
MALAYSIAN STAMP DUTY HANDBOOK

Arjunan Subramaniam

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STAMP DUTY 1994 BUDGET PROPOSALS

- 1. Stamp Duty on Contract Notes**
The rate of stamp duty on contract notes effective from 1.1.1994 is RM1.50 for every RM1,000 or part thereof on the value of any share, stock, marketable securities transacted. The previous rate was RM1.00.
- 2. Stamp Duty on Share Certificates: Item 70, First Schedule Deleted**
Effective from 1.1.1994 the stamp duty on share certificates is abolished. The previous rate was RM2.00 per certificate.
Item 7 of Fifth Schedule deleted from 1.1.1994.
Item 19 of Second Schedule deleted from 1.1.1994.
- 3. Payment of Duty by Bankers, Stockbrokers or Insurers – Section 9(1)(c)**
In case of compounded duties on unstamped cheques, contract notes or policies of insurance, bankers, stockbrokers or insurers are required to pay stamp duties on the first day of January and July. This procedure is changed from 1994 to 1st January, 1st April, 1st July and 1st October.
The said payments must be paid within 14 days of the respective due dates (8 days previously).



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PREFACE

The Stamp Duty Act Taxes Instruments not Transactions

Based on what appears to be a simple proposition has evolved a body of law which is complex as any other branch of Revenue Law. Stamp duties are levied under the Stamp Duty Act 1949, which applies to the whole of Malaysia effective from 1.10.1989. Prior to this date there were three separate Acts in operation. The objective of Stamp Duties is purely revenue collection. It has no other fiscal objectives. Over \$400,000 per annum is collected as revenue, and therefore, its claim to importance.

There are leading books on the subject but none devoted to stamp duties in Malaysia. This book is an attempt to fill the gap. The book is based, apart from experience in administering stamp duties, on lectures delivered on the subject at institutions of higher learning. The book is advanced as an introduction to the subject and it is hoped that future editions would evolve from this book into a “manual”.

The law is stated as at 1st January 1993. All errors and omissions are mine.

*Arjunan Subramaniam
Kuala Lumpur*



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CHAPTER 1

Structure of Stamp Duty Act 1949

1. Duty on Instruments

Stamp Duty is a duty on instruments not transactions. It is entirely a creature of Statute law, namely, the Stamp Duty Act 1949. In 1834, it was said of Stamp Duty that:—

“The law upon the subject of stamps is altogether a matter positive Juris (rules imposed by sovereign on subjects; law proper as opposed to moral law). It involves nothing of principle or reason but depends altogether upon the language of the legislature.” — (See *Morley & Hall* (1834) 2 Dowl 494).

Indeed, the whole law on stamp duties is statutory. However, case law developments in the field are important as they explain the meaning and scope of words used in the Act. A number of sections in the Stamp Duty Act 1949 are identical to the comparative provisions in the United Kingdom Act 1894. Cases decided in the United Kingdom, are therefore, important in understanding the words used in the Stamp Duty Act 1949. However, developments in stamp duty law in the United Kingdom have not been followed in Malaysia and care should be taken in referring to United Kingdom decisions. Nevertheless, it must be noted that Section 15A, Stamp Duty Act 1949 was introduced with effect from 1.10.1989 and is formulated on the comparative Section 42 of the United Kingdom Act. Thus, cases decided in respect of Section 42 of the United Kingdom Act are of great assistance in understanding Section 15A of the Stamp Duty Act 1949.

2. Part 1: Preliminary

In brief the parts and schedules deal with the following:

The Stamp Duty Act is divided into ten parts and four schedules. Each part enacts the enabling provisions for the imposition and administration of stamp duty.

This part contains certain definitions in Section 2. Apart from the definitions it covers powers of the Collector of Stamp Duties in Section 3A(1) to (5)

3. Part 2: Provisions Applicable to Instruments Generally

The liability or charge to stamp duty on instruments is in Section 4. Stamp duty being a duty on instruments means that there must be a document

before the duty arises. Thus, if there is no document, there is no stamp duty. This part also covers mode of payment of stamp duty, stamp duty on an instrument containing distinct matters, assessment of the value of property under transfer or settlement, and other general principles.

4. Part 3: Provisions Applicable to Particular Instruments

Part 3 covers important exemptions embodied in the Act. Section 15 grants relief from stamp duty in cases of reconstructions or amalgamations of companies. Section 15A gives relief from stamp duty in case of transfers between associated companies. Apart from exemptions other specific cases covered include, *inter alia*, the stamp duty payable in case of:

- i. voluntary conveyance *inter vivos*
- ii. conveyance in consideration of debt, stamp duties in respect of closure orders, contracts chargeable as conveyances on sale and leases.

Section 15 and 15A are of paramount importance to the business world and, complex though the sections may be, are useful to corporate structures.

5. Part 4: Liability for Payment of Duty

Part 4 has only a few sections covering who shall pay stamp duties.

6. Part 5: Adjudication as to Stamps

Part 5 sets out the whole process of adjudication as to stamps. Adjudication is the process by which the Collector of Stamp Duties determines the stamp duty payable on an instrument, after which process the Collector cannot claim that the duty has been wrongly assessed. Stamp duty imposition is unlike income tax where if an assessor of the Inland Revenue Department makes a mistake he can rectify it by issuing an additional assessment. But when a instrument is sent for adjudication as to stamps, the duty determined upon adjudication is final (subject to appeal) and the Collector of Stamp Duties could not years later claim he made a mistake. Some documents must be adjudicated.

7. Part 6: Of the Time of Stamping Instruments

Part 6 covers the position of instruments executed in Malaysia and outside Malaysia; it lays out the rules when such documents must be stamped. The time of stamping of bills, cheques or notes drawn outside Malaysia, transfers of shares is also covered in this part.

8. Part 7: Instruments Not Duly Stamped

One of the main principles of stamp duty is that instruments not duly stamped are inadmissible in evidence in civil cases. The examination and impounding of such instruments not duly stamped is the subject of this part.

9. Part 8: Allowance for Spoiled Stamps

This part has provisions for the refund of stamp duty in cases where the stamps were either “spoiled stamps” or misused stamps. Specific conditions are laid down for refund of stamp duty in cases of “spoiled stamps” or misused stamps.

10. Part 9: Offences and Penalties

Part 9 covers certain penalties for offences under the Act. Most of the penalties are small sums.

11. Part 10: Miscellaneous Sections

Part 10 covers certain miscellaneous items such as powers of inspection of public books and records, the power to exempt or reduce penalty.

12. The Schedules

a. The First Schedule

The First Schedule has “items” or “heads” with description of instruments or documents with the proper stamp duty payable or exempt thereof. Thus, item 32(a) reads:

Item Description of Instrument Proper Stamp Duty

32. Conveyance, Assignment, Transfer or Absolute Bill of Sale:

- a. On sale of any property (except stock, shares, marketable securities and accounts receivables or book debts of the kind mentioned in paragraph c)
 - i. 1% on the first \$100,000;
 - ii. 2% on any amount in excess of \$100,000 but not exceeding \$500,000;
 - iii. 3% on any amount in excess of \$500,000 but not exceeding \$2,000,000;
 - iv. 4% on any amount in excess of \$2,000,000.

In brief, therefore, the First Schedule is the authority of the quantum of stamp duty to be imposed for the various descriptions of instruments or documents.

b. Second Schedule

The Second Schedule covers the responsibility of persons in respect of cancelling adhesive stamps.

Thus, item 1 reads:

Agreement – No. 4. ... The person by whom the instrument is first executed.

c. Third Schedule

The Third Schedule sets out the responsibility of payment of duty, i.e., stamp duty by whom payable? Thus, item 1. reads:

1. Agreement or Memorandum of Agreement – No. 4 – The person by whom the instrument is first executed.

No. 4 refers to item 4 or “head” 4 in the First Schedule.

d. Fourth Schedule

The Fourth Schedule contains all enactments regarding stamp duty which have been repealed.

e. Fifth Schedule

The Fifth Schedule lists out the instruments on which duty is payable by means of a postal franking machine. Examples are:

- i. Bill of Lading
- ii. Cheque

13. Fixed Duties and *Ad Valorem* Duties

Duties imposed by the stamp Duty provisions are either fixed duties or *ad valorem* duties. *Ad valorem* duties, as the name implies varies with the value of the transaction in the instrument.

Example:

A fixed duty example is item 6, *Appointment of a Receiver* under a mortgage – \$10; another example is item 10, *Articles of Association* of a company – \$100

An example of an *ad valorem* duty is as follows:

Example: 1.1.1993 *et seq.*
Land sold at \$800,000

Stamp Duty is \$18,000 as follows:

1%	x	\$100,000	=	\$ 1,000
2%	x	\$400,000	=	\$ 8,000
3%	x	\$300,000	=	\$ 9,000
		<u>\$800,000</u>		<u>\$18,000</u>

14. Strict Construction

Acts of Parliament imposing taxes or duties are generally construed strictly. If the words are plain, a plea of hardship caused has no effect in its construction. However, if there is some ambiguity, it is generally decided in favour of the taxpayer.

In *Navaratnam v Suppiah Chettiar* (1973) 1 MLJ 173, Ong Hock Sim, FJ said;

“The words of Section 41 are precise and unambiguous. As Scott, LJ said in *Croxford v Universal Co.*: Where the words of an Act of Parliament are clear, there is no room for applying any of the principles of interpretation which are merely presumption in cases of ambiguity in the statute.” Person, J in *Jethi Bai v Ramachandra Narottam* said:

“The present Act goes much further than this. It provides, by Section 34, that an instrument shall not be admitted in evidence “unless such instrument is duly stamped.” Such a provision clearly imposes upon the court the duty of seeing in every case whether an instrument presented to it is “duly stamped” or not. “Duly stamped” as defined in the Act to be stamped in accordance with the law in force when such instrument was executed, or first executed. When this instrument was executed, Act I of 1879 was in force. That Act, in Section 16, lays down that all instruments chargeable with duty and executed by any person in British India shall be stamped before or at the time of execution. If an instrument is not so stamped, clearly it is not stamped according to the Act and cannot be held therefore to be “duly stamped.”

Further on his Lordship continued to say that a judge cannot modify the language of an Act to do justice:

“This was no doubt dictated, as the learned Chief Justice said in his judgment, out of sympathy for the predicament brought about by the refusal of an officer of the Stamp Office, Ipoh to follow the accepted practice. As Willes, J said (*Abel v Lee*): “No doubt the general rule is that the language of an Act is to be read according to its ordinary grammatical construction unless so reading it would entail some absurdity, repugnance or injustice.... But I utterly repudiate the notion that it is competent to a judge to modify the language of an Act in order to bring it in accordance with his views of what is right or reasonable.”

His Lordship emphasised that:

“the words of a statute never should in interpretation be added to or subtracted from, without almost a necessity” (*Cowper-Essex v Action L.B.*). In *R. v Berchet*, it was said to be a known rule of interpretation of statutes that such sense is to be made upon the whole as that no clause, sentence or word shall prove superfluous, void or insignificant, if by any other construction they may all be made useful and pertinent. Section 41 enacts that instruments shall be stamped before execution or at the time of execution, unless there is provision to the contrary, as in Section 47, which however expressly excludes promissory notes.”

14.1. Ambiguity in Words

In *United Malayan Banking Corp. Bhd v Pekeliling Triangle Sdn Bhd* [1991] 2 MLJ 559 the principle of strict construction and position of ambiguity in words used, was summarised and quoted as follows:

“The Stamp Duty Act 1949, is an Act relating to stamp duties and, as Lord Tenterden had stated in *Tomkins v Ashby*, ‘Statutes imposing duties are to be so construed as not to make any instruments liable to them unless manifestly within the intention of the legislature.’ The rules of construction of documents for stamp duty purposes and of stamp duty legislation are well summarised in the following passages from Sergeant and Sims Stamp Duties (9th Ed) p.18:

a. General Rule of Construction of Charge

It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language: *Denn & Manifold v Diamond* (1825) 4 B&C 243, and a statute imposing a tax upon the subject should always receive a strict interpretation and should not be allowed to operate as a charge unless the words are plain and unambiguous: *Daines v Heath* (1847) 3 CB 938. The party who seeks to bring an instrument within the Stamp Duty Act must show clearly that it falls within it, and no intendment can be made in favour of the liability: *Philips v Morrison* (1844) 13 LJ Ex 212 and *R v Winstanley* (1831) 1 Cr & J 434.

b. Ambiguity

If the statute is so indefinite and uncertain that it can be treated in two ways and the true construction of it is open to two views, one more favourable to the Crown and the other to the subject, then the latter construction should be adopted: *Clifford v IRC* (1896) 2 QB 187, approved and followed in *Hennell v IRC* (1933) 1 KB 415, CA. In other words, the subject, and not the Crown, is entitled to the benefit of the doubt: *R v Winstanley* (1831) 1 Cr & J 434.

We ought to bear in mind the above-quoted rules and that the object of the Act relating to stamp duties is to raise revenue by requiring documents of certain kinds to be stamped.”

14.2. Technical Words

Word’s used in an Act are generally given their ordinary meaning. But technical words are construed in accordance to the context in which they are used. Definitions of “Conveyance”, “bond” follow their technical meanings. In this respect case law developments in respect of meanings of words used in the Act must be borne in mind.

14.3. Liberal Construction

It was thought that a liberal construction should be given to exceptions in the Act, but this is doubtful. In *Pernas Securities Sdn Bhd v The Collector of Stamp Duties* [1976] 2 MLJ 188, Chang Min Tat, J quoted Halbury’s Law of England, thus:

“In construing provisions imposing the duty, strict attention must be paid to the actual words used by the legislature, but the words themselves must be understood in a “popular” sense that is, the sense which persons conversant with the subject matter with which the statute is dealing would attribute to them and, although no consideration as to what might be reasonable on the one hand, or oppressive on the other, can affect the conclusion, ambiguous words are construed in favour of the subject. Formerly a liberal construction was given to exceptions, but the tendency in recent years seems to be towards a stricter construction. Then duty being impressed upon instruments and not transactions, the fact that it may not be possible to devise a means for effecting the latter without resort to the former is no ground for straining the words of the statute in order to prevent such means, of escaping liability.”



CHAPTER 2

General Principles

1. General

The Stamp Duty Act is best understood by paying attention to some basic principles which form the basis for imposing Stamp Duties.

2. Instruments Liable to Duty: Section 4

The basic principle of stamp duty is that stamp duty is upon an instrument or document and not upon a transaction. Section 4 imposes or raises a liability to duty on several instruments as specified in the First Schedule.

If a transaction can be completed without the necessity of a document, then there is no stamp duty. The principle was explained by Taylor, J in case of *Lim Teck Lee v The Commissioner* [1956] MLJ 135 as follows:

“The fundamental principle is this. The Stamp Duty Act taxes instruments, not transactions. If there are two ways of carrying out a transaction the parties are content with the simpler, they are entitled to carry it out in that way. Whatever instrument they in fact use must be stamped as what it actually is, on a true construction of the document alone but extraneous evidence may be adduced to show, for instance, whether an assignment, was made in pursuance of a sale or of a partition.”

Thus, if Mr A wants to give a gift of a house to his daughter B, Mr A could buy the house in his name and transfer it to his daughter or give the cash to his daughter to enable her to purchase the house. If he purchased the house and transfers it to his daughter then the stamp duty is payable under head 32(a). First Schedule is payable twice: once on the instrument of transfer to him and then on the instrument of transfer to his daughter. The other alternative whereby the cash is given to the daughter to purchase the house only attracts stamp duty once.

Thus, if Mr B and Mr C enter into a partnership written agreement the stamp duty payable is a fixed duty of \$10 under head 57, First Schedule. But if there is no written document, then, there is no stamp duty payable.

A promise of marriage if oral requires no stamp, but if entered in a book, it cannot be tendered in evidence unless stamped. See *Ahmad Meah & Anor. v Nacodah Merican* (1890) 4 KY 583.

U.K. Cases:

- i. *Win Cory & Son Ltd. v IRC* (1965) AC 1088.
- ii. *Royal Liver Friendly Society v IRC* (1870) LR 3 Ex CR 98.

**3. Principal Instrument and Subsidiary Instrument –
Section 4(3)**

Where several instruments are used for the completion of a transaction, the principal instrument is subject to stamp duty as prescribed in the First Schedule and subsidiary instrument is subject to a fixed duty of \$10. Section 4(3) provides that the parties themselves shall determine which of the instruments is the principal instrument and which a subsidiary instrument.

Where a document is exempt, all subsidiary documents accessory to the primary purpose are also exempt.

In *Cheah Choon Gan & Ors. v Registrar of Titles, Kedah* (1973) 1 MLJ 107, Section 4(3) was considered. In that case seven appellants purchased a piece of land and become the coproprietors of the said land. Three groups of shares were held as follows:

- a. 1st. group consisting of the first appellant holding $\frac{95}{235}$ shares,
- b. 2nd. group consisting of second and third appellants holding $\frac{95}{235}$ shares, and
- c. 3rd. group consisting of 4th, 5th, 6th, and 7th appellants holding $\frac{60}{235}$ shares.

Subsequently by a partition agreement they agreed to subdivide the land into seven lots. The appellants in line with the partition agreement applied for cross transfers by means of three memoranda.

The Solicitors for the appellants requested the Collector to value separately the land described in the three memoranda of transfer.

The Collector valued the property at \$62,000, \$70,200 and \$55,600 respectively. The Solicitors then had the memorandum effecting the property valued at \$70,200 stamped with *ad valorem* duty and the other two memoranda with 50 sen stamps (as the duty then was). Upon presenting the stamped memoranda for registration, the Collector accepted the memorandum of transfer stamped with the *ad valorem* duty but rejected the other two on the basis that they were not properly stamped.

The appellant's main argument ran as follows: that this was either a case of partition or exchange and in either case it came within the scope of Section 4(3) and the cross-transfers involving the three instruments of transfer amounted to a partition within the meaning of Section 4(3). Again, this

case also came within the meaning of “exchange” attracting stamp duty under item 43, First Schedule.

At the Federal Court, Azmi, LP observed the following:

- i. It would be apparent from the second column of item 32 that in the case of conveyance or transfer the 1% stamp duty would be payable on the property, if more than one, of the greater value, and that in such a case the choice given to the parties under Section 4(3) of the Stamp Ordinance to determine for themselves which of the instruments so employed shall be the principal instrument, is not available to them.”
- ii. The other argument put forward by counsellor of the appellants was that this was a case of exchange attracting stamp duty under item 43 of the First Schedule to the Stamp Ordinance. He explained it in the following manner. An exchange at common law means an assurance by which one person conveys property to another in consideration of a conveyance of property by mutual conveyance or transfer. The seven lots in question came from the original lot 87 which was registered in the names of the appellants. The land was the same and no new property was involved and there was no monetary consideration. The three instruments of transfer presented by the appellants were merely to enable themselves in their three respective groups to become co-owners of their respective lots to the exclusion of other. The learned judge below himself had accepted that this was the intention of the parties. He had therefore erred in not holding that the three instruments so presented come within the meaning of “exchange” under Section 4(3) of the Stamp Ordinance 1949.”
- iii. His Lordship went on to conclude that: “I would, however, accept the alternative argument of the counsel for the appellants that this is a case of an exchange attracting item 43 of the First Schedule of a Stamp Ordinance and since *ad valorem* duty has been paid on the memorandum of the greater value, the other two instruments stamped with the 50 sen stamp each are therefore properly stamped.”

In *Pernas Securities Bhd v The Collector of Stamp Duties [1976] 2 MLJ 188*, the question of the principal agreement or security was raised. The facts were as follows.

A loan agreement was executed on 15.7.1974, under whose terms the lender agreed to lend to the appellant a sum of \$10 million dollars. The interest rate was fixed at 9%. The loan was to be released in 9 instalments over a year. Upon each advance, the lender was to execute a promissory note.

The issue was whether the stamp duty payable on the loan agreement was as a “Security” or as a mere agreement. The appellant’s argument was that the loan agreement was not a “security” and that the security consisted of several promissory notes.

Under the above circumstances it was held that the agreement is the principal or primary security and, therefore, chargeable under item 22(i)(a), First Schedule, and at a rate set out in Item 27.

Chang Min Tat, J: viewed the loan agreement as follows:

“In my view and with respect, the agreement must be read for its full effect. In the first place, the promissory note is a mere undertaking, however unconditionally it may be expressed, to repay the instalment and the agreed interest. The only other indication is the date of repayment contained in a note at one corner under “maturity-date”. It is silent as to any provisions for the payment of interest charged. Such provisions are made are contained in Clause 3.3 of the agreement. They are for quarterly payments. Other provisions are for capitalisation of interest in the event of late payment. Another, a provision not contained in the promissory note, is made for the earlier repayment of the loan. It specifies the notice that is to be given and lays down a penalty, presumably to make up, at least in part, for the interest lost. What appear however to me to be most significant are the clauses specifying the conditions precedent and the additional securities by way of warranty and further undertakings, which are all designed to safeguard the viability of the appellant – borrower as a trading concern and therefore its ability to repay. It is therefore in my view, and with respect, clear and beyond argument that the promissory note provides no security that is not given in the agreement. One begins to wonder at this requirement for the promissory notes save as an indication of the time each instalment is made.

In these circumstances, I am of the opinion that the document in question is the principal or primary security and therefore chargeable under Item 22(1)(a) of the first Schedule to the Stamp Duty (Special Provisions) Malaysia Act 1967, at the rate set out in Item 27.

It may of course be that the appellant is under an apprehension that he will have to pay the same *ad valorem* duty on promissory notes. If so, he will have to pay roughly twice the amount he had paid. But it seems to me, however, I am not deciding this issue, that he will have a good case to bring the promissory notes under Item 22(2) as “collateral or auxiliary or substituted” securities, for each of which the maximum stamp duty is \$5. If I am right, then as I have found some delight in working it out, the only difference is a mere additional \$68, from which he may take some consolation.”

An instrument stamped for the principal object covers objects accessory to the principal object and if the principal object attracts no duty, the accessory objects also attract no duty. [*Limmer Asphalt Paving Co. v IRC* (1872) LR 7 Ex 211].

4. Single Instrument Relating to Different Matters: Section 6

A single instrument relating to distinct matters will be subject to duty as if it were several and separate instruments. No duty evasion is possible by way of incorporating into a single instrument several distinct matters. By virtue of Section 6(b) an instrument subject to *ad valorem* duty can be subject to further duties including fixed duties. (See Section 17(2) *infra*).

Section 10(2) makes clear that two instruments written on one piece of paper must be separately and distinctly stamped. In other words a stamp appearing on a piece of paper for one instrument cannot be used for another instrument written on the same piece of paper. (Section 10(1)).

5. Liability Under Two Heads or Items

It is possible for an instrument to fall under two heads, and when such a situation arises, the Collector of Stamp Duties has the right to take stamp duty under the head which gives the higher duty. The authority for this proposition is in *Speyer Brother v Commissioners of Inland Revenue* (1908) AC 92, cited in the case *Stanway Limited v Collector of Stamp Duties, Ipoh* (1931-32) FMSLR 239.

However, where a document falls under a specific item, it is not chargeable under a general item, which attracts a higher duty.

Also note that if a transaction can be executed in alternative ways, the charge to stamp duty is on the instruments actually used. If an instrument purports to record a previous oral transaction, it may be treated that the instrument and the oral transaction are one. [*Cohen & Moore v IRC* (1933) 2 KB 126].

U.K. cases:

- i. *North of Scotland Bank v IRC* 1931 SC 149.
- ii. *British India Steam Navigation Co. v IRC* (1881) QBD 165.

6. Position of Instruments Not Duly Stamped

By virtue of Section 51(1) instruments not duly stamped are inadmissible in evidence. A not duly stamped instrument cannot be registered, acted upon or authenticated by any person or public officer. However, such an instrument is admissible in evidence.

- a. if duty and penalty are paid subject to certain specific conditions.
- b. in a criminal court.

One of the compelling reasons why people would want to stamp documents is this reason of non-admissibility of documents in evidence in civil cases.

By virtue of Section 51(1), every person who has authority to receive evidence, including persons in charge of a public office (except a police officer) must impound a document which is not duly stamped. However, a Magistrate or judge of a criminal court is not so bound to impound a not duly stamped document.

The proviso (b) to Section 51(2) provides that in case of a High Court judge the function of examining and impounding any instrument not duly stamped rests with the registrar. But note that a High Court judge should impound the instrument under Section 51(1), even if subsequent to the impounding by a High Court judge a Registrar exercises his function.

In *Arbiah v Azinol* (1972) 2 MLJ 57 the importance of impounding not duly stamped documents by the court was emphasised by Suffian, FJ (as he then was). In that case a document was not stamped and so not admitted in evidence. The defendant applied that the document be impounded.

Suffian, FJ (as he then was) held:

“There were several written agreements entered into between the parties, but we are concerned at this stage of this appeal with only one document (Exhibit PI). It was common ground that PI was chargeable with stamp duty, but it had not been stamped at all. The learned president who tried the case, applying Section 52 of the Stamp Ordinance, 1949, considered that PI was inadmissible and ignored its contents except by way of introductory back ground.

He gave judgment for the plaintiff and dismissed the defendant’s counterclaim, and the defendant has appealed to this court.

The defendant applies by notice of motion for this court to impound PI so that after payment of duty and penalty it may be admitted and its contents taken into account.

Her counsel states that the learned president should have impounded PI under Section 51, but owing to an oversight he (counsel) failed to bring that section to the notice of the learned president. Counsel further submits that this court has power under Sections 29 and 69 of the Courts of Judicature Act to impound PI, and send it for stamping and payment of any penalty due, and finally admit the document.

I agree, PI should normally have been stamped before or at the time of execution, Section 41; but it can also be stamped after execution on payment of a penalty in addition to the stamp duty, Section 47. The learned president overlooked his duty under Section 51 to impound the document. This appeal is a rehearing, and this court can do what he should have done. The document was all the time in the plaintiff’s possession. Before the trial the defendant’s solicitors intending to rely on it wrote to the plaintiff’s solicitors asking them to have it stamped at the defendant’s expense, but they refused to do so. At the trial it was the plaintiff himself who produced the document in evidence. In view of this I think that it is just that this court should impound the document and admit it in evidence on payment of the duty and the penalty if any, and I order accordingly”.

See also for similar decisions in *Paramount Limestone Sdn Bhd v Nader Minerals Development Sdn Bhd* (1979) 1 MLJ 90 and *Malayan Banking Bhd v Agencies Service Bureau Sdn Bhd & Ors* [1982] 1 MLJ 198.

6.1. Meaning of Duly Stamped

A document is “duly stamped” if it bears adhesive or impressed stamp of not less than the proper amount and the stamp is affixed or used in accordance

with the law for the time being in force. A document is not duly stamped where the stamp duty is not paid, or the stamps although of the correct amount had not been properly cancelled.

In *Navaratnam v Suppiah Chettiar* (1973) 1 MLJ 173, Ong Hock Sim, FJ said:

“Duly stamped” is defined in Section 2 and “means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in the Federation.” It has juridically been construed in *Chop Tiong Kok Hang v Hock Cheng & Co.* Huggard, CJ said:

“According to this definition, an instrument, in order to be duly stamped, must be stamped in accordance with the law for the time being in force in the colony and I interpret this to mean that the instrument must bear a stamp of the proper value, it must be stamped in the proper manner with the proper description of a stamp, and it must have been stamped at or within the time prescribed by law.”

In *Chop Tiong Kok Hong v Hock Heong & Co.* (1934) MLJ 74, Huggard, CJ addressing the question of duly stamped and its consequences said:

“Before a Court can admit in evidence an instrument chargeable with duty it must be satisfied that the instrument is duly stamped.” (See judgment of Parsons, J in *Jethi Bai v Ramachandra Narottam*, 13 Bombay 484).

The expression “duly stamped” is defined as follows in Section 2 of the Ordinance:

“Duly stamped,” as applied to an instrument, means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in the colony.

According to this definition an instrument, in order to be duly stamped must be stamped in accordance with the law for the time being in force in the Colony, and I interpret this to mean that the instrument must bear a stamp of the proper value, it must be stamped in the proper manner with the proper description of stamp, and it must have been stamped at or within the time prescribed by law.

In the present case it is admitted that the bills were not stamped prior to acceptances as required by Section 40 of the Ordinance and I have already expressed the view that the Ordinance contains no provision enabling bills of exchange drawn out of the Colony to be late stamped.

It follows, therefore, that in my opinion these bills are not duly stamped within the meaning of Section 49 and I am precluded from admitting them in evidence.”

In *Hup Cheong Motor Co. v Saong Jonathan & Anor* [1992] 2 MLJ 331 a deed of assignment was stamped, but the procedure in Section 7(3) of the Stamp Duty Act was not complied with, that is the stamp was not cancelled and therefore it was held “not duly stamped” and not admissible in evidence under Section 52(1) of the Act. But it could be admitted in evidence upon payment of a penalty of \$25 (proviso (a) Section 52(1) applied).

See also *Chiew Vui Kiet v Chong Fook Tien & Ors* [1971] 2 MLJ 158, where it was held that if an original document is not stamped and not produced in Court, a copy cannot be introduced in Court.

6.2. Registration of Not Duly Stamped Instruments

In *Development & Commercial Bank Bhd v Che Wan Development Sdn Bhd & Ors* [1990] 1 MLJ 12, the effect of an not duly stamped document was considered.

In that case the facts were:

- i. A development company had banking facilities of \$3.5 million and as security charged on their land.
- ii. there was a breach of the terms of the charge and the bank brought proceedings for the sale of the land.

It was argued, *inter alia*, that stamp duty was under paid and the documents should be impounded.

Abdul Malek, J held:

- i. In *Lall Singh v Parmanand* [1941] MLJ 176 it was held that on the allegation of insufficient stamp duty that having been passed by the registering authority as fit for registration, it cannot be impeached on the ground that it was not sufficiently stamped at the time of registration.
- ii. At any rate Section 14, of the Stamp Duty Act provided that interest should be excluded for Stamp Duty purposes.

A similar decision was arrived at in an earlier case of *Isahak Hamid v Mustapha* (1965) 2 MLJ 18 where the facts were:

- i. An election was held on 25.4.1964 for the Parliamentary Constituency of Tanah Merah.
- ii. Nomination papers of the successful candidate was accepted and it was alleged that the papers should have been rejected because the stamp thereon was not cancelled as prescribed in Section 7(3) of the Stamp Duty Act.

Ismail Khan, J held:

- i. The document was not duly stamped and therefore inadmissible in evidence,

- ii. But, notwithstanding the transgression of the law, the election was valid.

His Lordship quoted a number of United Kingdom cases in support.

7. The Contingency Principle

The liability to stamp duty is at the time when the instrument is executed. However, there may be circumstances when the consideration payable under a agreement is uncertain at the time of execution of the instrument. *Ad valorem* duty, if applicable, in such circumstances is based upon the following principles.

a. A Contingent Minimum

Where under an instrument, the total consideration payable is uncertain, but the minimum is stipulated, then the stamp duty payable is calculated on the minimum figure.

Example:

Mr A is a sole proprietor of Ace Company. In 1993, he sold his entire business to Mr B. The terms of the sale are as follows;

The consideration of the sale is fixed at 30% of the net profits for the next 3 years. However, if the profits do not exceed \$200,000 per annum, then Mr B will have to pay \$50,000 per annum.

The above transaction embodied in an instrument, document is subject to stamp duty under item 32(a), First Schedule, as a conveyance on sale duty. With effect from 1st January, 1993 the duty under item 32(a) is as follows:

- i. 1% on the first \$100,000;
- ii. 2% on any amount in excess of \$100,000 but not exceeding \$500,000;
- iii. 3% on any amount in excess of \$500,000 but not exceeding \$2,000,000;
- iv. 4% on any amount in excess of \$2,000,000.

The stamp duty is worked out as follows. The sale price is \$50,000 x 3 years = \$150,000.

Duty = First	\$100,000 =	\$1,000	(at 1%)
Balance	\$ 50,000 =	\$1,000	(at 2%)
		<u>\$2,000</u>	

b. Case of Contingent Maximum

In case where an instrument fixes the sale consideration at a maximum, then the stamp duty payable is calculated on the maximum sum.

Example:

An instrument of sale of a business fixes the sale consideration of 30% of the net profits for 3 years but if profits exceed \$600,000, then the purchaser of the business need only to pay \$120,000. In other words if the net profits for the three years are say, \$700,000, then the purchaser only pays \$120,000 and not 30% of \$700,000 which is \$210,000.

The stamp duty on \$120,000 under item 32(a), First Schedule

$$\begin{array}{r} \text{is } 1\% \times \$100,000 = \$1,000 \\ \text{and } 2\% \times \$ 20,000 = \underline{\$ 400} \\ \underline{\$1,400} \end{array}$$

c. Case of Contingent Variable Sum

In case where an instrument provides for the sales consideration to be a variable sum but provides a figure from which it may vary, then the stamp duty is upon the sum stated. Thus, if the written agreement for the consideration is, say, \$150,000, but varies with an inflation index for the next 3 years, then the stamp duty is on \$150,000 irrespective of the actual sales consideration which varies up or down with the inflation index.

Example:

A leases office space for 2 years. The first year rent is agreed at \$20,000. In respect of the second year, the rent is variable under an inflation index.

The stamp duty is on \$20,000, at rates stipulated under item 49(1)(a), First Schedule.

The stamp duty is \$200.

U.K. Cases:

- i. *Underground Electric Railways v IRC* (1906) AC 21.
- ii. *Jones v IRC* (1985) 1 QB 484.
- iii. *Independent Television Authority v IRC* (1961) AC 427.
- iv. *Underground Electric Railways & Glyn Mills & Company v IRC* (1914) 3 KB 210.

8. Substance and Form

For stamp duty purposes, generally, substance takes precedence over form. The parties may label an instrument as an “agreement” while in fact it is a conveyance on sale. Again, a dissolution of a partnership may be a conveyance on sale. In *Stanway Limited v Collector of Stamp Duties, Ipoh*, Thorne Ag. CJ said:

“Now I would here remark that under the provisions of the Stamp Enactment the parties to an instrument become liable to pay stamp duty upon the instrument made between them, having regard to the effect of the instrument, and they cannot avoid payment of the proper duty by using a form of instrument to carry into effect the transaction which, though in name falls within one category, by its effect into another. In other words parties cannot put a label on their own instrument and claim to pay duty on the document labelled; you cannot avoid the payment of stamp duty by describing a document which evidences your transaction as an agreement, whereas it is in its operation and effect a conveyance on sale.”

The facts in that case were as follows: By an agreement between Standard-Waygood Ltd. and Stanway Ltd. it was agreed to sell and purchase assets described in an attached schedule to the agreement.

The consideration for the said sale was to be paid and satisfied by the allotment to the vendors of shares in the capital of the purchasers. The vendors were to execute and do all such assurances and things as should be reasonably required by the purchasers for the vesting in them of the said premises. The said premises were sold as on 1.1.1931. From that date the purchasers were to be entitled to the profits received in respect thereof.

The Collector of Stamp Duties assessed duty on the agreement as an instrument of conveyance of sale under article 28(i), Schedule A, Stamp Enactment 1930. The purchasers were of the view that the instrument was an agreement within article 28, and the duty was a mere 25 sen and not \$1,772.70, *ad valorem* duty as a conveyance of sale.

Thorne Ag. CJ looking at the instrument said:

“That instrument would be described by the man in the street as an agreement of sale. But objection is taken to it that, although it is in the form of an agreement of sale, it is in effect a conveyance on sale for the reason that nothing further, it is argued, will be required to be done to complete the title of the purchasers to the assets thereby sold. Clause 4 is particularly referred to as evidencing that these assets had been sold at an earlier date.”

His Lordship finally concluded that the instrument was not a conveyance of sale because:

“This instrument is a concluded agreement between the parties, and is not a conveyance on sale, and further assurances are necessary in order that it may become completed purchase.

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