5/79

No. 31 of 1976

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN:

HOCK HENG COMPANY SDN. BERHAD — Appellant

- and -

THE DIRECTOR-GENERAL OF INLAND REVENUE — Respondent

RECORD OF PROCEEDINGS

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No. 31 of 1976

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" " "	25th May 1967
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No. 31 of 1976

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN:

HOCK HENG COMPANY SDN. BERHAD — Appellant

- and -

THE DIRECTOR-GENERAL OF INLAND REVENUE — Respondent

RECORD OF PROCEEDINGS

No. 1

CASE STATED BY SPECIAL COMMISSIONERS OF INCOME TAX

In the High Court in Malaya at Kuala Lumpur

No.1
Case Stated by Special Commissioners of Income Tax
6th November 1973

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

Between

Director-General of Inland Revenue — Appellant

And

Hock Heng Co. Sdn. Bhd. — Respondents

CASE STATED by the Special Commissioners of Income Tax for the opinion of the High Court pursuant to paragraph 34 of Schedule 5 to the Income Tax Act, 1967

1. The respondents appealed to us, the

In the High Court in Malaya at Kuala Lumpur

No.1
Case Stated by Special Commissioners of Income Tax

6th November 1973 - continued

Special Commissioners of Income Tax, in respect of the assessment of their income tax for the year of assessment 1968, as contained in the notice of additional assessment dated 16th May 1970.

2. The question in issue for our determination was whether the sum of $538,335.00 which represented a loss attributable to the respondents' business carried on in Singapore through their Singapore branch ought to be set off against their income derived from Malaysia under Section 44(2) of the Income Tax Act, 1967, in the ascertainment of their total income for the year of assessment 1968.

3. Encik Zilkifli bin Mahmood, Senior Federal Counsel (Inland Revenue) and Encik Quah Cheng Choon, Assistant Director of Inland Revenue, appeared for the appellant. Encik S. Woodhull, Advocate & Solicitor and Encik Chen Shoo Sang Tax Assistant of Messrs. Turquand Youngs & Co. appeared for the respondents.

4. We heard the appeal on 14th September, 1973 and gave our decision on 19th September, 1973.

5. No evidence was adduced at the hearing. The following documents were submitted to us by the parties :-

(i) Statement of Agreed Facts (Exhibit A1)

(ii) Notice of Additional Assessment for Year of Assessment 1968 (Exhibit A2)

(iii) Memorandum and Articles of Association of Hock Heng Co. Ltd. (Exhibit A3)

(iv) Statement of Trading Loss for the Year ended 31.12.1967 (Exhibit R4)

(v) Allocation of Singapore Accounts for the Year 1967 (Exhibit R5)

(vi) Resolution of Directors dated 5.8.1970 (Exhibit R6(A).

(vii) Resolution of Directors dated 14.12.1964 (Exhibit R6(B))

(viii) Resolution of Directors dated 24.5.1967 (Exhibit R6(C)

(ix) Invoice No.H.3229 dated 12.6.1967 (Exhibit R7(A))

(x) Invoice No.H.3230 dated 13.6.1967 (Exhibit R7(B))

(xi) Invoice No.H.3232 dated 14.6.1967 (Exhibit R7(C))

(xii) Receipt dated 17.12.1964 for $550.00 (Exhibit R8)

(xiii) Summary of Bank Statements (Exhibit R9)

(xiv) List of Directors (Exhibit R10)

6. The following facts were admitted :-

(a) The Respondents are rubber dealers and have their head office at Railway Godown No.10, Kuala Lumpur. They also have a branch at No.137A Cecil Street, Singapore, through which they carry on their business in Singapore;

(b) The respondents are ordinarily resident in Malaysia within the meaning of Section 9 of the Income Tax Act, 1967, and they carry on business in Singapore through a "permanent establishment" within the meaning of that term in Article II 1.(j) of the Double Taxation Agreement dated 16th August, 1966 entered into between Malaysia and Singapore and incorporated in the Double Taxation Relief (Republic of Singapore) Order, 1966, made under

In the High Court in Malaya at Kuala Lumpur

No.1
Case Stated by Special Commissioners of Income Tax

6th November 1973 - continued

Section 45 of the Income Tax Ordinance, 1947 and published as P.U.385 dated 27th October 1966.

(c) A second Double Taxation Agreement dated 26th December 1968 was entered into between Malaysia and Singapore and was incorporated in the Double Taxation Relief (Singapore) Order, 1968 made under section 132 of the Income Tax Act, 1967, and published as P.U.518 dated 26th December, 1968. Under paragraph 2 and 3 of Article XXI of this Double Taxation Agreement 1968, as amended by the Double Taxation Relief (Singapore) Order, 1973 P.U.(A)211 dated 9th August, 1973, it is provided that the earlier remain effective up to and including the year of assessment 1968;

(d) For the year of assessment 1968 the respondents derived income from Malaysia in the sum of $31,415.00 and suffered a loss of $538,335.00 attributable to their business carried on through their Singapore branch;

(e) Under paragraph 7 of Schedule 7 to the Income Tax Act, 1967, the respondent elected that bilateral credit shall not be allowed against Malaysian tax payable by them for year of assessment 1968;

(f) In the ascertainment of the respondents' total income for the year of assessment 1968, the Director General of Inland Revenue disallowed the respondents' claim to have the Singapore loss of $538,335.00 set-off against the income derived from Malaysia.

7. It was contended on behalf of the Director General of Inland Revenue that :-

(a) the respondents, having a permanent establishment in Singapore, the computation of income of their business

actually carried on in Singapore should be done in accordance with the laws of Singapore by virtue of the provisions of the Double Taxation Agreement dated 16th August, 1966, entered into between Malaysia and Singapore;

(b) paragraph 1 of Article XVII of the said Agreement provides that the laws of each Contracting State shall continue to govern the taxation of income in that State except where express provision to the contrary is made in the Agreement;

(c) the said Agreement provides, under Article I, that the taxes which are the subject of the Agreement include the Income Tax Ordinance, 1947. Therefore, in respect of the respondents' assessment of income tax for the year of assessment 1968, the Income Tax Ordinance, 1947, should apply because the Double Taxation Agreement, 1966, is effective up to and including the year of assessment 1966 by virtue of paragraph 2 and 3 of Article XXI of the second Double Taxation Agreement of 1968, as amended by P.U.(A)211 dated 9th August, 1973;

(d) the Income Tax Ordinance, 1947, and not the Income Tax Act, 1967, applies to this appeal. Section 10 of the Income Tax Ordinance, 1947, confines income derived from Malaysia and not on the world income scope as found in the Income Tax Act, 1967; and

(e) the respondents' claim to have the Singapore loss set-off against Malaysian income was, therefore, correctly disallowed by the Director General of Inland Revenue.

8. It was contended on behalf of the respondents that :

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No.1
Case Stated by Special Commissioners of Income Tax

6th November 1973 - continued

(a) the Income Tax Act, 1967, and not the Income Tax Ordinance, 1947, applies in this case;

(b) the basis of computation of income under the Income Tax Act, 1967 being on a world income scope the respondents' losses in Singapore should be taken into account in ascertaining their total income for tax purposes;

(c) the ordinary principles of commercial accounting stipulate the bringing into account of losses, and section 44(2) of the Income Tax Act, 1967, specifically provides for the deduction of losses; and

(d) the Double Taxation Agreement, 1966 is concerned with relief from Double Taxation and profits made in Singapore. The Agreement is not concerned with the computation of income which continues to be governed by the respective laws of Singapore and Malaysia. There is no provision in the Agreement disallowing losses in the computation of income in Singapore or Malaysia.

9. The following authorities were cited :-

(i) Shop and Store Development Ltd. v. I.R.C. (1967) 1 A.C. 472 @ 493

(ii) Maxwell on Interpretation of Statutes, 12 ed. 256.

(iii) Cape Brandy Syndicate v. I.R.C. (1921) 1 K.B. 69 @ 71

(iv) Oriental Bank v. Wright (1880) 5 Appeal Cases 844

(v) Re Micklethweit 156 E.R. 908

(vi) Partington v. Att-Gen (1869) L.R. 4 H.L. 100 @ 122

(vii) Lord Advocate v. Fleming (1897) AC 145

(viii) Tennant v. Smith (1892) AC 150

(ix) Att-Gen v. Carlton Bank (1899) 2 Q.B. 158 @ 164

(x) Nokes v. Doncaster Amalgamated Collieries Ltd. (1940) A.C. 1014

(xi) Shannon Realities Ltd. v. Ville de St.Michel (1924) A.C. 185

(xii) Croxford v. Universal Insurance Co. (1936) 2 K.B. 253, 281

(xiii) Barrell v. Fordree (1932) A.C.676, 682

(xiv) I.R.C. Ross & Coulter (1948) 1 All E.R. 616, 625

(xv) Ormond Investment Co. v. Betts (1928) A.C. 143, 156

(xvi) President Clyde in Whimster & Co.Ltd. v. I.R.C. 12 T.C. 813, 823

(xvii) Hochstrasser v. Mayes (1960) A.C. 376, 389

(xviii) Kanga on Income Tax, 6th Ed. page 11

(xix) Canadian Eagle Oil Co.Ltd. v. R. (1946) A.C. 119 @ 140

10. We, the Special Commissioners of Income Tax, who heard the appeal, after consideration of the facts and submissions made to us, were of the opinion that :-

(a) the Income Tax Act, 1967, and not the Income Tax Ordinance, 1947, applies in this case. The Income Tax Ordinance, 1947, was repealed by section 155(1) of the Income Tax Act, 1967, with effect from 1st January, 1968, and under section 1(3)

In the High Court in Malaya at Kuala Lumpur

No.1
Case Stated by Special Commissioners of Income Tax

6th November 1973 - continued

of the Income Tax Act, 1967, the said Act has effect for the year of assessment 1968 and subsequent years of assessment.

(b) section 3 of the Income Tax Act, 1967, provides for the imposition of income tax on a person ordinarily resident in Malaysia upon his income from wherever derived, subject to and in accordance with the Act. Therefore, in the ascertainment of the respondents' total income for the year of assessment 1963, all profits and losses from wherever derived and incurred should be brought into account.

(c) the taxes which are the subject of the Double Taxation Agreement 1966 include the Income Tax Ordinance, 1947. However, after the repeal of this Ordinance it was no longer a valid law in Malaysia with effect from 1st January, 1968. Thereafter, under paragraph 2 of Article I of the Double Taxation Agreement 1966 the said Agreement applied to the Income Tax Act, 1967, as the said paragraph 2 provides that the "Agreement shall also apply to any other taxes of a substantially similar character to those referred to in the preceding paragraph imposed in either Contracting State after the date of signature of this Agreement."

11. We accordingly decided that in the ascertainment of the respondents' total income for the year of assessment 1968, the respondents were entitled to have their Singapore loss in the sum of $538,335.00 set-off against their income derived from Malaysia under section 44(2) of the Income Tax Act, 1967, and we ordered that the assessment of income tax in respect of the respondents for the year of assessment 1968, as contained in the notice of additional assessment dated 16th May, 1970, be amended accordingly.

12. The appellant by notice dated 10th October, 1973, required us to state a Case for the opinion of the High Court, pursuant to paragraph 34 of Schedule 5 to the Income Tax Act, 1967, which Case we have stated and do sign accordingly.

13. The question of law for the opinion of the High Court is whether, on the evidence before us, our decision was correct in law.

Dated this 6th day of November, 1973.

Sgd: Ajaib Singh
(AJAIB SINGH)
Chairman,
Special Commissioners of Income Tax

Sgd: Lee Kuan Yew
(LEE KUAN YEW)
Special Commissioner of Income Tax

Sgd: Tan Sri Hj.Wan Hamzah B. Hj. W. Mohd.
(TAN SRI HJ. WAN HAMZAH B. HJ. W.MOHD.)
Special Commissioner of Income Tax

In the High Court in Malaya at Kuala Lumpur

No.2
Deciding Order of Special Commissioners for Income Tax

19th September 1973

No. 2

DECIDING ORDER OF SPECIAL COMMISSIONERS FOR INCOME TAX

1. We, the Special Commissioners of Income Tax, decide that in the ascertainment of the appellants' total income for the year of assessment 1968, the appellants are entitled, under section 44(2) of the Income Tax Act, 1967, to have their loss, amounting to $538,335.00 attributable to their business carried on in Singapore through their Singapore branch, deducted from their income derived from Malaysia.

2. We hereby order that the assessment of income tax in respect of the appellants for the year of assessment 1968, as per notice of additional assessment dated 16th May, 1970, be amended to give effect to our decision.

Dated this 19th day of September, 1973.

Sd: Ajaib Singh
Chairman

Special Commissioner of Income Tax

Sd: Lee Kuan Yew

Special Commissioner of Income Tax

Sd: Tan Sri Haji Hamzah b.Hj. W.Mohd.

Special Commissioner of Income Tax

No. 3

In the High Court in Malaya at Kuala Lumpur

No.3
List of Exhibits
undated

LIST OF EXHIBITS

EXHIBIT NO.	PARTICULARS
A1	Statement of Agreed Facts.
A2	Notice of Additional Assessment for Year of Assessment 1968.
A3	Memorandum and Articles of Association of Hock Heng Co. Ltd.
R4	Statement of Trading Loss for the Year ended 31.12.1967
R5	Allocation of Singapore Accounts for the Year 1967
R6(A)	Resolution of Directors dated 5.8.1970
R6(B)	Resolution of Directors dated 14.12.1964
R6(C)	Resolution of Directors dated 24.5.1967
R7(A)	Invoice No.H.3229 dated 12.6.1967
R7(B)	Invoice No.H.3230 dated 13.6.1967
R7(C)	Invoice No.H.3232 dated 14.6.1967
R8	Receipt dated 17.12.1964 for $550,000
R9	Summary of Bank Statements.
R10	List of Directors

In the High Court in Malaya at Kuala Lumpur

No. 4

STATEMENT OF AGREED FACTS

No. 4
Statement of Agreed Facts

undated

(i) Hock Heng is a company incorporated in Malaysia having its head office at Railway Goodown No.10, Kuala Lumpur. It has also a Branch at 137A Cecil Street, Singapore 1, through which it carried on its business in Singapore.

(ii) The Company is ordinarily resident in Malaysia under the provisions of the Income Tax Act 1967.

(iii) The agreed income/loss of the company for the year of Assessment 1968 is as follows :-

Income derived from Malaysia	$31,415
Loss attributable to business carried on in Singapore through Singapore Branch	$538,335

(iv) It is the contention of the Appellant company that the Singapore loss of $538,335.00 is allowable in assessing the company's tax liability for the Year of Assessment 1968.

(v) It is the contention of the Director General of Inland Revenue that the Singapore loss of $538,335.00 is not an allowable deduction for the purposes of assessing the company's tax liability for the Year of Assessment 1968.

(vi) The question to be decided is whether or not the Singapore loss of $538,335.00 is admissible in computing the company's

Malaysian tax liabilities for the year of Assessment 1968.

In the High Court in Malaya at Kuala Lumpur

No. 4
Statement of Agreed Facts

undated - continued

(Sgd.)

Director General of
Inland Revenue, Malaysia

(Sgd.)

Director
Hock Heng Co. Sdn. Bhd.

No. 5

No.5
Judgment of Chang Min Tat J.

11th July 1975

JUDGMENT OF CHANG MIN TAT J.

For the reasons given in my judgment in Federal Court Civil Appeal No.165/74 between United National Finance Berhad v. Director-General of Inland Revenue delivered by me on July 3, 1975, the deciding order of the Special Commissioners is set aside and I order that the assessment of income-tax in respect of the respondent for the year of assessment 1968 as contained in the notice of additional assessment dated May 16, 1970 be restored.

Kuala Lumpur

11th July, 1975

(CHANG MIN TAT)
Judge
High Court,
Malaya.

Counsel:

Encil Zulkifli bin Mahmood, Senior Federal Counsel, for appellant

Mr. S.Woodhull of Messrs. Shearn Delamore & Co. for respondent.

Certified true copy. Signed: C.B.Fernandez
15th July 1975
Secretary to Judge, Kuala Lumpur

In the High Court in Malaya at Kuala Lumpur

No.6
Order of High Court
11th July 1975

No.6

ORDER OF HIGH COURT

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

ORIGINATING MOTION NO.70 OF 1973

Between

Director-General of Inland Revenue — Appellant

And

Hock Heng Company Sdn. Berhad — Respondent

BEFORE THE HONOURABLE
MR. JUSTICE CHANG MIN TAT

In Open Court

THIS 11TH DAY OF JULY 1975

O R D E R

WHEREAS pursuant to paragraph 34 of Schedule of the Income Tax Act, 1967, a case had been stated at the request of the Appellant by the Special Commissioners of Income Tax for the opinion of this Court:

AND WHEREAS the said case came on for hearing on the 1st day of April 1975:

AND UPON READING the same and UPON HEARING Encik Zulkifli bin Mahmood Senior Federal Counsel for the Appellant and Mr. S.Woodhull of Counsel for the Respondent IT WAS ORDERED that this case do stand adjourned for Judgment AND the same coming on for judgment this 11th day of July 1975:

THIS COURT IS OF OPINION that the determination of the Special Commissioners of Income Tax is erroneous AND IT IS ORDERED that the appeal be and is hereby allowed and the Deciding Order of the Special Commissioners of Income Tax dated the 19th day of September 1973 be and is hereby

set aside AND IT IS ALSO ORDERED that the assessment for income tax in respect of the Respondent dated the 16th day of May 1970 be restored.

GIVEN under my hand and the Seal of the Court this 11th day of July 1975.

SENIOR ASSISTANT REGISTRAR
HIGH COURT, KUALA LUMPUR

In the High Court in Malaya at Kuala Lumpur

No.6
Order of High Court
11th July 1975 - continued

No. 7

MEMORANDUM OF APPEAL

In the Federal Court of Malaysia

No.7
Memorandum of Appeal
23rd August 1975

IN THE FEDERAL COURT OF MALAYSIA AT KUALA LUMPUR
(APPELLATE JURISDICTION)

CIVIL APPEAL NO: 102 OF 1975

Between

Hock Heng Company Sdn. Berhad — Appellant

And

The Director-General of Inland Revenue — Respondent

(In the Matter of Originating Motion No.70 of 1973 in the High Court at Kuala Lumpur

Between

The Director-General of Inland Revenue — Appellant

And

Hock Heng Company Sdn.Berhad — Respondent)

In the Federal Court of Malaysia

No.7
Memorandum of Appeal

23rd August 1975 - continued

MEMORANDUM OF APPEAL OF THE APPELLANT ABOVENAMED

Hock Heng Company Sdn. Berhad, the Appellant abovenamed appeals to the Federal Court against the whole of the decision of the Honourable Justice Chang Min Tat given on the 11th day of July 1975 on the following grounds :

1. The Learned Judge had failed to appreciate that under the Income Tax Act of 1967 the income of the Appellant Company had to be ascertained on a world basis.

2. The Learned Judge had erred in failing to recognise that in determining the income of the Appellant Company the profits and gains are computed as a global amount representing profits less losses of the Appellant's business wherever such profits and losses arise or are incurred.

3. The Learned Judge had erred in this interpretation of the Income Tax Act 1967 and the Double Taxation Relief (Republic of Singapore) Order 1966 in that the said Order provides relief in the event that tax is payable in Singapore after computation of Malaysian income on a global basis and that such computation takes into account profits and losses wherever incurred.

4. The Learned Judge had failed to apply the ordinary principles of commercial accounting as legally understood and accepted in that losses are brought into account in determining profits.

5. The Learned Judge had erred in not giving force to Section 44(2) of the Income Tax Act, 1967 that specifically provides for deduction of losses which under the said Act covers losses wherever incurred.

6. The Learned Judge had failed to appreciate that while the onus of showing that a particular class of income is exempt from taxation lies with the Appellant the burden is on the Respondent

to show under what provision of the Act the income is liable to tax and losses not allowable.

7. The Learned Judge had erred in applying his judgment in Federal Court Civil Appeal No.165/74 between United National Finance Berhad v. Director-General of Inland Revenue for not only were the facts dissimilar and the arguments canvassed unrelated to the case of the present Appeal but the foregoing Grounds of Appeal were not taken into account.

8. The Learned Judge rested his decision in the case of United National Finance Berhad vs. Director-General of Inland Revenue on the erroneous view that the world derivation scope of tax under the Income Tax Act of 1967 was varied to the local derivation and remittance basis by the Double Taxation Relief (Republic of Singapore) Order 1966.

Dated this 23rd day of August 1975

Shearn Delamore & Co.
SOLICITORS FOR THE APPELLANT

To:

The Chief Registrar,
Federal Court,
Kuala Lumpur.

And to :

1. The Registrar,
   High Court,
   Kuala Lumpur.

2. The Director-General of Inland Revenue,
   Bang. Suleiman,
   Kuala Lumpur.

In the Federal Court of Malaysia

No. 8
Judgment of Suffian L.P.

19th January 1976

No. 8

JUDGMENT OF SUFFIAN, L.P.

Coram: Suffian, L.P.
Lee Hun Hoe, C.J. Borneo;
Wan Suleiman, F.J.

Suffian: There are two separate judgments of this appeal. First I shall read mine, and then that of my brother the Chief Justice of Borneo who is absent.

(Reads own judgment)

JUDGMENT OF SUFFIAN, L.P.

Hock Heng Company Sdn. Bhd. is a rubber dealer. I shall call it the taxpayer. It had its head office at railway godown No.10 Kuala Lumpur. It also had a branch at 137A, Cecil Street, Singapore, through which it carried on its business in Singapore.

It is ordinarily resident in Malaysia within the meaning of section 9 of the Income Tax Act, 1967, and it carried on business in Singapore through a permanent establishment within the meaning of Article II, 1(j) of the Double Taxation Agreement dated 19th October, 1966 (published as P.U. 385 dated 27th October, 1966). I shall refer to this Agreement simply as the Agreement.

We are concerned with the tax liability of the taxpayer for the year of assessment 1968. For that year the taxpayer had an income of $31,415 from Malaysia, but suffered a loss of $538,335 attributable to its business carried on through its Singapore branch.

Under paragraph 7 of schedule 7 to the Income Tax Act, 1967, the taxpayer elected that bilateral credit (i.e. credit in respect of Singapore tax) should not be allowed against Malaysian tax payable by it for the year of

assessment 1968.

When ascertaining the taxpayer's total income for the year of assessment 1968, the Director-General of Inland Revenue declined to set off the Singapore loss against the income derived from Malaysia. The taxpayer appealed to the Special Commissioners who decided in favour of the taxpayer, namely that it is entitled to have its Singapore loss set off against its income derived from Malaysia under section 44(2) of the Income Tax Act, 1967.

The Revenue asked the Special Commissioners to state a case for the opinion of the High Court.

On 11th July, 1975, the High Court decided against the taxpayer, namely that it is not entitled to have its Singapore loss set off against its income derived from Malaysia.

The taxpayer has appealed to us.

It is submitted on its behalf that the applicable legislation on which this appeal turns is the Income Tax Act, 1967, and the Agreement.

Before the Special Commissioners the Revenue contended that the applicable statute was the Income Tax Ordinance, 1947, and not, as contended by the taxpayer, the Income Tax Act, 1967. But at the hearing before the High Court, the Revenue reversed this contention and accepted that the Income Tax Act, 1967, was the applicable statute.

Thus in this appeal there is agreement both as to the facts and as to the legislation applicable.

The issue in this appeal is whether the taxpayer may set off its Singapore loss against its Malaysian income. The taxpayer

In the Federal Court of Malaysia

No.8
Judgment of Suffian, L.P.
19th January 1976 - continued

contends that it can. The Revenue on the other hand contends that it cannot. As has been seen, both rely on the same legislation. So the dispute turns on the meaning to be given to the Agreement and the relevant provisions of the Income Tax Act, 1967.

The arguments on behalf of the taxpayer may be briefly summarised as follows :-

(1) At the relevant time under section 3(a) of the Act, tax is payable upon its income from wherever derived, that is upon its world income. In computing its world income, loss suffered in Singapore should be deducted from profit made in Malaysia - else, how can its world income be determined?

(2) According to section 44(2) of the Act, loss may be deducted and this must include, it is submitted, loss suffered in Singapore.

(3) Certain deductions are not allowed and these are enumerated in section 39 of the Act. Loss suffered in Singapore is not included; therefore it may be set off against Malaysian profit.

(4) According to the ordinary principles of commercial accounting, all gains and losses must be brought into account when computing income.

(5) The Agreement and its enabling authority (section 132 of the Act) provide for relief against double taxation, such relief is only in respect of profits made and taxed in Singapore. As the taxpayer has not claimed relief against double taxation, the Agreement does not apply. Therefore, it is submitted, only sections 44(2) and 39 apply, so that the Singapore loss may be set off against Malaysian income.

With all due respect to Mr. Woodhull, I do not agree. In my opinion the loss suffered by the taxpayer in Singapore cannot be set off against its Malaysian income.

The profits of the main branch in Malaysia are taxable in Malaysia in accordance with Malaysian law. The profits of its Singapore branch are taxable in Singapore in accordance with Singapore law. See para. 1 of Article XVII of the Agreement. (No further tax is imposed in Malaysia on the profits of the Singapore branch when remitted to Malaysia). How are the profits of the main branch in Malaysia ascertained? - by deducting Malaysian losses from Malaysian gains. How are profits of the Singapore branch ascertained? - by deducting Singapore losses from Singapore gains. I do not think that for this purpose it is correct to deduct both Singapore and Malaysian losses from Singapore gains. Malaysian losses have already been taken into account when ascertaining Malaysian profits. To allow Malaysian losses to be deducted from the Singapore gains would be to deduct them twice, once in Malaysia and once in Singapore.

Similarly I do not think that for the purpose of ascertaining its Malaysian profits it is correct to deduct Singapore losses from Malaysian gains. Singapore losses have already been deducted in Singapore from Singapore gains when ascertaining Singapore profits. To deduct them again in Malaysia from Malaysian gains for the purpose of ascertaining Malaysian profits would be to allow double deduction.

The above would appear to be consistent with ordinary accounting principles.

I am fortified in my view by paragraphs 2 and 3 of Article IV of the Agreement. The two paragraphs provide in effect that the Singapore branch must be treated as if it is an enterprise distinct and separate from

In the Federal Court of Malaysia

No.8
Judgment of Suffian, L.P.

19th January 1976 - continued

the main branch in Kuala Lumpur and that when ascertaining the profits of the Singapore branch there shall be allowed all expenses which would be deductible if the Singapore branch were an independent enterprise, i.e., distinct and separate from the main branch in Malaysia.

All this is quite contrary to section 3(a) of the Act which at the material time provided (as already stated) that the taxpayer should be taxed on its world income, i.e. on both its Malaysian and Singapore income, not only on its Malaysian income, and it would appear therefore that its Singapore losses must be set off against its Malaysian profits. But it appears that that would be so only in relation to countries with which Malaysia does not have a double taxation agreement, because section 3(a) is expressly made subject to the Act, and section 132 provides that a Double Taxation Agreement may override the Act, and the 1966 Agreement has overriden the Act, in so far as the losses of the taxpayer's Singapore branch are concerned. Also the Agreement itself says - and it is perfectly proper for it to do so - that it may contain provisions contrary to the Act; see paragraph 1 of Article XVII.

It is argued on behalf of the taxpayer that the Agreement does not apply because section 7 of schedule 7 to the Act allows the taxpayer not to claim any benefit from the Agreement and (it is not disputed) the taxpayer has not claimed any relief under it. With respect, there seems to me nothing in the Agreement which says that its provisions apply only to persons who claim relief under it. On the contrary it would appear to apply (and I rule that it does apply) to all Malaysian enterprises with a permanent establishment in Singapore, irrespective of whether or not they claim relief under the Agreement. It would appear to me that section 7 of Schedule 7 has no bearing on the question in issue here. On the contrary, section 132 itself says that when there is a double taxation agreement its provisions shall have effect in relation to tax

under the Act, notwithstanding anything in any written law.

I would therefore dismiss this appeal with costs.

(Reads judgment of C.J.Borneo)

Suffian: My brother Wan Suleiman F.J. who is absent wishes me to say that he concurs.

M. Suffian

Delivered in Kuala Lumpur on 19th January, 1976

(Tun Mohamed Suffian)
LORD PRESIDENT,
MALAYSIA

Notes

1. Argument in Kuala Lumpur on 12th November, 1975.

2. Counsel :

For appellant - Mr. S. Woodhull of M/s Shearn Delamore & Co., Kuala Lumpur;

For respondent - Encik Zulkifli bin Mahmood, Senior Federal Counsel.

3. Authorities cited :

(1) Director-General of Inland Revenue v. E.D.C. (1973) 2 MLJ 22.

(2) Nokes v. Doncaster Amalgamated Collieries Ltd. (1940) A.C.1014, 1022

(3) Shannon Realties Ltd. v. Ville de St. Michel (1924) A.C. 185, 192, 193.

(4) Croxford v. Universal Insurance Co. (1936) 2 KB 253, 281.

(5) Barrell v. Fordree (1932) A.C.676, 682

(6) I.R.C. v. Ross & Coulter (1948) 1 All E.R. 616, 625.

JUDGMENT OF SUFFIAN L.P.

(7) Cape Brandy Syndicate v. I.R.C. (1921) 1 K.B. 69, 71.

(8) Oriental Bank v. Wright (1880) 5 App. Cas 844, 856.

(9) Ostime v. Australian Mutual Provident Society 38 T.C. 492 and (1960) A.C. 459.

(10) Whimster & Co. Ltd. v. I.R.C. 12 T.C. 813, 823.

(11) Odeon Associated Theatres Ltd. v. Jones (1971) 2 All E.R. 407, 414.

(12) Cape Brandy Syndicate v. C.I.R. 12 T.C. 366.

(13) Colquhoun v. Brooks 2 T.C. 490, 500.

(14) McCalmont v. C.I.R. 22 T.C. 533, 541.

Certified true copy

Sdg
Setia-usaha kapada Ketua Hakim Negara
Mahkamah Persekutuan
Malaysia
Kuala Lumpur

28 Jan 1976.

No. 9

JUDGMENT OF LEE HUN HOE, C.J.

In the Federal Court of Malaysia

No. 9
Judgment of Lee Hun Hoe, C.J
19th January 1976

JUDGMENT OF LEE HUN HOE, CHIEF JUSTICE BORNEO

This is an appeal against the decision of Chang Min Tat, J. in setting aside the deciding order of the Special Commissions and ordering the assessment for income tax in respect of an appellant company to be restored.

Facts as agreed are set out at page 69 of the Appeal Record as follows :-

"(i) Hock Heng is a company incorporated in Malaysia having its head office at Railway Goodown No.10, Kuala Lumpur. It has also a Branch at 137A Cecil Street, Singapore 1, through which it carried on its business in Singapore.

(ii) The Company is ordinarily resident in Malaysia under the provisions of the Income Tax Act 1967.

(iii) The agreed income/loss of the company for the year of Assessment 1968 is as follows :-

Income derived from Malaysia	$31,415
Loss attributable to business carried on in Singapore through Singapore Branch	$538,335

(iv) It is the contention of the Appellant company that the Singapore loss of $538,335.00 is allowable in assessing the company's tax liability

In the Federal Court of Malaysia

No. 9
Judgment of Lee Hun Hoe, C.J.

19th January 1976 - continued

for the Year of Assessment 1968.

(v) It is the contention of the Director General of Inland Revenue that the Singapore loss of $538,335.00 is not an allowable deduction for the purposes of assessing the company's tax liability for the Year of Assessment 1968.

(vi) The question to be decided to [sic] whether or not the Singapore loss of $538,335.00 is admissible in computing the company's Malaysian tax liabilities for the Year of Assessment 1968."

The relevant legislation to be considered are (a) the Income Tax Act 1967 and (b) the Double Taxation Relief (Republic of Singapore) Order, 1966 (hereinafter referred to as DTA 1966). The Singapore branch of the appellant company sustained loss to the tune of $538,355.00. The only issue before the court is whether the Singapore loss is an allowable deduction in computing the appellant company's tax liabilities for the year of assessment 1968.

The learned Judge based his judgment on the reasons given by him in the case of United National Finance Berhad v. Director-General of Inland Revenue (Federal Court Civil Appeal No.165 of 1974) on 3rd July, 1975. The High Court decision is reported in (1975) 1 M.L.J. 109. Both Suffian, L.P. and H.S. Ong, F.J. concurred with the learned Judge. There this court upheld Hamid, J. (1) in confirming the determination of the Special Commissioners that the profits from the sale of certain investments were not capital gains but a trading income and, therefore, assessable to tax, and (2) in overruling the decision of the Special Commissioners that the loss sustained by the taxpayer's Singapore branch could be brought in to determine its chargeable income in Malaysia.

We are concerned with the second limb, that is, the loss incurred by the Singapore branch. Briefly, the facts in that case are that the taxpayer is a wholly-owned subsidiary of the United Malayan Banking Corporation Berhad which is a finance company. It commenced business in Malaysia in 1964 and its sister branch in Singapore in 1965. Up to 1969 it bought and sold shares in eleven companies both private and public. Some shares were sold at profits and others were transferred to its parent company and to the United National Finance (Singapore) Ltd., its sister branch in Singapore. The profits realised by the taxpayer were used in the course of its business as a finance company. It was contended that the profits which had been assessed to tax for the years of assessment 1968 and 1969 were capital gains and not trading income as the shares formed part of a holding which was purchased and held as investment. The Special Commissioners considered that in buying and selling shares the taxpayer was carrying on a business in dealing in shares as an adventure or concern in the nature of trade. They, therefore, held that the profits were assessable to tax under section 4(a) of the 1967 Act. This was upheld by both Hamid J. and this court. In respect of the second limb the factum or quantum of loss sustained by the Singapore branch was not in dispute though the figure of losses was not disclosed. The Special Commissioners held that the taxpayer was entitled to deduct the Singapore losses from its income derived in Malaysia. Hamid J. considered that the Special Commissioners had erred in law as the net effect of their decision would result in the Singapore losses to be taken into consideration twice, once in Singapore and again in Malaysia. Chang Min Tat, J. agreed with this view and dismissed the appeal.

In that case the taxpayer argued that the DTA 1966 for the year of assessment, 1968 had no relevance whatsoever as it had made no profit but incurred losses. There was no income for which it could claim any relief. As it incurred losses, it could claim no relief.

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The DTA 1966 did not, therefore, come into play. Encik Woodhull for appellants also dealt with this point in another way. He said there was no conflict between the domestic charging provisions of Malaysia and Singapore calling for the application of the DTA 1966. In the year of assessment 1968 the Singapore taxing authority did not seek to tax the Singapore branch profits. The simple answer is that there was no profit to be taxed. He conceded that had there been profits in Singapore the liability of those profits to tax would have been governed by Article IV of the DTA 1966. There being no liability to tax in Singapore, he, therefore, submitted that the DTA 1966 had no application. I do not agree.

At this stage it would be convenient to refer to relevant provisions of section 3 of the 1967 Act which reads :-

> "3. Subject to and in accordance with this Act, a tax to be known as income tax shall be charged for each year of assessment -
>
> (a) in the case of a person ordinarily resident for the basis year of assessment, upon his income from wherever derived.....
> .....".

That this section applied to a company is clear by virtue of Section 2 which defines "person" to include a company.

Encik Woodhull pointed out that the scope of assessment had changed. Under the Income Tax Ordinance 1947 tax was exigible on the income "accuring [Sic] in or derived from the States of Malaya or received in the States of Malaya from outside the States of Malaya" (see section 10(1) of the Ordinance). By the 1967 Act, repealing the 1947 Ordinance, in the case of a person ordinarily resident in Malaysia, as in the case of appellant company, tax is chargeable for each year of

assessment "upon income wherever derived." (See section 3 of the 1967 Act). The change from what is commonly described as the Derivation Scope under the 1947 Ordinance to the World Income Scope under the 1967 Act occurred while the DTA 1966 was still in force. The provisions of the DTA 1966 are meant to afford relief from double taxation, particularly profits made in Singapore. Appellants claimed no relief from double taxation as it had made no profit. There is no provision in the DTA 1966 disallowing losses. It is not concerned with the computation of income which continues to be governed by the respective tax laws of Malaysia and Singapore. In computing the profits of the appellant company, certain principles have to be observed. It was submitted that the ordinary principle of commercial accounting which require the bringing into account of all gains or losses should be applied. The observations of Lord Clyde in Whimster & Co. Ltd. v. I.R.C. (1) and of Pennycuick V-C in Odeon Associated Theatres Ltd. v. Jones (2) were referred to in support. The contention of appellants is that section 44(2) of the 1967 Act specifically provides for deduction of loss, therefore in computing the income the losses incurred by the Singapore branch have to be brought into account under the 1967 Act on the basis of the World Income Scope. This argument seems to find favour with the Special Commissioners. They correctly considered the DTA 1966 and the 1967 Act together. They held that as section 3 of the 1967 Act provided for the imposition of income tax on a person ordinarily resident in Malaysia upon his income wherever derived, therefore the appellant company was entitled to have the Singapore losses set off against their income derived from Malaysia under section 44(2) of the 1967 Act. Chang Min Tat,J. was

(1) 12 T.C. 813 @ 823
(2) (1971) 2 A.E.R. 407 @ 414

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not impressed by the contention for the reasons he gave when sitting in this court.

The DTA 1966 is not a piece of Malaysian domestic legislation but a contract entered into between the Malaysian Government and the Singapore Government whereby arrangements are made for the benefits of taxpayers in both countries, such as appellant company, "with a view to affording relief from double taxation." Section 132 of the 1967 Act provides that if any double taxation arrangement have been concluded and by statutory order (published as P.U. 385 dated 27th October, 1966), the arrangements afford relief from double taxation, those arrangements shall have effect in relation to tax under the 1967 Act, notwithstanding anything in any written law. However, paragraph I of Article XVII of the DTA 1966 expressly provides that:-

> "The laws of each Contracting State shall continue to govern the taxation of income in that State except where the express provision to the contrary is made in this Agreement."

There are two material provisions in Article IV, namely paragraphs 1(a) and 2 which state as follows :-

> "The profits of a Malaysian enterprise shall not be taxable in Singapore unless the enterprise carried on business in Singapore through a permanent establishment situated in Singapore. If the enterprise carries on business as aforesaid, tax may be imposed in Singapore on the profits of the enterprise but only on so much of them as is attributable to that permanent establishment which are remitted to Malaysia."

"Where an enterprise of one of the Contracting States carried on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing independently with the enterprise of which it is a permanent establishment."

These provisions apply in regard to the basis year of 1967 for the year of assessment 1968. Encik Zulkifli for the Revenue contends that the express provisions set out in Article IV of the DTA 1966 is that a Malaysian enterprise which carried on a business through its branch in Singapore could claim relief from double taxation if it could be established that that branch is a permanent establishment. In other words, tax shall not be imposed in Malaysia in respect of the profits made by the permanent establishment which are remitted to Malaysia. It is not in dispute in this case that the Singapore branch qualified as a permanent establishment. The Singapore branch must, therefore, be treated as a distinct and separate enterprise from its head office in Malaysia. As stated previously Article XVII of the DTA 1966 provides that the laws of each Contracting State shall continue to govern the taxation of income in that State except where express provision to the contrary is made in the DTA 1966. Express provisions contained in Article IV of the DTA 1966 indicate that the Singapore branch is to be treated as a distinct and separate enterprise. The result is that any chargeable income derived from Singapore will have to be the concern of the Singapore tax authority. Encik Zulkifli, therefore, submitted that the introduction of the DTA 1966 would not expose any chargeable income derived by Singapore branch in this case to the World Income Scope for the purpose of section 3 of the 1967 Act.

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In other words, the whole basis of chargeable income from World Income Scope is transformed to that of the Derivation Scope.

Encik Woodhull says that the only provision in the DTA 1966 is for relief of profits and nothing is said about disallowing losses. He disagrees with the contention of the Revenue that the DTA 1966 denies the appellant company relief for the losses incurred by the Singapore branch in computing its income taxable in Malaysia for the year of assessment 1968. The Revenue relies much on the statement of principle in the speech of Lord Radcliffe in Ostime (H.M. Inspector of Taxes) v. Australian Mutual Provident Society:- (3)

> "Bilateral agreements for regulating some of the problems of double taxation began, at any rate so far as the United Kingdom was concerned, in 1946. The form employed, and for obvious reasons similar forms and similar language are employed in all agreements, is derived, I believe from a set of model clauses proposed by the fiscal commission of the League of Nations. The aim is to provide by treaty for the tax claims of two governments both legitimately interested in taxing a particular source of income either by resigning to one of the two the whole claim or else by prescribing the basis on which the tax claim is to be shared between them."

The Revenue also relied on section 132 of the 1967 Act. But, appellant contends that section 132(1) refers to the double taxation arrangements as affording relief from double taxation to specific provisions which may be included in the double taxation arrangement, itemised in sub-section (4). These arrangements are all directed at relieving income from tax or declaring which

(3) 38 T.C. 492; 517 (1960) A.C.459

country is to tax which income. He says nowhere in the Malaysian domestic legislation or in the DTA 1966 is there any suggestion that the purpose or effect of the DTA 1966 is to tax in one country income which would not otherwise be taxable under the domestic legislation. Paragraphs 1(a) of Article IV of the DTA 1966 makes it clear that no further tax shall be imposed in Malaysia in respect of the profits of the permanent establishment which are remitted to Malaysia. If the DTA 1966 were not in existence then the profits remitted would be subject to tax in Malaysia as income. When applying DTA 1966 the provisions of section 132 of the 1967 Act become significant. Section 132 says that "as long as the order remains in force, those arrangements shall have effect in relation to tax under this Act notwithstanding anything in any written law." This means that the DTA 1966 may override the 1967 Act.

Section 40 of the 1967 Act tells what constitutes adjusted loss from a business. The DTA 1966 could vary the mode of taxation in Malaysia or Singapore. For instance, the profits which a Malaysian enterprise derives from Singapore from the operation of ships or aircraft shall be exempted from Singapore tax vide Article VI of the DTA 1966. The relief granted under DTA 1966 is in the form of an exemption by the Malaysian authority in respect of income tax payable in Singapore which would otherwise be taxed twice, that is, once in Singapore and again in Malaysia. As the DTA 1966 has varied the mode of taxation in Malaysia it is submitted that section 40 must also be read as varied by the statute. I doubt the deduction of a loss or losses incurred in Singapore can be allowed when computing tax liability in Malaysia for the simple reason that the loss or losses cannot be said to be attributable to activities in Malaysia. Consequently, the losses incurred by the Singapore branch had to be disregarded in computing the appellant

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Judgment of Lee Hun Hoe, C.J.

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company's profits in Malaysia.

Income attributable to activities in Singapore of the Singapore branch, being a permanent establishment, should be treated as a distinct and separate enterprise subject to Singapore tax law. This is the implication derived from reading paragraph I of Article XVII and paragraph 2 of Article IV of the DTA 1966. Whether the Singapore branch makes profits or incurs losses, in assessing tax in Singapore the chargeable income would have to be computed in accordance with the Singapore tax law. The profits after such taxation if remitted to Malaysia would not be taxed again in Malaysia. That is the measure of relief provided by the DTA 1966. There is no relief for loss. Appellants cannot try to have their losses incurred by the Singapore branch deducted from income derived in Malaysia. This would mean the losses are twice deducted, once in Singapore and again in Malaysia. As Chang Min Tat, J. said appellants could not eat their cake and keep it at the same time. They cannot have two bites at the cherry.

With respect, the learned Judge is right to hold that the losses attributable to activities in Singapore of the Singapore branch could not be deducted in computing the appellant's tax liability in Malaysia for the year of assessment 1968. I would dismiss the appeal with costs here and below Deposit to respondent against taxed costs.

(Sgd.) Lee Hun Hoe
CHIEF JUSTICE,
BORNEO.

Read by Suffian, L.P. in Kuala Lumpur on 19th January, 1976.

Certified true copy :

Sgd

Secretary to Chief Justice
Borneo
17/2/76

In the Federal Court of Malaysia

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19th January 1976 - continued

Wan Suleiman, F.J. concurred.

Counsel:

Encik S. Woodhull for appellant
Solicitors: M/s Shearn Delamore & Co.

Encik Zulkifli bin Mahmood for respondent
Senior Federal Counsel.

No. 10

ORDER OF FEDERAL COURT

No. 10
Order of Federal Court
19th January 1976

O R D E R

THIS APPEAL coming on for hearing on the 12th day of November 1975 in the presence of Encik S. Woodhull of Counsel for the Appellant and Encik Zulkifli bin Mahmood, Senior Federal Counsel on behalf of the Respondent AND UPON READING the Record of Appeal herein AND UPON HEARING Counsel as aforesaid IT WAS ORDERED that this Appeal do stand adjourned for Judgment AND the same coming on for Judgment this day in the presence of Encik S. Woodhull of Counsel for the Appellant and also mentioning on behalf of the Senior Federal Counsel for the Respondent:

IT IS ORDERED that this Appeal be and is hereby dismissed :

AND IT IS ORDERED that the Appellant do pay to the Respondent the costs of this Appeal

In the Federal Court of Malaysia

No.10
Order of Federal Court
19th January 1976 - continued

as taxed by the proper officer of the Court.

AND IT IS LASTLY ORDERED that the sum of $500/- (Ringgit Five Hundred only) paid into Court by the Appellant as security for costs be paid to the Respondent towards taxed costs.

GIVEN under my hand and the seal of the Court this 19th day of January 1976.

L.S. (sgd) Haji Abdullah Ghazali

CHIEF REGISTRAR
FEDERAL COURT, MALAYSIA

No.11
Order granting final leave to appeal to His Majesty the Yang di-Pertuan Agong

No. 11

ORDER GRANTING FINAL LEAVE TO APPEAL TO HIS MAJESTY THE YANG DI-PERTUAN AGONG

IN THE FEDERAL COURT OF MALAYSIA AT KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. 102 OF 1975

Between

Hock Heng Company Sdn.Berhad Appellant

And

The Director-General of Inland Revenue Respondent

(In the Matter of Originating Motion No.70 of 1973 in the High Court of Malaya at Kuala Lumpur

Between

The Director-General of Inland Revenue — Appellant

And

Hock Heng Company Sdn. Berhad — Respondent)

CORAM: SUFFIAN, LORD PRESIDENT, FEDERAL COURT, MALAYSIA; ONG HOCK SIM, JUDGE, FEDERAL COURT, MALAYSIA; WAN SULEIMAN, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT

THIS 12TH DAY OF JULY 1976

O R D E R

UPON MOTION Preferred unto Court this day by Encik Sandrasegaran Woodhull Counsel for the Appellant and in the presence of Encik Bakarudin bin Suleiman, Federal Counsel for the Respondent AND UPON READING the Notice of Motion dated the 23rd day of June, 1976 and the Affidavit of Sandrasegaran Woodhull affirmed on the 12th day of June, 1976 and filed herein AND UPON HEARING Counsel as aforesaid IT IS ORDERED that final leave be and is hereby granted to the Appellant to appeal to His Majesty the Yang di-Pertuan Agong against the decision of the Federal Court given on the 19th day of January, 1976 AND IT IS ORDERED that the costs of and incidental to this Application be costs in the cause.

GIVEN under my hand and the Seal of the Court this 12th day of July, 1976.

(sgd) Haji Abdullah Ghazali

L.S. Chief Registrar
Federal Court, Malaysia

No. 31 of 1976

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN:

HOCK HENG COMPANY SDN. BERHAD — Appellant

- and -

THE DIRECTOR-GENERAL OF INLAND REVENUE — Respondent

RECORD OF PROCEEDINGS

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