of gross neglect. Big companies can't do such checking. We submit this approach of judge can't be upheld.

p.1271/2 An assumption that judge is right in saying R.S. is caught in these sections it is well a matter which affects the mind of the court in assessing a penalty.

1.41

p.1272 1.11-30 No complaint of this test.
p.1274 Passage adds nothing.
p.1274 1.36- p.1275 1.10 True ct. must have regard to sum omitted.
Reasonable expression.

p. 1275 Dangerous doctrine. Vitiates his approach. Figure before him. Evidence on both sides. Another passage later - vitiates his view.

(Self: Query why need to spend time on the two systems if result was roughly same).

(Thornton agrees to Exhibits A etc.)

In Court of Appeal

No. 56

Judge's Notes 15th July 1963 (Continued)

Adjourned to 10.0 a.m.

T.J.G.
15/7/63.

16.7.63. Bench and Bar as before.

10.0 a.m.

Borneman continues:

16th July 1963

I had mentioned I would show (1) Cook Sutton's figure roughly same as Thian's.

(2) Produce figures of Easterman. (sic)

(1) Record p.1494

1st col. All transported from Thian's 2nd report at p.1414

Eg. 1946-p.1432

2nd column. 584000 beginning now. 462,000/- which is brought from last page of C.S. at p.1539. Top left columns. That was amended on p.1577 The adjustment - 513,000/- top left. The two approaches give approx. the same result.

(2) Basis of Easterbrook's figures.

p.1414 is an early version. But in by agreement Ex. J & K.

First sheet is computable of business profit. In due course we will say hit and miss - unjustified. So wrong and speculative that it is wrong to accept them and judge should not have done so. O'D will analize them. Took balance. Deducted items. Added various items. Deduct I think in Thian's report adds 11,000 every year for stock adjustment.

In Court of Appeal

No. 56

Judge's Notes 16th July 1963 (Continued)

Out of sky.

Grogan Rd. Add. in cost and whole profit. By far the greater number of bigger figure.
Rents - include Gian's
p.1540 Last bal. column ties up.

Was a long dispute below on Gian Singh's rents. Whose? We contend that they are Rattan Singh's. But here we can't go on pure facts. By law that conclusion from primary facts is law. But as to G.S.'s rents we can't say no evidence to support judge's conclusion. So we don't allow it.

Result is:-

p.1540 C.S. £17644

p.1517 adjusted £21027.5.0

p.1540 top Col.2 is the rents.

Add to 21027 rents of 109,155 (£5457.15.0) = £26485. That sum we now concede is to be compared with the £60,000 odd for Commsr. That does not affect the q. of fraud, wilful default at all. I only concede primary fact on the figures.

Judgment p.1275 l.35

p.1276 l.22
p.1278 l.39 - p.1280 l.19

p.1281 l.7 Figures a little wrong.

p.1282 l.19 There is no doubt about this theft. Evidence was given. Reported to police etc. Feel judge indicate some doubt which is not justifiable.

p.1283 l.8 - 1284 l.44

p.1286 l.11 Comm. we added on 414,000/- as the expenditure. We did not put it at Shs.900/- per month.

Figures here given are from pp.1283-1284.

At p.1540 B set out the total income. There he set out to apportion it over the years. p. 1539 Approx. on turnover of the business with some adjustments.

Judge criticises it. As good as any. Can't just divide it up.

p. 1286 l.36

Builders have very big fluctuations of profits. Very good years. Very bad years. May be many or few big contracts. Useful to know what the main contracts were. Blackhall found that out and applied it.

p.1285/6 What is clear told B about the big contracts and he then said that effect very

p.1287/8 Judge has failed to observe that Thian's computations are in substance the same. Rejects the weightings. May be reasons. But not after the whole evidence can be rejected out of hand. Judge thrown out our computations all together. Then accepts Easterbrook in toto. That approach can't be right. I can't be 100% right and 100% wrong.

Comes to Easterbrook's approach.

p.1288 l.27

p.1289 Judge fails to appreciate that accepting Mr. Thian's figures overall they differ little.

Gian Singh's rents. We don't pursue. Not q. of law or mixed.

p.1291 l.25— pp.1292/3/4 Grogan Rd. house.

p.1293 l.31 Don't follow this bad analogy. It is clear position. O'D will show E's figures in this.

p.1294 l.16 Undisclosed rents.
p.1294
p.1295 l.36 Remarkable comment
p.1295 l.39 Demolition
p.1296 l.13

In Court of Appeal

No. 56

Judge's Notes 16th July 1963 (Continued)

It is 10000/- in 1948 only.

p.1296 Adjustment refused
p.1296 l.33 Medical expenses
p.1297 l.11 Lump sum contracts
p.1297 l.45 Remarkable passage.

Judge prepared to take E. throughout. But it shows wrong approach. If a man tells me he does not intend to pay his debt it is bad law to say can't deduct if for tax. Next thing he gets a writ. Has no connection with computation of profits.

p.1298 Wife 30,000/- (1951 Renjit Kain)

p.1299 £100 p.a. car.

Small. Comsr. say judge not entitled to assume £100.

p.1299 Comr. challenges this £100

p.1299 l.31
Work in progress - stock.

O. right to say builders carry small stocks.

p.1300 Clear judge thinks is excessive. But can't give any credit for it. No adjustment.

p.1300 l.35 Legal exes.

He says he can see some items. But doesn't adjust them.
p.1301.

Draw attention to this para. Is it the proper approach.

It is no good saying onus is on the tax payer if judge himself should hold excessive -
p.1302 to p.1303 l.18

There was no evidence at all of anything else a judge is not entitled to say to himself; There may be something else. I submit judge should make his own estimate when finds excessive but can't say by how much. That is what a Commsr.must do. Here judges are burdened with

those matters. In England an expert Tribunal would ct. Many occasions in England in which a court says we can make a computation and we sent it to the Commisr.

Judgment shows that the judge is prepared to find no credit at all to appellant and to hear nothing against Easterbrook.

Yesterday I said 4 matters. Will repeat them.

1. Wrong in law on appln. of 1952-1958. Because he didn't appreciate that legal proceedings pending must be construed in its context. Shut out fact that legn. intended to maintain what is obviously right. Steps in due process of law.

2. Appeal is on law or mixed law and fact. Most cases are the latter, if only because you don't decide law in abstract. Only true case of law pure is when both parties ask for construction of a document. Recent case in U.K. Mixed fact and law - duty of court is to see if ct. below has drawn the proper conclusion from the primary facts. Will give authority if required later. Judge failed here in that.

3. Submit proper conclusion on facts was (a) no fraud or wilful default or gross neglect, and (b) that in any event the assessments are excessive. What judgment vitiated by his acceptance of excessive. In fraud etc. you are not dealing with a man who writes and speaks English. Can't regard him in same way as intelligent and expert English business man. Judge did not give enough consideration to this.

We have now to demonstrate not that each figure is wrong. But we set out to take various items that we will show patently wrong and invite ct. to say judge did not draw a fair conclusion from the primary facts.

O'Donovan

Certain arbitrary assumptions by Commsr. accepted. Increased income beyond reason. I will single out a few inst. which can't reasonably be supported.

Grogan Rd. property.
p.1537 l.9 67,000/- surplus. That figure was not accepted. Commsr. contention that it should be 80,000/- accepted. p. 1525
Adjustments conceded 80,000/- cap. Commsr. dealt with it. Ex.J. In 1950 cost of plot added 51,320/-. In 1953 80,000/- added as profit on sale. The explanation of 51,320/-
p. 678 Easterbrook
l.1
p.679 l.25
p.681 Summary l.32
p.682 l.40

As I understand this it means Easterbrook could not find source of part of the expenditure. He could find 50,000/-. But 51,320/- computed. Whole is added for 1950. As a profit made by him for that year not appearing in his book. New result is the whole 111,320/- has been charged against him as income. Then when sold in 1953 80,000/- profit also.

Judge should have deducted 80,000/- in 1953 and that is the only thing he should have done.

p. 1293 He says does not help. But cost of construction and acquisition were already debited in books 10,000/- and bal. in 1953.

Error is in saying cost of plot and bldg. must be added back - only if it is a mis-expenditure.

I think at p.683 explc. shows that the entire cost of the plot sold has been taken into a/c.

44,000/- p.1297 Judgment. Lump sum contracts. Error of law. A simple statement by a person that he has no intention of paying a creditor does not deprive debt of character if deductible he had reason for a conclusion.

36,000/- light exs. totally disallowed.
Thian put in a report.
p.1408
p.1483 Khanna: bill
p.1489 2 items of 1940/- may be capital

Wrong not to allow 1 penny.

p. 665 l.36 E'brook
p. 666 l.9
p. 835 E is xx.m. l.32
p. 837 l.27

p. 840 l.19
At least partially it must be revenue
The appellant I can't rely on. I rely on E's admission and the judge's findings.

More impt. Work in progress and stock in hand adjustments. Ex.J. added annually from 1949 on Shs.11,000/-. Represents a cumulation increase in stock year by year. No justification in turnover increases. No justification for any figure at all. It is cumulation 55,000/- at end of '53 more than shown in appellant's a/cs.

Appellant's a/cs.

p.1495 End 1953 Stock 20,000/-

1953 p.1496 T & P & L Opening stock 20,000/- and same carried forward.

1954 p.1498 Opens 20,000/- Ends at 20,000/-

(Thornton says these a/cs are not accepted). They are accepted for 55, 56, 57.

1955 Open 20,000/- and close p.1500

1956 p.1502 Same.

1957 p.1504 Factual closing figure of 13631.63 to figure accepted. Working back from that one observes that the arbitrary cumulative increases by and of 1953 have disappeared. He has never been given any credit for any reduction in stock. Commsr. had it both ways. Been subjected to a heavy penalty. In determining this on probabilities judge erred altogether in not looking at the terminal 1957 figure and deducing that the cumulation increases were wholly improbable.

In Court of Appeal

No. 56

Judge's Notes 16th July 1963 (Continued)

Re Work in Progress there is an equally remarkable picture. Evd. in 1953 with 120,000/- wp. in p.

In 1954 no penny of that allowed (withdrawn see p.1498 top right)

I compare self to stock in trade.

What judge credited was that he thought excessive time might be other income to counteract. But he should have found no justification for cumulative figure. Why cumulative?

One finds figures arbitrarily added. Some of them show added without justification. Taxpayer has thereby discharged burden of proof of showing excessive. Judge to make a reasonable assessment. His approach to capital worth would be reviewed in light of that.

Adj. to 2.30 p.m.

T.J.G.

2.30 p.m. Bench & Bar as before.

Borneman:

That is our case.

There are some - will L.F. want to put in. I have no objection.

Case for the appellant.

Thornton:

0 of documents. The additional assessments for the 8 years mentioned yesterday. I have found them and put in 3 copies of each. The figures do agree with Ex.K. Make no point on them. My copy of record.

Refer p.1393 A letter from Thian & Co. That is the amt. of disclosure. Para.3 Q's and A's.

The amt. is not there but it is at p.1389
The q's & a's conclude at p.1399
The original photostat had underneath the first answer the signatures. I have got copies putting all in correct order.
(Handed in). We allow some importance.

Also

p.1406 of Thian of 3/5/58

Final page at p.1411

The photostat - has by Rattan Singh and his signature.

Will authorise the way in which we approach the problem of appellant's case.

1st grounds 1 & 3 which Act applies. 5th Schedule. No argument was addressed 3 (b) With 1 & 3 ground 11 goes.

2nd Grounds 2, 5, & 6.

Treadwell will deal with 7 - 10.

First question. Which Act.
Fifth Schedule. para.1 "legal ..... pending".

Look at it in two sections 1. "legal .. Commissioner"
2. Pending.

I am agreed with Borneman on importance of context. L.F. mentioned Re Vexatious Actions Act. I agree.

Submit in context of this para. and regarding both Acts the legal proceedings are either
Appeal proceedings 77 & 78 of 52
" recovery 86 of 1952.

Conversely the objection proceedings in sect.74 do not contitute legal proceedings.

I agree "legal proceedings" is not a word of concise defn. a narrow interpretation. It is comprehensive. Not necessarily limited to court proceedings.

In Court of Appeal

No. 56

Judge's Notes 16th July 1963 (Continued)

Ordinary natural meaning to be accepted in context.

Submit not necessary to attempt a concise defn. but that it does mean judicial or quasi judicial proceedings.

Natural meaning .... v. Commsr. implies time protagonists and in addition some jud. & quasi jud. authority to hear and adjudicate on. The judge referred to fact that can't be judge in our cause.

p.1261 l.44 My Lords ... Frome United Breweries Co. Ltd. v Bath J.J., (1926) A.C. 586. Headnote at 590

Submit right up to Notice of Appeal comm is performing a stat. administration duty as opposed to judicial or quasi jud. As a party to any question above the assessment he is disqualified from giving it quasi judicial decision.

That function in administrative appears from sec.71(1) in Part X of 1952.

Duty to assess.

74 Objection. (1) To some assessment
(2) "may apply ... to review and revise.

More appropriate to adm. function. (4) Refusal Contract those words with the appeal section.

s.77 } "may appeal against the assessment".
s.78 }

The word "against" must be given effect. Not appropriate word for an application to review and revise assessment. Submit in contest it is the appeal provisions.

When are those proceedings pending. Submit as soon as it is commenced and remain until concluded. In this case commences by notice of appeal.

Stroud J.D. (Vol.3) 2141 "pending".

Smith v Williams (1922) 1 K.B. 158 was quoted by L.F.

It was a successful appeal v Commsr.

Taxpayer died. Re-continued v ex. In my favour - not too high as it was not argued that they might have begun earlier.
p.162 "In my view....."
Submit the notice in writing is equivalent to the notice of appeal here. Delbert v Evans No.8 (not pursued).

It says pending was for appeal
Dunn v Bevan (1922) 1 Ch.276. He held in will case not pending in those circumstances.

When "commenced"

Sect. 11 of Adm. of Justice Act, 1960, the word "pending" is associated with "imminent". Contempt. Distinction. Pending then - something started.

Evidence Act 1938 - distinction but pending and anticipated proceedings. Sect.1(3) Statements etc.

I submit: In context legal proceedings against the Comm. refer to appeal - not objection proceedings - legal proceedings construction at least involves quasi jud. proceedings. - commsr. is not carrying out a quasi jud. function but administration. They do not pend until commenced by notice.

My L.F. submitted whole process must be looked at as process of law. Once set in motion - pending. I accept the whole thing as a process to be found in statute. But the early stages of the process do not amount to a legal proceeding.

My L.F. must accept the conclusion of his own logic. If it is whole process of law he must go to the end of way and include assessment. What I say is impossible. He referred to sect. 7 of 1952 Act, and said that so far it was administrative and unilateral. I agree and submit that such is not properly called "legal proceedings etc."

In Court of Appeal

No. 56

Judge's Notes 16th July 1963 (Continued)

That is ground 1, 3 and 11. Judge right in holding no power to reduce the additional tax.

If I am wrong in that q. whether this ct. might reduce quantum of ad. tax. I submit formally that the amount was not excessive (I mean the additional tax by way of penalty).

Grounds 4, 5, 6. Fraud and w.d. And q. of time barred assessment - s.72 of 1952.

L.F. submits no fraud or wilful default and 1946 - 1950 (inc.) were out of time. Para (4) proviso to s.72.

The question is whether there was evidence on which judge could hold there was f. or W.d.

(To self. Suggested Commsr. applied self to those words).

Also made in May 1958 - ad. assessments '58 Act published 6 mos. later. Therefore, I submit it is the 1952 Act which must be looked at in considering what was done in May 1958. The proviso to 1 of Fifth Schedule has no application because it is only relative to dates after the publication of the Act. So I am only concerned with "fraud and wilful default".

Not disputed onus on respondent p.980 judge discussed degree of proof. But judge found proved beyond reasonable doubt so degree is not material to discussion.

Fraud Record pp.1269-1271

Signing in blank. p.1269 l.11
Return admitted inaccurate.

p.159 l.36 - et seq.

p.1270 l.14 It is clearly a relevant considn. that income was omitted.

Then Gian Singh s.24(1) s.24(1) of '52.

p.1291 - relevant passage l.10

At the hearing case for appellant was that the income was Gian Singh. Much emphasis on lack of English. I submit on that that in tax law all must be treated alike. But duty is due and law makes no exception. s.59 of 1952(1) Duty and return. If he prefers to let an accountant do his duty for him he doesn't avoid his responsibility.

Kaye v. C.I.T. 11 Vol.1 T.C. (E.A.) 94
Similar plea - accountant
p.103 para. 13 & 14
Responsible for acts of agents.

The fact is that appellant signed the accounts and returns.

Sect.62 of 52 - deemed cognisent.
Return to p.1270 (I am not concerned
p.1271 l.41 with gross neglect)
Wellington v Reynolds 40 T.C. 209 at p.215
"The first problem ... wilful default".
Very close to definition of judge at top p.1269 of wilful neglect.
Sheikh Fazel Noordin C.T. v Comm. of I.T. (1957) E.A. 616 wilful default. 2 E.A. T.C. pt. III 275.

Adj. to 10.0 a.m.

T.J.G.

17.7.63. Bench & Bar as before.

10.0 a.m.

Thornton continues:-

17th July 1963

I had been referring to wilful default. Forbes J. in that case did refer to the same case as Mayers J. -

Young v Harston's contract.

There a clear finding of w.d. p.1272 l.31

Gian Singh's rents and fact of pending that rightly assessed. How should final allowance not be claimed for him. The fraud or w.d. regarding those rents arise thus. The returns excluded by S's rents. And at the same time stated that G.S. had no income. The tax payer tried in those years

In Court of Appeal

No. 56

Judge's Notes 17th July 1963 (Continued)

tried to have it both ways. He couldn't at same time say the rents were G.S.'s and his own.

Return now to the general question. Was judge entitled - was there evidence or w.d. he cld. properly reach these conclusions.

Not disputed the returns incomplete. Whatever the quantum exactly. £21,027 is admitted excluding Gian Singh's rents. £14,000 returned. Agreed that the assessment was £64,000. If the fig. is anything like it is correct it must be fraud or w.d. those figs. relate to the whole gross.

Closest to 1946-50.

Record p.1443 to the following page - ann'd.

Their document is not part of the previous page (1443) It is in wrong place. Calcu. 1443 (a). It was a consent order in course of Sumerfield's address. Will compare returns (left) with rt. column.

Ex.26 Blackhall (his adjusted figures)

1946 1 & 3 order	£1100 =	£1600
47	900 =	3000 over
48	900 =	3000
49	950 =	1600
50	1500 =	2300

(Neither rents include Gian Singh's rents)

On our figures left out much income and has given no honest explanation.

On sub. of rents and particularly G.S.'s rents the evidence throughout was that the rents of Blenheim Rd. ppty but for no other. Some rent returned - therefore accountant knew rent returnable. Left out. Thian's report (1st) p.1452 Lists properties ref to Schedule B 1948-53 Sched. A lists date of acquisition p.1455 Sched. A B next page A lists certain ppty. not acquired in 1946-50 but some were omitted.

Submit an inference may be drawn from fact that the omissions were not in a single year - if through what period up to 1950.

I commented on R.S. and lack of English. Want to add the point that judge was entitled to reject. R.S.'s evidence that he knew nothing about what was going on. Saw him. Believed he lied. It was demonstrated. He was entitled to ask self why acct. should fraudulently leave out when he queried nothing.

While ct. told Nanda out of country Shaffi, R.S.'s book-keeper was not called.

Treadwell: Grounds 7 - 10
1st aspect. Respt. contends that the q's raised are pure fact and can't be raised here.
S.113(h) of 1958 Act.

May be claimed that finding unreasonable, perverse (Edwards v Bairstow). Edwards v Bairstow 36 T.C. 207

Machinery - trade. H. Lds. disturbed finding on ground perverse.

In that extent the evidence can always be looked at - hence we did not make this a prelim. point.

But in examining the evidence the court is limited in two ways.

(a) Was there evidence to support finding as a matter of law.

(b) Whether it was simply perverse.

May also be met is to claim a misdirection of law association with finding of fact. That is not claimed in grounds of appeal: nor in argument.

3 of the 4 grounds preface the attack with "misdirected" Use of word does not make it so. rather than strict of law. Urge that the inquiry does not extend to a re-appraisal. I will attempt to repute R's contention that more = questions are mixed law and fact. True apln. mixture of l & f.

In Court of Appeal

No. 56

Judge's Notes 17th July 1963 (Continued)

But where fact is separate it is pure fact. Following when complied findings of judge conclusive.

Montague Burton Ltd. v C.I.R. 20 T.C. 48 at p.58 (1933)
I come now to conclusions

Hyndland Investment v C.I.R. (1929) 14 T.C. 694
At 700 "on these ...
" "we had a ...

a case rather like ours.

Sun Insurance Office v Clark 1910-12 6 T.C.59 Ex parte.
p.77 apln.
No rule of law or proper way of making an estimate.
p.78 It is ...
p.80 The question

Sheikh Fazal Trust 1957 E.A.516

p.624 D E F

If ever there was a case to which these principles I have expounded applied it is this. Mass of evidence and reports. Judge, clear from judgment, relied on demeanour. R.S. Blackhall and Easterbrook. Case for strict application.

Make no point of that but R.61 of C/A Rules require concise statements of grounds.

My L.F. did not treat them separately. Lumped them together and ranged at will through record. Submit they must be considered as set out.

There are 9 attacks on findings of fact.

7(b) I can't find any evidence that the accountants were competent and reputable. May be deemed.

In line 8 "disregarding"
" 9 (last two lines argument
" 10 (last 6 words argument

Ground 7(a) covered in part by Thornton
But duplicated in grounds of appeal
Will refer to evidence & judgment.

p.123 R.S. 1.1
p.123 1.10 - 37
p.131 1.37
p.132 1.29
p.134
p.141 1.29-38
10 p.143 1.24
p.159 1.18 p. 160
Judgment p.1255 1.16 - p.1256 1.12
p.1269 1.11 - p.1271 1.40

Particularly this last passage is as clear a position pending a substantial evidence.
p.1271 1.11 - p.1272 1.2 Gian Singh & Nanda
p.1272 1.31 - p.1273 1.13

Correct to say that it was never directly challenged that R.S. was unfamiliar with English.

20 All people alike under law. May be inference of complicity bet. R.S. & Nanda. Some labour it. Findings clear.

All discrepancies are against the revenue what pos motice could accountant have without complicity.

This and follg. ground bring in demeanour and credibility.

Demonstrated that R.S. sworn a false afft. for Estate Duty - perjury.

30 He asked judge to believe he signed a/cs and returns without word of enquiry - explanation. He was not concerned to see Nanda claimed all reductions allowable - or return too much income.

Judge found it incredible on ample grounds.

He took into a/c a fictitious claim for a debt due to his wife and also that Rattan Singh signed a certificate of disclosure put by Thian & B. purposely to reveal all his bank a/cs. P.O.S.B. trivial. Bank of Baroda, Mombasa - one

in India. I think substantial amount but I put this on credibility.

p.1434 Amended bot. sheet. Cap. item. Bot Bank of India - I am instructed there was one 87,613/-.

Next attack falls to

7(b) Entrusting accountancy to an accountant. Partly duplicative. Passages I have quoted apply and also -
p.115 l.1 R.S. - Curious situation. Accountant does it all.
p.122 l.10
p.126 l.35 Household
Again hides behind accounts.
p.127 l.13 & p.128 l.4
p.130 Ref. to Baroda Bank

Judge entitled find that
Judgment p.1278 Additional passage.
l.3 - l.21
l.25 - p.1279 etc.

Judge drew inference of evasiveness. Main dealing with architects, labour, suppliers would have knowledge of figures.

p.117 l.17 To Edmonds J. Ex.D p.
This court at a disadvantage there
(Ex.c Blackhall's first report)
But R.S. must have given the confirmation.

Ground 7(c)

Curiously worded. Suggests an unjudicial approach. E. criticized judge's approach on those lines.

First aspect: warn court that it suggests that it was on the acceptance of Thian's reports which were basis of findings of judge.

Thian agreed to prepare reports on R.S.'s behalf. Tried to re-create balance sheets. E. found 1st unsatisfactory. 2nd report made.

Judge correctly addressed himself to onus of proof. Deemed right until shown wrong. (assessment).

It was not through Thian that appellant tried to discharge onus. Through Blackhall. Easterbrook began with Thian's reports. Much debate and argument. (Figure was agreed. No I leave that out) E. began with Thian. Assessed. Insofar as Thian's report is significant it is only insofar as part of E's evidence. and insofar as Blackhall's system was being extolled. But it would be hopeless for me to separate from whole of E's evidence, that relating to Thian's report. Must take it in context. But this is not the q. on issue. Judge said after task was to decide whether on bal. of p. appellant had shown assessment to be excessive. When he said E may have been excessive he meant not shown on preponderance of probabilities.

Judgment - as touching T's report.
p. 1256 l.13 - p.1257
p. 1288 l.27 - p.1289 l.38
p. 1294 l.16 - p.1300

I repeat "may be excessive" means "I find it to be excessive" p.1301 - 1302

Record p.1444 When I referred before to agree figures. Easterbrook & Thian. But was retracted by Rattan Singh who was assessed. Blackhall made 3 attempts. None accepted. It was coincidence (3rd) when he conceded £7,000.

p.1221 l.16

I can't point to each part of that evidence but I can analyse the total figure added on. The 8,5000 is only the rent.

Judgment refers p.1287 l.34 £7,000 Obviously a factor with judge. It was Shs. 152,684 precisely, of which Gian Singh's rents were Shs.85,700/-.

Estate duty	5666/-
Mag. payt.	2000/-
Architect (1952)	2500/-
Fares to ind.	10,000/-
Psn'l exps.	10489/-

Wrong charged to contracts -
Psn'l exps other than household - 16895/- (not contested)

In Court of Appeal

No. 56

Judge's Notes 17th July 1963 (Continued)

Depreciated 4614/-
Accountants (1953) 15000/-

But this was ancilliary to his main conclusion of Blackhall.

Ground 8 capital worth system. Judge drew no inference about the system. Accepted suitable some occasions p.1275 l.35

Borneman said fix opening and closing figures; then must go into man's life. I agree.

Investigation must fill in the blank picture. E. contended in this case it failed. Judge agreed. Few records. Records available to Thian were not available to B. for one reason or another.

Judge discredited B. because he failed to cross examine. B. saw R.S. only once. Shaffi not at all. Made not attempt to go into his life.

Continuing with Ground 8. only 2 & 3 are the same point. p.1276 l.22 - p.1277

To self I don't quite accept that the 2 sets of figures agree. I think it was Thian's 1st report. p.1257 l.14 £35,000. Will try and elucidate this later.

Grounds 9 & 10. Same general questions. Judge said not to be prepared to accede to any point for appellant. It omits the basic fact that it was not a question of balancing equally. The onus on appellant. He found it not discharged.

Stock figures Ex.J. 11,000/- for 5 years. Clearly an estimated sum. Complaint - unreal. Comutation and that it disappeared. 55,000/-. That argument is mistaken. It does not remain in existence. Stock is bought and used.

The 1957 sum 13,000 odd. 55,000/- later added & 20,000/- = 75,000/-. p.1447, Thian's 1st report.

Same comment of unreality can be made on these a/cs certified by management. p.671 l. 41 Evidence of E.

Sale of Grogan Road property. Found capital transaction. Contended 1953 income should be reduced by 80,000/- profit. But that was all. And that only if cost of bldg. had been deducted as a revenue transaction. I think no a/c has been taken of fact that there were 2 buildings. One was sold. Erected 1952-53. What was added back in 1950 was the cost of both plots and one building. So cost of bldg. has not been added back.

Lump sum contracts. Amounts alleged to be debits to others. Rattan Singh said to have said wouldn't pay. Claimed will retain this character. Not so. Makes the entries sham. Round figures. Inference was that suspicion engendered as to their existence. p. 1297 l.11- p.1298

Adj. to 2.30 p.m.

T.J.G.

2.30 p.m. Bench & Bar as before.

Treadwell continues:-

Find further points only.

O'Donovan referred to legal expenses. First Evidence p.835 l.32 At p.840 l.19 like under 20/- in each case. For appellant to show the amt. referable to revenue year by year. Failed to do that. Simple enough task. Record Yesterday appellants attached importance to fact that B's figures nearly agreed with Thian's. I thought that must have been T's figures on his first report - My L.F.'s said record.

I now say the fig. they must have referred to were in the 1st report.

p.1446 Ex.2 C This is the first report.

p.1494 compare.

a/cs in Ex. 2 C - 1948 - 53 a3Cs

1948 T & P & L a/c £65980.30.
1.9 79732

This similarity goes right through those a/cs. No.9 that the figures at p.1494 are the Thian 1st report not 2nd. p.1443/4 T's 2nd report. Total income £35,443 Addition of cols. 1 & 3 & subtraction.

Total inc. of Blackhall £20,192
adjusted.

So it is wrong to say they are righty the same. T's report does not include Gian Singh's rent.

Borneman:

The last point. I regret I may have misled the court by including Gian Singh's figures. We were so instructed. But though they are further apart than I thought they are closer than the Crown thinks. Compare again p.1443 and p.1494. In the latter - totals from all year from 1946 to 1957.

Thian's 1st report only covered 1948 - 56. 2nd from 1946. So when see 1946 at top of 1494 assumed it came all from 2nd. It was a mixed 1st and 2nd. See p.1443 2nd report.
Thian's 2nd. 1946 757 = 15,000
1947 2466 = 49,000
It is a mixture. p.1443

(a) Rents: 1 & 2 Thian some must look at trading profits.

Total profits 1948-53 T's 1st report £13,621 (trading profits) Corresponding figs. from T's 2nd report £21,015.

Profits for 1956 & 7 are common £3223
"16844 £24238 £7394 dif. bet. Thian 1 & 2.

p.1494 462,000 was one total
p.1539 462,042
p.1577 513,000

513,000 includes G.S.'s rents.

This point is left for moment. Borneman to proceed on other points.

Summary

1. For relevant purposes of this case it is 1952 Act which apply and not 1958.

My L.F's say that is so far as "wilful neglect" is concerned.

So remains only - power to remit penalty.

2. No proper evidence on which judge could have found fraud is wilful default.

3. If ct. against us on that and Crown entitled to make odd assessments so for both because of fraud or w.d. then in any event they are excessive.

(a) First. Easterbrook's figures so wide of the mark. that they should be rejected and Cook Sutton's figures put in their place; or

(b) At very least it has been shown Easterbrook quite wrong to add Grogan 80,000/- 55,000/- stock. Lump sum contracts 44,000/- and to some degree on legal expenses. Very small. And show haphazard nature. In a/c that same mtg. in the assessment at or adjustment of the specific items.

4. If 1952 Act applies ct. has power to consider the penalty. 2 basis. 1st ct. will reduce the penalties by reference to the deductions from assessments such as Grogan Road. 2nd Reduce the penalties having regard to all the circs. Approach - lack of English. under 1958 Act if specific reduction made.

(O'D. has gone into the earlier figures. I accept what Treadwell said and I do not rely on any rapproachment but the 2 sets of figures. I don't rely on that)

In Court of Appeal

No. 56

Judge's Notes 17th July 1963 (Continued)

1. Application of which Act. Proviso para.1 5th Schedule. "Legal proceedings pending". Not of int. General import - natural meaning - in context. Context is that it would be contrary to nat. justice for leg. not to protect rights and liabilities already become attached in the circs.

My L.F. went on to other circumstances. You don't construe a statute to defeat manifest intention of legislature unless words compel it.

Para.1 of 5th comes after a while new Act. If consolidating act it would be quite clear. Context is that of parties rights in matters begun. Manifest intention is that rights and liabilities already vested shall not be disturbed.

I don't say words are ambiguous. It is a problem to be solved. If in doubt never construe so as to defeat manifest intention. Is one straw in wind. In sect. 81 of 1952. Marginal note. I don't mind whether it is part of the section. It is an indication of approach of the legislature.

Clear that if read the Act through, even though when the tax payer and commsr. are joined in combat there are legal proceedings. Where notice of objection is given both sides have expressed themselves in a certain way there are proceedings. They disagree. They take legal steps to enforce own view. Pending because not complete. Each side has disagreed and will settle by and in course of one process of law.

2. Broad submission that on the facts there was no proper evidence on which fraud or w.d. could be found. Either side could have spent a day each on this issue. When judge had before him a man who did not speak or understand English it is not f. or w.d. to leave things to your auditor.

Seems to me judge is saying there is fraud because it is w.d. etc. trust auditor without inquiry. Judge not justified in that approach.

If be against me on that short point I say no more. Agree with the passages quoted by my L.F. No point in my referring to long transcript of evidence.

3. If on the facts ct. finds it was competent to make these assessments it has been demonstrated it is excessive.

Crown says it is question of fact. Bound to fact. Court must interfere in these circs. Start answer a few years ago the issues of what was meant by q. of law etc. appeared to be understood differently in England and Scotland.

Always laws if no evidence of a certain matter.

What is meant by "proper evidence". By design that dif. was resolved in this way. Edwards v Bairstow went to H. of Lds. for that purpose.

Edwards v. Bairstow 36 Tax cases 207 Dispose of all such problems. Facts immaterial. Simonds & Radcliffe dicta.

p.224 "Before ...
p.227 "At these ...
p.228 "Nor do I
p.229 "My Lords
p.231

Can't be shut out because q. of fact. Fully appreciate one confined to law or mixed. On the evidence accepted the assessments are excessive and the judge wrong in law in upholding these.

Errors so drastic that should reject E's computations and say this was no way to get at it. Take the figure of either of the others. I don't mind which.

In Court of Appeal

No. 56

Judge's Notes 17th July 1963 (Continued)

Secondly they are demonstrably excessive in certain particular instances. Judge can't say may be many errors but I uphold it.

Grogan Rd. property. Ex. J. 80,000
Cost of Gr.Rd. plot 5,320

Treadwell's position impossible this money Cost of bldg. had been treated as part of 1950 income. Don't complain of that. But when sold the profit of 80,000 is brought in also. Record p.683 Summarized. What we look for here is income which is subject to tax. (Sale price 193,000/- p.683 l.40). This shows J. not prepared to reject E in any way. Must take £4,000 off assessment for 1953.

Stock adjustment 55,000/-

He imposed a hidden penalty on R.S. In a period in which business fluctuated he adds comutation figure.

p.737 l.36 75,000 55,000 plus the 20,000/- in Entirely arbitrary. Not figures in 1955-6-7. 13631/- in 1957. Been accepted. Never any credit given. Accumulation never carried forward.

Legal expenses.

Added in. Small amt. But shows the approach of judge. He found some small amount and revenue - and it was his duty to find some amount to reduce by.

Lump sums 44,000/-

No ground to refuse. British Petroleum Co. Ex. J. Round um debits to contracts. E. never put to R.S. that he had made such a remark.

p. 1298.11.4-10 Suggest means his is that not going to recover. Supports it with another prop. But he does not rely on the prop.

Submit we have read good in these points. Erred in law in approaching matter in way he did. I refer particularly on his remark about giving credit for other possible income not found.

p.1301 l.30 - it is wrong in law to purport to have regard to any such matters. p.1303 l.13 "regrettable words".

5. Last point.

How does acceptance of my case affect (whole & part) What this court may do. Consider, manner of construction, ingredients put in to the assessment. Ct. would say assessments for those years would be adjusted accordingly. Having done that accepting power to review penalty. First reduce in accordance with the precise deductions. Then a more general consideration of whole matter.

E. has rounded it all up by a lump sum 120% (152%) Sumerfield. That penalty imposed by a man shown to have been forceful in other matters. Figures that should have been used. Rejected that any credit or a/c should be taken of lack of English. (Treadwell: Penalties are assessed by the Commissioner oral E).

Commsr. having consulted with E did it then.

(Mutual appln. for certificate for 2 counsel).

C.A.V.

T. H. GOULD

17/7

In Court of Appeal

No. 57

Judgment of Gould Ag. P. 24th August 1963

NO. 57

Judgment of Gould Ag. P.

IN THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

CIVIL APPEAL NO. 17 of 1962

BETWEEN

RATTAN SINGH s/o NAGINA SINGH APPELLANT

AND

THE COMMISSIONER OF INCOME TAX RESPONDENT

(Appeal from a judgment and decree of H.M. Supreme Court of Kenya at Nairobi (Mayers J.) dated 31st July, 1961

in

Civil Appeals Nos: 4-11 of 1959 (Consolidated)

Between

Rattan Singh s/o Nagina Singh Appellant

and

The Commissioner of Income Tax Respondent).

JUDGMENT OF GOULD AG. P.

This is an appeal from a judgment and decree of the Supreme Court of Kenya at Nairobi dated the 31st July, 1961, dismissing appeals (which were consolidated) by the appellant against eight additional assessments to income tax for the years of income 1946 to 1953 inclusive.

The appellant, an Asian, was the sole heir of his father Nagina Singh, who had carried on business as a builder for many years prior to his death on 11th January, 1946. The appellant then carried on the business in his father's name According to the income tax returns made by the

the appellant over the relevant period his income was as follows:

1946	£1,168	1947	£867
1948	£887	1949	£938
1950	£1,621	1951	£1,244
1952	£3,888	1953	£3,402

The total is £14,015.

In 1956 the income tax department began to investigate the appellant's affairs and there were a number of interviews with his representatives. Then Mr. Thian of Thian & Bellman, Chartered Accountants, was instructed to investigate; he acted apparently on behalf of the appellant for reference is made in the reports to his instructions and to him as "our client". His first report was dated the 15th November, 1956, and covered only the period of six years from 1948 to 1953. On the 7th October, 1957, Mr. Thian made a further report after "a closer investigation", covering the years 1940 to 1953. Mr. Thian's method was to attempt to reconstruct accounts for the years in question, from such meagre records as had been kept and from information obtained from the appellant and his book-keepers. There were virtually no books or records for 1946 and 1947. Mr. Thian's report of the 7th October, 1957, indicated a total income for the eight years 1946-53 in excess of £35,000, approximately 2½ times the amount returned.

Mr. Easterbrook, the respondent's accountant, who had been concerned since 1946 in the investigation of the case, took Mr. Thian's first report as a starting point and in the light of the second report and his own investigations, made adjustments which resulted in the assessable income being increased to a sum in excess of £64,000. On this basis additional assessments to tax were issued on the 21st May, 1958. On the 30th September, 1958, the appellant gave notice of objection. On the 4th December, 1958, notice of refusal of the objection was given by the respondent. Up to that time the income tax

legislation in force was comprised in the East African Income Tax (Management) Act, 1952. On the 30th December, 1958, the East African Income Tax (Management) Act, 1958, was published in the Gazette, a fact the significance of which will shortly be made plain. On the 31st December, 1958, the appellant gave notice of his intention to appeal against the additional assessments for the relevant years, and the ensuing appeals were determined on the 31st July, 1961.

I will deal first with Grounds 1 &3 of the Memorandum of Appeal to this court. It is unnecessary to set them out but, in brief, they challenge the learned judge's finding on the question which act was properly applicable in the appeal. The 1958 Act, by section 1(1) was deemed to have come into operation on the 1st January, 1958, but that provision was "subject to the Fifth Schedule". Paragraph 1 of the Fifth Schedule (excluding sub-paragraph (b) of the proviso) reads:-

> "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 -
>
> (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;"

A reference to paragraph (b) of the proviso appears in the Memorandum of Appeal but the subject was not pursued in argument and it is therefore unnecessary to reproduce it. It will be seen from the proviso that Parts X to XVII of the 1958 Act are to be read into the 1952 Act as from the relevant date except in the circumstances dealt with in sub-paragraph (a). The question whether those Parts are applicable in the present case has two-fold significance.

In the first place section 105 of the 1958 Act (which is in Part XII) provides that an assessment may be made at any time prior to the expiry of seven years after the year of income to which it relates. If that were all, and if the section is applicable, the majority of the assessments in this case would be time barred. But the section contains the following proviso:-

> "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;"

I refer particularly to the words "fraud or any gross or wilful neglect" in that passage. Under section 101(1)(b) of the 1958 Act (Part XI) a person who omits from his tax return any amount which should have been included therein shall be charged, where the omission was due to "any fraud or to any gross neglect" with substantial additional tax. In the 1952 Act the corresponding provisions are sections 72 and 40. Proviso (a) in section 72 abrogates the seven year limitation on assessments, "where any fraud or wilful default has been committed by or on behalf of any person...". Section 40(1)(b) provides for additional tax where amounts have been omitted from a return and subsection (2) reads:-

> "(2) If the Commissioner is satisfied that the default in rendering the return 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."

The difference is not very marked. Under the 1952 Act the test for retention of additional tax is "fraud or gross or wilful neglect"; under the 1958 Act the test for imposition of additional tax is "fraud or gross neglect". As regards limitation the 1952 Act is "fraud or wilful default" and the1958 Act "fraud or any gross or wilful neglect". The last phrase may be slightly wider than the former.

The second relevant difference between the two Acts arises in a limitation imposed by the 1958 Act on the powers of a local committee or a court on appeal against an assessment, Subsections (5) and (6) of section 101 of the 1958 Act (in Part XI) do not appear in the 1952 Act. Subsection (5) provides that where a ground of appeal relates to the charge of additional tax the decision of the committee or judge shall be confined to the question whether the failure, default or omission which gave rise to the charge was due to fraud or gross neglect. If the committee or judge finds that the omission etc. was not so due the whole additional tax is remitted. Under subsection (6) the Commissioner may remit the whole or part of any additional tax and except as provided in subsection (5) there is no appeal against his decision.

When the appeal was argued in the Supreme Court it was on the basis that the determination of the question whether the case did or did not fall within the provisions of paragraph (a) of the proviso to paragraph 1 of the Fifth schedule to the 1958 Act governed the matter of the applicability of the 1952 or 1958 Act as the case may be, in respect of both points of distinction between those Acts which I have referred to above. In this court, however, counsel for the respondent took up a different position. He conceded that as the applicability of Parts X to XVII of the 1958 Act under the proviso abovementioned took effect only from the date of the publication of the Act on the 30th December, 1958, an additional assessment imposed some six months earlier must be based on the law as it then stood; that meant that section 72 of the 1952 Act applied and that to justify the assessments which would otherwise be time barred the respondent had to show "fraud or

wilful default". Counsel's concession did not, however, extend to the question of the powers of a committee or judge on an appeal as that was a matter arising after the publication of the 1958 Act. Therefore the question whether the Supreme Court had power to remit the tax which was in the nature of a penalty remains a live issue.

The relevant portion of paragraph 1 of the Fifth Schedule has already been set out. The important words are "legal proceedings by or against the Commissioner which are pending". The date of publication being the 30th December, 1958, the question is whether at that date any such proceedings were pending. The learned Judge in the Supreme Court held the contrary. Before this court counsel for the appellant argued that on the 4th December, 1958, at the latest, that being the date of the refusal by the respondent of the appellant's objection, proceedings were pending. He submitted that the assessments in May, 1958, the objection thereto, and the refusal of the objection were all steps in the due process of law from which further proceedings might eventuate, all being part of the process of determination of legal rights. He emphasized that the phrase "legal proceedings" must be considered in the particular context, that of the 1952 and 1958 Acts, the context indicated an intention to preserve rights and liabilities already vested.

Counsel for the respondent agreed that the words in question must be construed in their context. Two types of judicial proceedings were envisaged in the Acts - appeal proceedings as authorised in sections 77 and 78 of the 1952 Act and a suit by the Commissioner for the recovery of tax under section 86. He did not contend for a narrow interpretation of the word proceedings, which is not necessarily limited to court proceedings, but in their ordinary natural meaning in the context the words "legal proceedings ..... pending", referred to judicial or quasi judicial proceedings. The Commissioner's statutory duty to assess is administrative and unilateral and any decision by him including a decision on an objection cannot be quasi judicial. In the present case the legal proceedings were commenced by the

notice of appeal which was one day after the publication of the 1958 Act.

The court was referred to Smith v Williams (1922) 1 K.B. 158 in which it was held that a notice requiring Commissioners under section 59 of the Taxes Management Act, 1880, to state and sign a case for the opinion of the High Court, was the commencement of proceedings. Counsel for the respondent, however, pointed out that it was not argued that the proceedings in that case might have commenced even earlier. I think the case presents no complete analogy, for it was clear there that what was in contemplation was proceedings in a Court. Bunciman & Co. v Smith & Co. (1904) 20 T.L.R. 625 merely indicates that in the context of section 496 of the Merchant Shipping Act, 1894, "legal proceedings" meant legal process taken to enforce the rights of the ship owner. Little is to be drawn from that case except perhaps the concept of enforceability; it could be said that legal proceedings against the Commissioner comprise only that process of law whereby a right claimed against him (in the present case a right to have an assessment reduced or set aside) can be enforced. That would not include the steps incidental to the fixing of the tax liability in which the tax payer may participate by way of negotiation or argument but in relation to which his rights can only be determined finally and effectively by resort to legal proceedings. As to the meaning of the word "pending" counsel for the respondent submitted that legal proceedings were pending as soon as they were commenced. He referred to section 11 of the Administration of Justice Act, 1960, (relating to contempt of court) and the differentiation there made between proceedings that are pending and those that are imminent. He referred also to the use of "pending" and "anticipated" in relation to proceedings in section 1(3) of the (English) Evidence Act, 1938.

In the Supreme Court the learned Judge held that there were no legal proceedings pending at the date of the publication of the 1958 Act, as the notice of appeal was not given until the next day. His reasons were (a) that the legal

proceedings must be by or against the Commissioner, who cannot be a judge in his own cause; as he determines the objection that cannot be a proceedings against him, and (b) the original assessment is appealed against and it could hardly be said that legal proceedings were pending after every assessment until the time for objection had expired.

For my part, I think, that the first of these reasons is the basic one. The second may be a logical consequence of it. There can be no doubt that legal proceedings in the present case commenced with the appeals initiated by the notice of appeal of the 31st December, 1958 - that is legal proceedings in the sense of court proceedings, which, I venture to think, is what is normally thought of when the phrase is used generally and apart from considerations of context. Proceedings in that sense, could not be pending before the 31st December, 1958, and if legal proceedings are to be regarded as pending before that date they must be of a different nature. Hence Counsel for the appellant suggests that every step in the legal process of determining tax liability is a step in a legal proceedings. That takes him too far, as it would extend right back to the return of income by a tax payer. So it is said that the proceedings commence when the amount of tax liability is put in issue by notice of objection and its rejection in whole or in part. I cannot accept this, though I think that the fact that this procedure is a condition precedent to proceedings by way of appeal is the strongest argument in the appellant's favour. But can the steps at the stage of objection be regarded as proceedings by or against the Commissioner? They are in the nature of negotiation. If the tax payer decided not to appeal could it be said the legal proceedings had been pending against the Commissioner where all he had been called upon to do was to consider the objections and come to his own decision upon them? I think the proceedings at that stage merely finalise the assessment and the only proceedings which can be said to be brought "against" the Commissioner are those which are brought before some other tribunal or person who has been given legal authority to interfere and

settle the issue between the Commissioner and the tax payer. Those are the appeal proceedings initiated by the notice of appeal and I think there is a distinction both in law and logic between them and the earlier steps. Up to the date of the notice of appeal the proceedings by way of appeal may (or may not) have been anticipated, but they cannot, in my opinion, be said to have been pending. As to the broad argument for the appellant that the context requires the Fifth Schedule to be read so as to preserve existing rights and liabilities it is clear that the proviso to paragraph 1 does in fact contemplate interference with such rights and liabilities unless they have been finally determined before the publication of the act or unless proceedings were then pending. The submission therefore lends no assistance in the determination of the question where the legislature intended the dividing line to be drawn. For the reasons I have given I am of opinon that the learned judge's decision on this issue was correct and that he consequently had no power to remit or mitigate the additional tax imposed by way of penalty. He could, of course, decide the question whether the failure default or omission was due to any fraud or gross neglect under section 101(5) of the 1958 Act.

Before discussing the question of whether any of the assessments were statute barred I will deal with a matter which goes to the allegation that the assessments were based on an excessive estimate of the appellant's income and therefore has also a bearing on whether the appellant or another person in relation to the returns was guilty of fraud or wilful default. At the hearing of the appeal the appellant put forward evidence and reports by partners in Messrs. Cook Sutton & Company, Accountants, of whom Mr. Blackhall gave the more important evidence. Their investigations took place at a later stage than that of Mr. Thian and, unlike his, were based on the "capital worth" system. That has been briefly described as a system in which total capital worth at the opening date is subtracted from total

capital worth at the closing date; the difference gives a starting point for ascertainment of income and various adjustments are made. Personal drawings and other non-deductible expenditure are added; capital receipts are deducted and capital expenditure added. Then, if the period taken exceeds a year, an apportionment of the income must be made between the years. Mr. Blackhall's estimate, made on this basis, was very substantially lower than Mr. Thian's, but the learned judge nevertheless accepted the latter. Ground 8 of the Memorandum of Appeal alleges that in so doing he did not draw the correct inference from the evidence before him. Before this Court counsel for the appellant did not attempt to go into the evidence referred to but made the general allegation that the "capital worth" system was so well known that it should not have been rejected in the present case. I should mention in passing that it was at one stage contended for the appellant in argument before this Court that the the results of the calculations of Mr. Thian and Mr. Blackhall did not differ very substantially, but this submission was later abandoned.

In his judgment the learned judge in fact accepted evidence that the system is commonly adopted in cases where records are incomplete; but he devoted a number of pages in his judgment to indicating why he would not accept it in the present case. For one thing, it depended largely upon the thoroughness and efficiency with which the accountant extracted information from the tax payer and the reliability of the information so given. Mr. Blackhall did not impress him as being at all likely so to conduct an examination and he gave cogent reasons for believing that information given by the appellant would be unreliable. Mr. Blackhall was moreover handicapped by the absence of books which had been stolen or disappeared. The learned judge pointed out that Mr. Blackhall in cross-examination agreed that his estimate of income must be increased by some £7,000. he considered his demeanour under cross-examination was unimpressive and that he had been shown to have made inadequate inquiries on certain matters. He had no hesitation in concluding that Mr. Blackhall's computation of income was wholly

unreliable. Whether or not it would be open to this court to review the approach of the learned judge to this question in an appeal limited to matters of law or mixed fact and law, I am of the opinion that the appellant has entirely failed to show that he was in any respect wrong.

I come now to the question of "fraud or wilful default" which governs the Commissioner's right to assess after seven years from the expiry of a particular year of income. The words quoted are from section 72 of the 1952 Act, and, as I have already mentioned, counsel for the respondent has conceded in this court that they are applicable. It will be well to preface my remarks on this subject by indicating that there has been no challenge to the learned Judge's directions to himself upon the onus of proof. He held that the burden of proving fraud or gross or wilful neglect rested on the respondent; he referred to Bater v Bater (1950) 2 All E.R. 458 and the reference by Denning L.J. at p.459 to the standard of proof in fraud. On the subject of the general burden he referred to section 113(c) of the 1958 Act under which the onus of proving that an assessment appealed against is excessive is on the person assessed; (the 1952 provision is similar). He said however, that the degree of proof required is far lower than that required to show a fraudulent omission of income.

The learned judge approached the question in the first place on the basis of the wording of the 1958 Act, under which the Commissioner must show "any fraud or any gross or wilful neglect." Later he said:-

> "Everything to which I have referred as warranting the conclusion that there was fraud either by Nandha or by the Appellant or both of them in relation to tax, would apply with equal force irrespective of whether the question of the existence or otherwise of fraud arose to be determined under the Act of 1952 or under that of 1958".

under the 1952 Act of course the words are "fraud or wilful default", and I would agree indeed that

nothing turns on the rather subtle distinction in the present case. The circumstances are such that if the appellant is blameworthy he must be so in high degree. The learned judge quoted the following passage from the judgment of Bowen L.J. in In re Young and Harston's contract, (1885) 31 Ch.D. 168 at 174-5:-

> "Default is a purely relative term, just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances - not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction. The other word which it is sought to define is 'wilful'. That is a word of familiar use in every branch of law, and although in some branches of the law it may have a special meaning, it generally, as used in courts of law, implied nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent."

The learned judge's conclusion on this subject was expressed thus:

> "For the foregoing reason I consider that the respondent has established, not merely that degree of preponderance of probability which is sufficient to discharge the onus of proof in Civil proceedings but, beyond a reasonable doubt, that there was fraud or gross or wilful neglect or wilful default on the part of the appellant and Nandha in relation to tax in respect of each of the years of income in respect of which Mr. Foot contends that the assessments were out of time. Hence, I hold that each of the assessment, the subject of these appeals, was made timeously."

As I read his judgment the learned judge had two main factors in mind in arriving at this conclusion. The first, a general one, but to my

own mind the more important, was the major discrepancies between the income returned over the relevant years and the true income. Even if the latter is taken at the figure shown in Mr. Thian's second report and not as estimated by Mr. Easterbrook the amount returned over the relevant period was only 40% of what it should have been. It would take cogent explanation of this to negative the clear inference that this was deliberate fraud on the part of someone. The appellant's explanation was that his practice had been to sign tax return forms in blank and leave it to his auditor Mr. Nandha to fill them in and forward them to the authorities. He also signed the accompanying accounts. Counsel in the Court below stated that Mr. Nandha left for India in 1956 and could not be traced. The books during the relevant period, however, were kept by a Mr. Shaffie who was not called as a witness and there was no such explanation in his case.

That the learned judge regarded the appellant as a man unworthy of credit appears from a number of passages in his judgment. There is early reference to his having signed a certificate of full disclosure containing specific reference to his bank accounts - it later became apparent that he had omitted to disclose two such accounts. Later the Learned judge held that he had either consciously sworn to a false estate duty affidavit in relation to his father's estate or had omitted to check the accuracy of the figures. The learned judge also held that it was impossible to place any reliance upon the appellant's version of his personal expenditure; he held also that the appellant falsely put forward an allegation that his wife had lent the business Shs.30,000/-. With regard to the particular matter now under consideration two aspects of the appellant's evidence were rejected by the judge. He found it "difficult to believe" that anyone conducting such a successful business could be so uninterested as never to seek to ascertain the sum returned as his income for tax pruposes. He found it "incredible" that the appellant never asked Mr. Nandha whether the business was making a profit or a loss.

The second matter which the learned judge referred to was a claim for an allowance in respect of Gian Singh, a son of the appellant, in the returns for the relevant years. He was represented as having no income, whereas the appellant claimed that certain rentals belonged to Gian Singh. It followed that the returns were not honest either in claiming that Gian Singh had no income, or in failing to return the rental income as the appellant's own.

The learned judge summed up his view on these two aspects of the matter as follows:-

> "Hence, as I do not believe that the appellant was in fact ignorant of what Nandha was doing on his behalf, and do not believe that Nandha would have made fraudulent returns on behalf of the appellant without the appellant's complicity, it follows that in my view the appellant committed fraud in relation to tax in respect of each of the years of income 1946 to 1953, both inclusive".

Against these findings counsel for the appellant advanced only one short submission. Albeit persuasively argued it amounted only to this: that having regard to the acknowledged fact that the appellant could write no English beyond his signature and knew very little of the language, and to the fact that many large companies and organisations rely and must rely on auditors and accountants for their tax returns, the appellant should have been believed when he claimed ignorance. I think that the answer is that the judge was considering a specific case. The business was not a large company but a solely owned and operated building business and one which the appellant carried on most successfully in spite of the lack of knowledge of English. The learned judge, a judge of experience, had listened to a mass of evidence concerning that business, including that of the appellant, whose demeanour the judge had full opportunity of observing. There has been no challenge to the evidence upon which the judge formed his opinion on the various matters mentioned above which indicated dishonesty. Consideration of the generalization which has been urged upon this court does not incline me to the

opinion that the learned judge erred in any way in his assessment of the appellant or in his finding of complicity on the part of the appellant in the fraudulent returns. It would appear that the learned judge might also have relied (though he did not do so specifically) upon section 100 of the 1958 Act (section 62 of the 1952 Act) whereby any person signing a return furnished under the Act shall be deemed cognizant of all matters contained therein.

The learned judge went on to consider the position in case he was wrong in disbelieving the appellant and pointed out that (under both the 1952 and 1958 Acts) the Commissioner may raise an additional assessment after the expiration of the seven year limitation whenever there is fraud or gross or wilful neglect by or on behalf of any person in relation to tax. It is not limited to the tax payer himself. Having regard to my view that the judgment should be sustained on the question of the appellant's complicity I do not deem it necessary to go into this second aspect. For completeness I would add that, although the judge did not specifically deal with section 101(5) of the 1958 Act (under which additional tax is remitted on a finding negativing fraud or gross neglect) his findings are wide enough to cover the wording used in that subsection.

What has been discussed so far covers all the grounds of appeal in the Memorandum except Ground 4, which was abandoned, and certain grounds which challenge the assessment as being excessive. Ground 8 relates to the "capital worth" system and I have already rejected the appellant's submissions on that subject. The only remaining challenge is directed to a number of specific additions made by Mr. Easterbrook to the income as shown in Mr. Thian's second report. Before dealing with these I will consider briefly an objection taken to them on behalf of the respondent.

The submission was that those particular grounds raised questions of pure fact and as such could not be considered by the court in this appeal.

Counsel put it that the only circumstances in which such findings could be reconsidered by this court were those in which there was no evidence to support the findings or where the findings were perverse. I think that perhaps the language used in Edwards v Bairstow & Harrison (1955) 36 T.C. 207 may, in a tax case, open the door a little more widely than the word "perverse" indicates. I will quote only from the speech of Lord Redcliffe at page 229:-

"I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inference drawn from them. When the case comes before the Court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the Case contains anything ex facie which is bad law and which bears upon the determination it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the Court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves and only to take their colour from the combination of circumstances in which they are found to occur."

In Sheikh Fazal Ilahi Noordin Charitable Trust v Commissioner of Income Tax. (1957) E.A. 616, Sir Ronald Sinclair, Vice President (as he then was) put the matter succinetly thus, thus, at p.624:-

> "In a limited appeal such as this we cannot interfere with a finding of fact unless there is no evidence to support it or unless the finding is unreasonable having regard to the evidence."

Edward's case (supra) does not appear to have been considered there, but the passage quoted occurs in a part of the Vice President's judgment which indicates that he was speaking of conclusions rather than primary facts and I think his approach, briefly put, is similar to that conveyed by Edward's case.

In INCOME TAX LAW & PRACTICE by PLUNKETT & NEWPORT (29th Edn.) at para. 363 it is put thus:-

> "The High Court is not entitled to substitute its own view of the facts as decided by the Commissioners unless either there was no evidence which would support the conclusions of the Commissioners or if the decision of the Commissioners is wholly inconsistent with the facts as found in evidence."

It will be necessary to bear these principles in mind when considering the specific matters which remain to be discussed.

The first of such matters concerns what has been known as the Grogan Road property. The appellant bought a plot of land in that road; on one half he erected a house and store for himself and on the other, shop premises. The whole cost was debited to capital account. He then sold the shop premises for Shs. 193,000/-. The respondent contended that the profit was taxable as income and the appellant that it was a capital profit. The learned judge held that it was a capital transaction and, as the respondent has not cross appealed against that decision it is not necessary for me to discuss the reasons for it. What is in issue on the appeal is the learned

judge's refusal to make any corresponding adjustment in the relevant assessment. He said:-

> "This conclusion, however, is not favourable to the taxpayer in as much as if I am right in holding that this was a capital transaction, the entire cost of the plot upon which the Grogan Road business building stands and of the construction of that building ought not to have been deducted from the gross profits of Nagina Singh (Builders), that this is so is manifest when it is remembered that while monies expended for the purpose of earning income are deductible expenses, monies expended for the purpose of acquiring an asset which will, in turn, be used for earning income are not so deductible."
>
> .....
>
> "Hence, although the profit derived by him from the transaction, that is to say, the sum which represents the difference between the price for which he sold and the price which it cost him to acquire the plot and to build the building is a capital profit, the cost of the plot and of the building must be added back for income tax purposes."

All that is no doubt true, but the question is does it reflect the actualities? The appellant says it does not. In his computations Mr. Easterbrook added back to the appellant's Income for the year 1950 Shs.51,320/- under the heading "Cost of Grogan Road Plot (est.)" and in 1953 he added the item Shs. 80,000/- as "Profit on Sale of Grogan Road building". Counsel for the appellant submitted that having regard to the adding back of the Shs. 51,320/-, the whole of the cost of the plot and building had already been taken into account and that the judge should have therefore allowed the Shs.80,000/-. Counsel referred to the record of Mr. Easterbrook's evidence and the following passage in particular:-

> "Q. Will you first of all explain how you arrive at this figure of Shs. 51,320/- which you have called cost of Grogan Road plot estimated?

A. According to the information I have the plot cost Shs. 26,000/-. It was then sub-divided into two plots. The legal cost of acquisition was Shs.400/-. So that in relation to the one plot occupied by Mr. Rattan Singh there is Shs.13,400/-. After discussion the cost of putting up the building in which Mr. Rattan Singh lived was Shs.90,000/-, making a total of 103,400/-. In the report Mr. Rattan Singh has been charged Shs.5,080/- which leaves 98,320/- to have come from somewhere. To that is added 13,000/- for the other half because it was in that year that the whole plot was purchased, which gives a total expenditure relating to 1950 of 111,320/-. In the drawings account included in the report there is a debit to drawings of 60,000/- described as Grogan Road building, which I understand has been credited to business sales, thereby putting into profits as it were 60,000/-. As the total expended in that year is 111,320/- and only 60,000/- has been recovered, the 51,320/- is the difference between what was charged to Mr. Rattan Singh and what was actually expended by him."

Mr. Easterbrook's evidence as a whole, however, indicates that he was there dealing with the building erected by the appellant for his own use, though he allowed for the whole and not only one half of the cost of the land. If there is any doubt about this it is resolved by an examination of Mr. Thian's reports. The earlier one, having commented that the cost of "the store and residence at Grogan Road" was met from business funds, stated that entries had been passed covering the cost of the building only, namely Shs. 60,000/-. There was then reference to the necessity for a further adjustment to the credit of revenue for the cost of the plot, Shs.28,000/-, less a deposit of Shs. 5,080/45 accounted for in 1950. In the 1957 report occur the following passages :-

"According to our report dated the 15th November, 1956, the information contained therein regarding the two properties of 5th Avenue, Parklands, and Grogan Road does not appear to present a true position in as much as (1) the valuation made by Messrs. Sauvage & Scade Ltd., exceeds the valuation made by our client to you on the 18th April, 1956, and (2) the cost of Grogan Road property given at that time referred only to one position of the building.

The position would now appear to be as follows:-

1. Valuation of building erected in 1950 on Plot L.R. 209/136/68 known as Grogan Road Property and valued by Messrs. Sauvage & Scade Ltd. at 83,200/-

2. Valuation of buildings erected in 1950 on portion of the above plot and sold in 1953 to one Kashmirilal and valued by our client at ..... 100,000/- "

"In dealing with the accounts, it is, of course, proper to bring into account the cost of these buildings since it is clear that the materials and labour were charged against the firm and not to our client in his personal capacity. It is necessary, therefore, in adjusting items 1 and 2 above for 1950, to add the amount of 123,200/- to the profit as under:-

Amount credited in accordance with account submitted previously and per our report dated 15th November, 1956.	60,000/-
Difference still to be accounted for as above	123,200/-
Total of items 1 and 2	183,200/-

In addition, the sale in 1953 of the one portion of the property was shown by us as Shs.190,000/- whereas, in fact, it was sold for 193,000/-. The difference of 3,000/- should also be adjusted.

It would appear that, subject to the correctness or otherwise of the valuation placed upon that portion of the property sold by our client, the resultant profit on the sale was as follows:-

Costs of Plots (two)	26,000/-
Cost of building	100,000/-
Profit	67,000/-
Sold for (1953)	193,000/-

Since however, this is an isolated transaction and a capital profit which, in our opinion, falls outside the normal scope of the business of our client, we have omitted this profit of 67,000/- from his income for 1953".

Clearly what is being said there is that the cost of both buildings was Shs. 183,200/- of which Shs. 60,000/- had been included in the accounts with the 1956 report. It appears that the adjustment for the land itself was not made at that time. In the adjustment of balance sheets included with the second report Mr. Thian added, for the year 1950, additional taxable income of Shs. 127,091/99 which can safely be assumed to include the Shs. 123,200/- above mentioned. If Mr. Easterbrook had opened his calculations on a basis which included that amendment then the appellant could rightly have claimed that the cost of both buildings had been added to his taxable income. He did not, however, pursue that course but in relation to the years 1948 - 53 (inclusive) he started with the accounts accompanying the 1956 report, and made his own adjustments.

In the first place, as appears from Mr. Easterbrook's evidence, the value of the building lived in by the appellant was taken (after discussion) as Shs.90,000/- and not Shs. 83,200/- as stated in the second report. The calculation then can be set out thus:-

Cost of one house		Shs.	90,000
Less dealt with in 1956 a/cs			60,000
			30,000
Add legal costs			400
Add (whole) cost of land	26,000		
Less deposit allowed for	5,080		20,920
		Shs.	51,320

That was the amount added back in 1950 and it does not take into consideration the Shs. 100,000/- cost of the second building which was later sold. If, therefore, the Shs. 80,000/- profit on that sale is to be regarded as a capital profit the Shs.100,000/- expenditure must be added back to income. That would more than cover the Shs.80,000/- charged in 1953 as a revenue profit. In my judgment the learned judge was correct in his ruling on this point.

The next specific matter relates to the addition to assessable income of a number of amounts under the heading in Mr. Easterbrook's computation of "Round sum Creditors unexplained". The years in question are 1948, 1950, 1951 and 1953 and the total is Shs.55,980/-. In his judgment the learned judge said it was Shs.44,000/- but this must be an inadvertence as Mr. Easterbrook's evidence on the "round sum creditors unexplained" item contains a passage to which the judge refers and there is no doubt that that item is the one here in question. The judgment, on this topic, reads:-

> "These contracts were shown in the books in round figures without any details being given as to their nature or as to the parties. Easterbrook requested the appellant or his advisers to supply statements from the other contracting parties that these monies were in fact due to them. According to his version he was informed by the appellant that he did not intend to ask the contracting parties for statements because some of them were dead and he had no intention of paying the others."

There is a slight inaccuracy there in relation to Mr. Easterbrook's evidence as recorded. What the witness quoted the appellant as having said is "Some of the people have died and I don't intend to pay them". Another relevant passage in the judgment reads:-

> "The fact, if it be a fact, that the appellant had no intention of paying creditors would in itself deprive the sums due to those creditors of their character of deductible expenses as it would be a novel doctrine that monies could be deducted for the purpose of income tax as revenue expenditure when in fact there was no intention of incurring that expenditure. Quite apart from the foregoing, the failure of the appellant to justify these sums seems to me to indicate that the preponderance of probability is that the liability to which they relate was never in fact incurred and that these sums were fictitious entries in the books."

There is, in my opinion, an error in law in the first of those sentences and counsel for the respondent has not contended the contrary. If a trader buys stock on credit the amount does not lose its character as a deductible expense because he says he will not pay it or fails or refuses to do so. I say nothing as to the position which would arise if for some reason the money was legally irrecoverable. For the respondent it was contended that the decision should be supported on the basis of the second

sentence in the passage last quoted. I was at first inclined to doubt whether this was intended to be a firm finding but it would seem that it was, for in the next sentence the learned judge used the word "conclusion" in relation to it. That being the position I do not think the appellant has shown any basis for interference with the finding, which in fact goes further than was necessary. If the learned judge had found simply that the appellant had been asked to obtain statements from the creditors in support of the various items, had failed to do so, and then in the appeal had failed to discharge the onus which was on him to show that the amounts should not have been treated as income, that would have sufficed. I think that the appeal fails in relation to these amounts.

Next, in order of argument, was a sum of Shs. 36,506/34 spent in legal expenses which the respondent refused to allow as a deduction from income. During the early stages of negotiation no particulars of these expenses were supplied. Later an advocate's bill of costs was submitted, but the respondent made no deductions. The learned judge thought that the advocate's account contained some items relating to expenses which would be deductible, but many which might or might not be. He considered it impossible for the respondent or the court, without further information, to say what sum ought properly to have been allowed. The appellant has contended in this court that the judge should have allowed any item which seemed to him to be a revenue expense. I will deal with this matter quite shortly. Where a matter such as this is in issue before a court, and the onus is on the taxpayer, it is entirely insufficient for him to produce a bill extending over a number of years and tell the court to read it and make a guess. Even now counsel has tendered no list of items which could be said to speak for themselves. In cross-examination Mr. Easterbrook, questioned by the judge, conceded that in the case of a few small items he had sufficient information to establish that payments were deductible; the judge commented "Indeed I think under Shs.20/- in each case". Such items I would treat as falling within the maxim "De minimus non curat lex". As to the

others the onus on the appellant has not been discharged.

For the appellant, counsel's next submission related to stock-in-trade. His argument originally embraced work in progress as well but that was abandoned. In his judgment the learned judge dealt with both of these subjects together and in rather general terms. He concluded that while Mr. Easterbrook's estimate in relation to work in progress (I think that he was in reality there speaking of stock-in-trade as well) might be excessive he had no material by which he could determine by how much in any particular year.

The argument concerning stock in trade may be expressed thus. The stock figure estimated by Mr. Thian for the purpose of his first report accounts was Shs.20,000/-, and this figure was retained throughout the period 1948 to 1953. Mr. Easterbrook arbitrarily added Shs. 11,000/- in each of the years 1949 to 1953 (inclusive) resulting in a theoretical build up of stock to Shs. 75,000/-. In the 1957 accounts there is what can be presumed to be a factual valuation of stock as at the 31st December of that year at Shs.13,631/63 and these accounts were accepted by the respondent. It was submitted that the learned judge should have inferred from this figure that Mr. Easterbrook had taken an exaggerated view of the value of the stocks carried by this type of business, and should have made a reduction accordingly. Before referring to Mr. Easterbrook's evidence I note that in the balance sheet as at the 31st December, 1956, stock on hand is shown as Shs.50,450/- though the closing stock in the Trading and Profit & Loss Account for that year and the opening stock for 1957 is still the old arbitrary figure of Shs.20,000/-. I do not understand this seeming contradiction, which was not I think, mentioned by counsel, and I propose to disregard it.

Mr. Easterbrook's evidence was that he had been unable to agree with Mr. Thian and representatives of the appellant about the stock figure. He had available accounts of comparable

businesses which indicated that stock might vary between 3% and 6% of turnover. His estimate of Shs. 75,000/- was based on 6% of the turnover for 1953 but the additional Shs. 55,000/- was spread back over five years as being more favourable to the taxpayer than adding it all in one year, though it gave an artificial appearance of annual increases of stock. No stock records had been kept.

In Court of Appeal

No. 57

Judgment of Gould Ag. P. 24th August 1963 (Continued)

The challenge to this adjustment on the basis of a single factual figure some four years later than 1953 is not very strong. Nevertheless the learned judge thought the amount added back was excessive, and there seems no particular reason why Mr. Easterbrook should have taken 6% rather than 3%. The matter is one of inference rather than of primary fact but in any event I think this court is entitled to interfere because of one of the reasons given by the learned judge for not giving effect to his opinion that Mr. Easterbrook's estimates may have been sometimes excessive. The learned judge took into account the possibility that the appellant had other undisclosed sources of income. No authority was quoted to the court and I know of none, but in my opinion this is a misdirection, and the judge should have made a reduction where he considered an addition excessive. I therefore propose to allow the appeal on this particular point and make a reduction, which must necessarily be arbitrary. I would reduce the amount added back from Shs. 55,000/- to Shs. 27,500/- spread over the same five years, in amounts of Shs. 5,500/- each. In a case such as this, where the additional tax in the nature of a penalty is well below the maximum (the court was informed that the amount imposed was approximately 150%) the reduction I have indicated does not render any portion of such additional tax beyond the Commissioner's jurisdiction. By virtue of section 101(5) of the 1958 Act I do not think that this court has power to

order a proportionate reduction in the additional tax but the Commissioner has power to reduce it under subsection (6). As the additional tax was presumably imposed by way of a percentage no doubt he will do so.

In case my opinion that the provisions of the 1958 Act apply to this appeal is incorrect, I would add that it is not a case in which I would interfere generally with the penalty imposed by the respondent. It has been urged that his lack of English should be taken into consideration. Perhaps it has, for the maximum penalty has not been imposed. The learned judge obviously considered the appellant to be thoroughly dishonest and I have no reason to differ.

In the result, I would dismiss the appeal except that I would order the assessments for 1949 to 1953 (inclusive) to be reduced as mentioned above by Shs. 5,500/- each. As to costs, the degree of success of the appellant is negligible in relation to the amount involved in the appeal. I would, therefore, order that the appellant pay the respondent's costs of the appeal and certify for two counsel.

Dated at Nairobi this 24th day of August, 1963.

T. J. GOULD

.....

ACTING PRESIDENT

NO. 58

Judgment of Crawshaw Ag. V-P.

IN THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

CIVIL APPEAL NO: 17 OF 1962

BETWEEN

RATTAN SINGH s/o NAGINA SINGH APPELLANT

AND

THE COMMISSIONER OF INCOME TAX RESPONDENT

(Appeal from a judgment and decree of H.M. Supreme Court of Kenya at Nairobi (Mayers J.) dated 31st July, 1961

in

Civil Appeals Nos. 4-11 of 1959 (Consolidated)

Between

Rattan Singh s/o Nagina Singh Appellant

and

The Commissioner of Income Tax Respondent)

JUDGMENT OF CRAWSHAW AG. V-P.

I have read the judgment of the learned Acting President; I agree with his reasoning and conclusions and with the orders proposed by him.

Dated at Nairobi this 24th day of August, 1963.

E.D.W. CRAWSHAW

.....

ACTING VICE-PRESIDENT

In Court of Appeal

No. 59

Judgment of Edmonds J. 24th August 1963

NO. 59

Judgment of Edmonds J.

IN THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

CIVIL APPEAL NO: 17 OF 1962

BETWEEN

RATTAN SINGH s/o NAGINA SINGH APPELLANT

AND

THE COMMISSIONER OF INCOME TAX RESPONDENT

(Appeal from a judgment and decree of H.M. Supreme Court of Kenya at Nairobi (Mayers J.) dated 31st July, 1961

in

Civil Appeals Nos: 4 - 11 of 1959 (Consolidated)

Between

Rattan Singh s/o Nagina Singh Appellant

and

The Commissioner of Income Tax Respondent)

JUDGMENT OF EDMONDS J.

I also agree and have nothing to add.

Dated at Nairobi this 24th day of August, 1963.

E.J. EDMONDS.
JUDGE

I certify that this is a true copy of the original.

Acting Associate Registrar

NO. 60

Order

IN THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

CIVIL APPEAL NO. 17 of 1962

BETWEEN

RATTAN SINGH s/o NAGINA SINGH APPELLANT

VERSUS

THE COMMISSIONER OF INCOME TAX RESPONDENT

(Appeal from a judgment and decree of Her Majesty's Supreme Court of Kenya at Nairobi - Mayers J. dated 31st July, 1961)

in

Civil Appeals Nos. 4 to 11 of 1959 (consolidated)

between

Rattan Singh s/o Nagina Singh Appellant

versus

The Commissioner of Income Tax Respondent

In Court this 24th day of August, 1963.

BEFORE The Honourable the Acting President (Sir Trevor Gould)

The Honourable the Acting Vice-President (Mr. Justice Crawshaw)

The Honourable Mr. Justice Edmonds, a Judge of the Court.

In Court of Appeal

No. 60

Order 24th August 1963 (Continued)

O R D E R

THIS APPEAL coming on for hearing on the 15th, 16th and 17th days of July, 1963, in the presence of Roy Borneman, Esquire and Bryan O'Donovan, Esquire, of Counsel for the Appellant and G. C. Thornton, Esquire and P.J. Treadwell, Esquire, of Counsel for the Respondent IT WAS ORDERED that this appeal do stand for judgment and upon the same coming for judgment this day IT IS ORDERED:-

(a) that this appeal be and is hereby dismissed;

(b) that the assessment for the year of income 1949, 1950, 1951, 1952 and 1953 be and is hereby reduced by the sum of Shs.5,500/00;

(c) that the Appellant do pay to the Respondent the costs of this appeal to be taxed and certified by the Taxing Master of this Court and this Court doth certify that the employment of two counsel was proper and reasonable.

Given under my hand and the Seal of the court at Nairobi this 24th day of August, 1963.

F. HARLAND

REGISTRAR
COURT OF APPEAL FOR EASTERN AFRICA

ISSUED this 9th day of December, 1963.

No. 61

Order Granting Final Leave to Appeal to Privy Council 10th February 1964

NO. 61

Order Granting Final Leave to Appeal to Privy Council

IN THE COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

CIVIL APPLICATION NO. 8 OF 1963

(In the matter of an intended appeal to the Judicial Committee of the Privy Council)

BETWEEN

RATTAN SINGH S/O NAGINA SINGH APPLICANT

AND

THE COMMISSIONER OF INCOME TAX RESPONDENT

(Application for final leave to appeal to the Judicial Committee of the Privy Council from a judgment and order of the Court of Appeal for Eastern Africa at Nairobi dated 24th August, 1963,

in

Civil Appeal No. 17 of 1962

Between

Rattan Singh s/o Nagina Singh Appellant

and

The Commissioner of Income Tax Respondent)

In Chambers this 10th day of February, 1964.

Before the Honourable the Acting President (Sir Trevor Gould).

In the Court of Appeal

No. 61

Order Granting Final Leave to Appeal to Privy Council 10th February 1964 (Continued)

O R D E R

UPON the Application presented to this Court on the 4th day of February, 1964, by Counsel for the above-named Applicant for Final Leave to Appeal to the Judicial Committee of the Privy Council AND UPON READING the affidavit of Jaitendar Kumar Winayak sworn on the 4th day of February, 1964, in support thereof AND UPON HEARING Mr. J. K. Winayak of Counsel for the Applicant and Mr. P. J. Treadwell of Counsel for the Respondent THIS COURT DOTH ORDER that the Application for Final Leave to appeal to the Judicial Committee of the Privy Council be and is hereby granted AND DOTH DIRECT that the Record including this Order be despatched to England within ten days from today AND DOTH FURTHER ORDER that the cost of this Application do abide result of the intended appeal.

GIVEN under my hand and the Seal of the Court at Nairobi, this 10th day of February, 1964.

F.HARLAND.
REGISTRAR.

ISSUED this 10th day of February, 1964.

I certify that this is a true copy of the original.

Sgd. ?
for REGISTRAR.
10.2.1964.

GP:

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No.14 of 1964

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

RECORD OF PROCEEDINGS

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