CASE—NOTES

ELEPHANTS, MONKEYS AND BURGLARS THE PROBLEM OF DEFINING TRADE

International Investment Limited

v.

Comptroller General of Inland Revenue[1]

In the *International Investment* case, the perennial problem of what constitutes a 'trade'[2] showed its ubiquitous head again, this time in the form of whether a single isolated transaction in real property amounted to 'trade' or 'business' under s. 10(1)(a) of the Income Tax Ordinance 1947. Briefly, the facts were as follows. The appellant, a limited company, had as one of its objects the capacity to deal in immoveable property and land development. To finance its business the company negotiated a large bank overdraft. The company then proceeded to purchase six pieces of land with a view to developing them, and started the construction of a six-storey building with a shopping arcade and an hotel on them. The appellant then decided to dispose of the land and building, which was half-completed, to another company in exchange for shares in the latter company. The value of the shares exceeded the value of the property transfered. The appellant argued that this was a capital profit resulting from the reconstruction of its business, the purpose of which was to expand its activities of investment in securities. The Revenue however contended that this was income profit of a trading activity and therefore chargeable under s. 10(1)(a) of the 1947 Ordinance.

The Special Commissoners decided that the company had been engaged in the business of dealing in land and therefore the profits were assessable to tax. The High Court, in dismissing the appeal, found that there was evidence to support the Special Commissioners finding that, although the transaction was isolated, it was carried on with the intention of dealing in property. The appelant brought the matter to the Federal Court.

In dismissing the appeal, Raja Azlan Shah F.J. in the Federal Court pointed out that the question whether or not the company carried on the business of trafficking in land within the income tax statute was a question of law. What the learned judge meant by this is obscure. It is settled that

[1] [1975] 2 M.L.J. 208.

[2] "Trade' here is used interchangeably with 'business' although under the Income Tax Act 1967 the word 'business' is given a wider import as to include "trade and every manufacture, adventure or concern in the nature of trade".

whether a trade has been carried on is a question of fact to be decided by the Special Commissioners. The Commissioners are judges of fact and the primary facts found by them and the inference drawn from those facts are all treated as questions of fact. Normally their findings are not subject to review unless they have misdirected themselves on some points of law. But what the statute means by 'trade' is a question of law (*Edwards* v. *Bairstow and Harrison* 36 T.C. 207).

The word 'trade' or 'business' is not defined by the 1947 Ordinance.[3] Authorities on the question of whether or not an activity amounts to trading are plentiful but in none of the cases have the judges attempted to give a definition to the word. Many have thought that the word is not susceptible to a definition and just as many have recognized that, although the situation of trade is amorphous, there are incidents which distinguish the trading from the non-trading activity. Some of the incidents, such as the frequency of the activity, adaption of the subject-matter of the transaction to make it more marketable or the nature of the subject-matter itself, may point to the fact that the transaction is in the nature of trade. The inference of 'trade' or 'no trade' would depend on the circumstances of the case. Judicial expositions are of little help in doubtful cases. Raja Azlan Shah F.J. appreciated this and he cautioned that cases on income tax depend so much on their peculiar facts that excessive reliance on precedents may be dangerous.

The incident that features prominently in the instant case is the isolation of the transaction. If trade connotes continuity, does it mean that an isolated transaction or a speculation engaged in once and for all does not possess the legal quality of trade? In the present case International Investment Ltd. was engaged only in a single transaction, and even then in a transaction of a kind normally used for investment and not for trading. Counsel for the appellant, none other than Barry Pinson himself, sought to rely on Gill F.J.'s (as he then was) judgement in *E.* v. *Comptroller General of Inland Revenue* ([1970] 2 M.L.J. 117) The learned judge said that since 'trade' in the 1947 Ordinance is not statutorily extended to include an adventure or concern in the nature of trade, therefore "it follows that a profit from an isolated transaction of purchase and resale of property, even if it is held to be an adventure or concern in the nature of trade, is not liable to income tax under s. 10(1)(a)."[4] He found support for this proposition in the decision of the Singapore Court of Appeal, where the charging section is in *pari materia* with s. 10(1)(a), in the case of *D.E.F.*

[3] 1967 Act gives a circular definition to the word 'trade' See *ibid.*

[4] The situation would of course have been different under the 1967 Act owing to the statutory extension to the meaning of trade to include 'adventure or concern in the nature of trade'.

v. *Comptroller of Income Tax* ((1961) M.L.J. 55). In that case Buttrose J. said, to found trade for the purposes of s. 10(1)(a), there must be a series of repetitious acts. Ambrose J. felt that it was not possible to construe trade under the section as including an adventure in the nature of trade. He went on further to say that, though the word trade could not in the context be used to cover an isolated transaction, if it is proved that a person intended to conduct one business transaction with that intention, then he carried on a trade. Short of that clearly evinced intention, there must be a continuous exercise of an activity.

It is therefore still true to say that if an individual is engaged only in a single profitable activity, the fact that it was carried on once and for all would militate against the inference that he has carried on a trade. This is so even under the 1967 Act because not every speculation is a concern or an adventure in the nature of trade. But when a company is involved, the circumstances might be sufficiently changed to warrant the inference of trade which is not tenable in the case of an individual. In this connection Raja Azlan Shah F.J. pointed out that the test to be applied to an individual is different from that which is applied to a company. The counsel for the Inland Revenue argued that the use of the word 'Ltd' behind the appellant company's name raised a strong presumption that it was intended to carry on a business. However this contention was rather thin on the ground.

The learned judge continued by saying that the nature and purpose of the company as expressed in the Memorandum of Association was an important evidentiary item. The form which the company takes however is not conclusive on the question whether it has traded. To give an example, an investment company which is formed to hold land or other property as an investment may yet be held to be trading, and if it has made a trading profit, it may be assessable despite the fact that it is an investment company. "The question is not what business does the taypayer profess to carry on, but what business does he actually carry on" (*I.R.C. v. Hyndland Investment Co.* 14 T.C. 694 at p. 699). What one has to look at is the particular activity undertaken by the company. A company may have consistently been regarded by the Revenue as an investment company. But the Revenue is not estopped from treating a particular activity as of a trading nature.

One further point raised by the Revenue was that, owing to its financial standing, or the lack of it, the appellant company was not in a position to develop the property and that all along it had intended to speculate in the property. Had the appellant decided to hold the property as an investment, the argument goes, it would have taken them years to recoup the money in order to discharge the bank overdraft outstanding. The terms of the loan were unknown but somehow the Special Commissioners found it as a fact that the appellant had intended to deal in property. No doubt the

inadequacy of capital available to the company to develop the property as an investment was a factor taken into account in drawing the inference that the company had no intention to hold the property as an investment.

The point of this exercise is perhaps to re-emphasize that trade is very much in the nature of the proverbial elephant. "We can recognize a 'trade' when we see it," said Lord Denning, "(b)ut we are hard pressed to define it." (*Griffiths* v. *Harrison* [1963] A.C. 1 at p. 20). He went on to ask: "Is a monkey a human being or an animal in the nature of human being?" And what about a gang of burglars? They acquire and sell goods. They are organized. They make a profit. But are they engaged in trade or an adventure in the nature of trade? It might have helped if one bears this in mind before deciding to take the court on another fruitless search for a definition. The existence or otherwise of a trade is a question of fact and the matter should not normally be pursued beyond the Special Commissioners.

Shaukat Ali Mahmud.

LIABILITY UNDER CONTINUING GUARANTEES SECURING OVERDRAFTS

Heng Cheng Swee v. *Bangkok Bank Ltd.*[1]

There is a dearth of Malaysian cases interpreting and applying the provisions of Part VIII of the Contracts Act, 1950 (Revised – 1974) (Act 136), pertaining to contracts of indemnity and guarantee. The decision of the Federal Court in *Heng Cheng Swee* v. *Bangkok Bank Ltd.* is particularly welcomed as it deals with that type of contracts of guarantee which are widely employed by bankers as collateral for overdraft facilities.

Briefly, the facts of the case are as follows: The plaintiff Bank advanced money on overdraft to a company, Malaysian Timber and Granite Products Ltd. to the tune of $462,039.39 plus interest, commission and banking charges. The overdraft facilities were secured by various guarantees given by the directors of the company in addition to a guarantee for $75,000 given by the defendant, a lawyer. The document signed by the defendant was the standard continuing guarantee form supplied by the Bank. The company subsequently failed to pay the amount owing under the overdraft and was eventually ordered into compulsory liquidation. The bank then called upon the defendant to pay the $75,000 guaranteed by him. The defendant disclaimed liability under the guarantee on the

[1] Federal Court Civil Appeal No. 34 of 1975. To be reported in [1976] 1 M.L.J.