~~P.C.~~
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1960
Judgment
28

IN THE PRIVY COUNCIL No. 31 of 1965

ON APPEAL

FROM THE COURT OF APPEAL JAMAICA

BETWEEN

THE COMMISSIONER OF INCOME TAX
Appellant

- and -

HANOVER AGENCIES LIMITED Respondents

CASE FOR THE APPELLANT

Record

1. This is an appeal from a Judgment and Order of the Court of Appeal, Jamaica (Duffus, P., Henriques J. and Waddington J.) dated the 18th day of December, 1964, allowing an appeal by the Respondents from an Order made by Shelley, J. dated 18th October, 1963, by which Order the Respondents' appeal against a decision of the Income Tax Appeal Board of Jamaica dated 1st May, 1963, was dismissed. By its said decision the Income Tax Appeal Board had upheld an assessment to income tax, dated the 5th day of January, 1962, made on the Respondents for the year of assessment 1960. pp 18.48 p. 16 pp 3.6

2. Two questions are raised by the appeal:

(i) whether the negotiation of leases and the collection of rents by the Respondents amounted to the carrying on of a trade or business by them within the meaning of Section 5 of the Income Tax Laws, 1954, and

(ii) if so, whether a property known as the "Bank Building" was being used by the Respondents during the year of assessment for the purpose of acquiring

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the income from such business within the meaning of Section 8(o) of the Income Tax Law, 1954

pp 14.15

3. The facts of the matter appear from the Record and may be summarized as follows:-

The Respondent Company was incorporated as a limited liability company in 1947 for the purpose of taking over a business carried on under the name or style of Kirkconnell Brothers Successors; it had as one of its objects the acquiring of freehold property and the leasing of all or part of the company's property. That business which, up to 1944 was carried on and known as Kirkconnell Brothers was purchased in 1944 by the principal shareholders of the Respondent Company. The business of Kirkconnell Brothers included that of merchants dealing in hardware and lumber, that of operating a wharf and of letting premises to tenants. Their successors added to the range of businesses that of dry goods merchants, picture house proprietors, building blocks, manufacturers, wholesale provision merchants and insurance sub-agency. In 1945 Kirkconnell Brothers Successors purchased three buildings, one of them was subsequently pulled down and rebuilt in accordance with designs and plans submitted by Barclays Bank D.C.O. to whom the building was leased and who still occupy the building, (known as the "Bank Building") as tenants of the Respondent.

After the acquisition of the business of Kirkconnell Brothers Successors, the Respondents continued to rent the premises acquired from Kirkconnell Brothers Successors and acquired six additional premises which they also rented out.

4. The relevant statutory provisions are contained in the Income Tax Law, No. 59 of 1954 and read:-

"5. Income Tax shall, subject to the "provisions of this Law, be payable by every "person at the rate or rates specified "hereafter for each year of assessment in "respect of all income, profits or gains "respectively described hereunder -

"(a) the annual profits or gains arising or "accruing -

"(i) to any person residing in the

Island from any kind of property whatever, whether situate in the Island or elsewhere; and

"(ii) to any person residing in the Island from any trade, business, profession, employment or vocation whether carried on in the Island or elsewhere;

.....

"(b) profits or gains accruing in or derived "from the Island or elsewhere, and whether "received in the Island or not in respect of -

.....

"(ii) rents, royalties, premiums and any other profits arising from property;

....."

"8. For the purpose of ascertaining the "chargeable income of any person there shall "be deducted all disbursements and expenses "wholly and exclusively incurred by such "person in acquiring the income

.....

"and such disbursements and expenses may "include

.....

"(c) any sum expended for repair of buildings, plant and machinery employed in acquiring the income, or for renewal, or repair of any implement, utensil or article so employed;

.....

"(o) a reasonable amount for exhaustion, wear and tear of any building or structure used by the owner thereof for the purpose of acquiring the income from a trade, business, profession or vocation carried on by him;

....."

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p. 2

5. On the 24th January 1962 the Respondents appealed to the Income Tax Board of Review against a decision of the Appellant as to the assessment on the Company for the Year of Assessment 1960, claiming to be entitled to an allowance for wear and tear under Section 8(o) of the Income Tax Law,

p. 15

in respect of the "Bank Building". They contended that the evidence established that they were carrying on a business of letting premises and that the premises were used by them for the purpose of acquiring the income within the meaning of the

p. 15

said section; they contended further that the construction of the word "used" by the Court in Hendriks v. (Income Tax) Assessment Committee (1941) 4 J.L.R. 60 was obiter since the Court had already decided that Henriks was not carrying on the business of letting premises. The Appellant relied on the Hendriks' decision. The Board,

pp. 4. 6.
p. 15

dismissing the appeal, held as a matter of fact that the Respondents were carrying on a business of letting premises but, following the decision of the former Court of Appeal in Hendriks v. (Income Tax) Assessment Committee, held that the premises were not used for the purpose of acquiring the income.

p. 7

6. In May 1963 the Respondent Company gave Notice of Appeal to a Judge of the Supreme Court in

p. 11

Chambers. The Grounds of Appeal contained in the Notice were as follows:-

(1) That the Appeal Board was wrong in holding that the Landlord who is carrying on the business of renting premises is not entitled to a wear and tear allowance in respect of those premises

(2) That the interpretation placed upon the word "used" by Section 8(o) of the Income Tax Law by the Appeal Board was too narrow and was incorrect

(3) That in law a person who carries on the business of renting premises is using the said premises for the purpose of acquiring their income.

(4) That the Appeal Board were wrong in holding that the word "used" meant "occupied".

(5) That the Appeal Board was wrong in holding that it was bound by the dictim used by the Court of Appeal in the case of Hendriks v.

Assessment Committee. That the said dictum did not bind the Appeal Board but was either obiter dictum or alternatively, was per incuriam and was not part of the ratio decidendi of the case. In the further alternative the said dictum was based on the language of Section 9(3) of the Income Tax Law, Cap.201 of the Revised Laws of Jamaica, 1938 Edition and the Appeal Board was wrong in applying the said dictum to the language of the Income Tax Law, 1954.

7. On the 18th day of October, 1963, the appeal from the decision of the Income Tax Appeal Board came before Mr. Justice Shelley in the High Court of Justice in Chambers. An Order was made dismissing the appeal on the basis that the Court was bound by the decision in the Hendriks case. p. 16

8. On the 11th day of November, 1963, the Respondent Company gave Notice of Appeal to the Court of Appeal. The Grounds of Appeal contained in the Notice were as follows:- p. 17

(1) The Appeal Board having found as a fact that the Respondent Company was carrying on the business of renting premises the Appellant was in law entitled to a wear and tear allowance in respect of such rented premises.

(2) On the proper construction of Section 8(o) of the Income Tax Law - Law 59 of 1954 the said premises were used by the owner thereof for the "purpose of acquiring the income" from the business carried on by such owner, to wit the Respondent Company.

(3) That so far as the case of Hendriks v. Assessment Committee 4 J.L.R. 60 purported to decide the contrary to the Respondent Company's contention the said decision was wrong in law and should not be followed.

9. The Respondents' appeal to the Court of Appeal was argued before Duffus, P., Henriques J. and Waddington J. on 10th, 11th, 12th, 15th, 19th, 22nd and on 23rd June, 1964, and on 18th December, 1964 the Court of Appeal gave judgment allowing the appeal with costs there and below. pp. 19. 47

Each of the learned Judges of Appeal gave reasons for his judgment. The first judgment was given by Waddington, J.A. who set out the facts pp. 19. 28

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and contentions of the parties substantially as recorded above, read Section 8(o) of the Income
p. 21 Tax Law and observed that two questions fell for consideration:

(1) Was the Appeal Board wrong in law in finding, on the facts before it, that the Respondent Company was carrying on a business of letting premises.

(2) If the answer to the above question was in the negative, was the "Bank Building" used by the Respondent Company for the purpose of acquiring the income from the business carried on by them.

Dealing with the first question the learned Judge of Appeal remarked that the Appellant, the Commissioner, placed reliance for his contention that the negotiation of leases and the collection of rents did not constitute the carrying on of a trade or business on Hendriks v. Assessment Committee 4 J.L.R. 60 and on Fry v. Salisbury House Estate Ltd., (1930) A.C. 432. He considered that the decision in Hendriks' case that the letting and management of four properties did not amount to the carrying on of a business,
p.23 ll.1-10 was based on the particular facts of the case; that that case did not decide that in no circumstances could the letting of premises ever constitute the carrying on of a business - indeed the passage quoted at page 64 of the Report appeared to recognize that a company formed for the express purpose of acquiring and letting premises could be said to be carrying on a business. In the present
p.23 ll. 12-25 case the Appeal Board decided on the facts that the Respondent Company was carrying on the business of letting premises.

p. 23 l. 26 In Fry v. Salisbury House Estate Ltd., (1930) A.C. 432, a company, which was formed to acquire, manage and deal with a block of buildings, let out the rooms as unfurnished offices to the tenants. It was assessed under Schedule A of the Income Tax Act, 1918 on the gross value of its building. The Crown also claimed to make an assessment under Schedule D to include the rents of the offices as part of the receipts of a trade, making allowance for the Schedule A tax. Lord
pp. 23-4 Warrington based his judgment on his opinion that on the particular facts of the case the
p. 24 company was not carrying on a trade: Lords

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Tomlin and Macmillan also expressed the view that the Company was not carrying on a trade. In the view of the learned Judge of Appeal what their Lordships were saying was that, having regard to the provisions of Schedule A, a mere receipt of rent by the company simpliciter could not thereby take the case out of Schedule A and bring it within Schedule D; different considerations would apply if the question was merely whether a person who habitually acquires and lets property could be said to be carrying on a trade or business of letting property: this view was supported by the words of Slesser LJ in the Court of Appeal, [1930] 1 K.B. 304 of 331. Accordingly that was no authority for the Appellant Commissioner's view that the negotiation of leases and the collection of rents did not constitute the carrying on of a trade or business.

p. 24 l. 37

p. 25

Dealing with the second question the learned Judge of Appeal said that Furness C.J., in the Hendriks Case 4 J.L.R. 60 at page 65, in deciding that the business was carried on - not on the premises in question but elsewhere, - at the Appellant's office or home, was there equating the meaning of the word "use" with a physical user or occupancy of the premises by the owner. The learned Judge of Appeal said that this would restrict the ordinary meaning of the word. He adopted observations of Upjohn, L.J. in Stephens v. Cuckfield Rural District Council (1960) 2 All E.R. 716 at page 719, to the effect that when Parliament used ordinary words in common and general use, it was inappropriate to try to define them further by judicial interpretation unless the context required that some special or particular meaning be placed on them; Upjohn, J. had also cited with approval the observations of Somervell L.J. in Bath v. British Transport Commission (1954) 2 All E.R.542 at page 543 to the effect that where perfectly familiar words were used in a statute all the judge could do was to say whether or not he regarded them as apt to cover or describe the circumstances in question in any particular case.

p. 26 l. 1

p. 26 l. 36

p. 27 l. 15

In the view of the learned Judge of Appeal an owner of premises who leases them in making use of those premises by employing or applying them for the purpose of letting; it followed therefore that if he carried on a business of letting premises then he was using the premises for the purpose of acquiring any income which

p. 27 l. 32

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might derive therefrom

p. 28 l. 3 — He said that he was satisfied that he was not bound by the decisions of the former Court of Appeal; the present Court was separate and distinct from the former Court of Appeal which ceased to exist on the coming into operation of the Judicature (Appellate Jurisdiction) Law, 1962

p. 29 — 10. Duffus, P., after stating the facts, and
p. 30 ll 25.30 — referring to Section 8 of the Income Tax Law, said that in the circumstances of the case before him the decision of the Appeal Board, that the Respondent Company was carrying on a business in respect of the negotiation of leases and the collection of rents from the tenants of its various holdings, was the correct decision. He
p. 30 ll. 34.40 — concurred with the analysis by Waddington J.A. of the Hendriks and Salisbury House cases.

p. 31 l. 44 — He observed that there was great similarity between the objects in the Memorandum of Association of the Westleigh Estates Company, Limited, which was judicially construed in Inland Revenue Commissioners v. The Westleigh Estates Company, Limited (1923) 12 T.C. 657 and the objects in the Memorandum of Association
p. 32 ll. 9-20 — of the Respondents. He did not know whether that case had been cited in argument in Hendriks v. Appeal Committee 4 J.L.R. 60, but the opinion of Warrington L.J. in The Westleigh Estates Company Limited 12 T.C. 657 at page 692, that the description of the objects in that case was the description of a trade or business, supported the view expressed by Furness, C.J., in the Hendriks Case when he remarked, at page 62, that if the company had been genuinely formed for the express purpose of acquiring and letting the premises, the company could have been said to have been carrying on a business for, in that case, the company would be formed and organized for that very purpose.

p. 30 l. 21
p. 30 l. 38 — The finding of the Appeal Board used the word "Business" and not "Trade". In his view the words were not synonymous and the word business had a wider connotation; support for that view was
p. 33 l. 1
p. 34 ll. 3-42 — found in the judgment of Wright, M.R. in In re a Debtor ex parte Debtor (1936) 1 Ch. 237 at page 239. He derived no assistance from Union Cold Storage Company, Limited v. Jones 8 T.C.725;
pp. 34-5 — in the present case the Respondents owned the premises for the direct purpose of its business

of acquiring an income from rents; there was no question of remoteness or anything indirect about the wear and tear, which was the direct result of the business.

Accordingly the decision of the Appeal Board that the Respondents were carrying on a business was correct in law and amply supported by the facts. p. 35 ll. 4-9

As to the second question, whether the Respondents "used" the Bank Building for the purpose of acquiring the income from their business, it had been submitted for the Respondents that the Hendriks case had been wrongly decided; and that the ordinary dictionary meaning of the words in Section 8(o) indicated that the owner of the buildings was entitled to a deduction for wear and tear. The President considered that the owner of buildings who let them out at a rent was using, utilizing or employing them for the purpose of acquiring the income to be derived therefrom. Examination of Section 8 as a whole convinced him of that view. That Section allowed as deduction in ascertaining the chargeable income of any person all disbursements and expenses wholly and exclusively incurred by such persons in acquiring the income. Under Section 5(h)(ii) rents were specifically mentioned as a source of income. As rents were taken into account in arriving at a taxpayer's chargeable income the taxpayer was entitled to deduct the permitted disbursements and expenses exclusively incurred in acquiring the income from such rents. Under subsection 8(c) the taxpayer was entitled to deduct "any sum expended for repair of buildings ..... employed in acquiring the income ....." The Court was informed that the Commissioner of Income Tax permitted an owner of buildings from which rent was derived, which were not physically occupied by him, to make a deduction for repairs of those buildings and had in fact done so in the present case. Likewise the Commissioner permitted as a deduction under subsection 8(g) insurance premiums paid on buildings "use in acquiring the income" from rents, although they were not physically occupied by the owner. There was no logical reason why a different meaning should be given to the word "use" in Section 8(o)

p. 35 l. 15
p. 35 l. 37
p. 36 l. 31
p. 36 l. 43
p. 37 l. 9
p. 37 l. 21
p. 37 l. 25

Examination of earlier legislation revealed that the Section dealing with deductions for repairs and wear and tear, section 9(f) of the 1938 Income Tax Law (Cap. 201 of the 1938 Revised Edition of the Laws of Jamaica) was repealed by the p. 37 l. 42
p. 38 ll 23.8

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Income Tax (Amendment) (No. 2) Law, 55 of 1939 and a new Section (f) substituted. Paragraph (3) of the proviso to Section 9 of the 1938 Law was also repealed and a new paragraph substituted.

p. 38 l. 37 In 1954 a new Income Tax Law, Law 59 of 1954 was enacted, but the new "wear and tear" Section was substantially the same was it was after the 1939 amendment. The amendment, in 1939, of paragraph (3) of the proviso to Section 9 had the effect of placing on the taxpayer the burden of showing that the amount claimed for wear and tear was for wear and tear of property used by the owner for the purpose of acquiring the income. Prior to the amendment, the taxpayer had only to show that the amount claimed was for wear and tear of property arising out of the use or employment of such property in the business or

p. 39 l. 11 trade. The amendment also equated wear and tear with repairs; in both cases the property had to be used for the purpose of acquiring the income. That this was a real distinction was shown in the case

p. 39 l. 18 of Strong & Company of Romsey v. Woodifield 5 T.C. 215 per Lord Loreburn L.C. at page 219. It did

p. 40 l. 13 not appear from the Hendriks case 4 J.L.R. 60 that the earlier Income Tax Legislation was enquired into or brought to the Court's attention. The Respondent Company cited Newcastle City Council v.

p. 40 l. 23 Royal Newcastle Hotel (1959) 1 All E.R.734, as authority for the proposition that in a taxing statute, use of land by the owner thereof for the purpose of acquiring income ought not to be

p. 42 l. 34 restricted to actual physical user by the owner. In the learned President's view that case illustrated that use of land by its owner depended upon the purpose for which he owned it and did not necessarily entail actual physical user thereof. It also explained the meaning of the words "used for the purposes thereof" in the New South Wales Local Government Act, 1919, Section 132(1)(d), which were almost the same as the words "used for the purpose of" in Section

p. 42 l. 40 8(o). That case had been decided fourteen years after the Hendriks case, 4 J.L.R. 60, and, as the two were irreconcilable, the Court should follow the decision of the Privy Council as the final court of appeal, unless it can be clearly distinguished.

p. 42 l. 47 On the question of whether the Court was bound to follow the decision of a former Court of Appeal, the learned President said that the present Court of Appeal was a completely new Court of Appeal for independent Jamaica, and was not part of the Supreme Court of Judicature

unlike the former Court of Appeal. The present Court derived its jurisdiction and powers initially from the Constitution. Accordingly the present Court of Appeal did not consider itself bound by a decision of the earlier Courts of Appeal when Jamaica was a colony and had not yet attained the status of an independent nation, though it would regard their decisions with the utmost respect. p.43 l. 45

Following the language used in the Privy Council in Chisholm v. Hall (1959) 7 J.L.R. 1964, there had not, in the judgment of the Court, been any such uniform current of authority as would require them in departing from their own views on the true meaning and interpretation of Section 8(o) of the Income Tax Law, 1954, in deference to the principle of stare decisis which, in their judgment had no application. p. 44 l. 10

11. Henriques, J.A. observed that it was important to realise that the Hendriks case, 4 J.L.R.60, was decided on the facts then before the Court, and that case did not go so far as to say that in no circumstances could the letting of premises constitute the carrying on of a business; in that case it was stated that a company genuinely formed for the express purpose of acquisition and lease of premises might be said to be carrying on a business. p. 44 l. 37 p. 45 l. 28

It seemed to him that the judgment of Furness C.J. in the Hendriks case placed an unnecessary restriction on the ordinary meaning of the word "use" when confining it to mere physical user. In his opinion, the owner who leased was in fact making use of his premises by employing them for the purpose of letting, and if he engaged as a consequence in the business of letting those premises, then he might be said to be using those premises for the purposes of acquiring any income which he might derive therefrom. p. 46 l. 14

He considered that the presence Court of Appeal which was set up on Independence by Section 103 of the Jamaica (Constitution) Order in Council, 1962, was not bound by any decision of any former Court of Appeal. p. 46 l. 33

12. An Order granting to the Appellant leave to appeal from the decision of the Court of Appeal was made on the 23rd day of July 1965. p. 48

13. The Appellant humbly submits that the Income

Tax Appeal Board and the Court of Appeal, Jamaica, misdirected themselves in law in holding that the letting of premises by the Respondents constituted a business falling within Section 5(a)(ii) of the Income Tax Law, 1954. Alternatively there was no evidence upon which the Appeal Board could properly find that the letting of the premises amounted to such a business.

Section 5 makes separate and specific provision in subsections (a) (i) and (b) (ii) for the taxation of income arising from the ownership of property. The Section thus in terms distinguishes between such income (which may conveniently be described as investment income) and the profits from a trade, business, profession, vocation or employment to which Section 5(a)(ii) refers. It is respectfully submitted that the reference to business profits in the latter context connotes profits derived from an active, profit seeking course of conduct, similar to a trade or profession.

Further, it will be noted that the Section draws no distinction between individuals on the one hand and limited companies on the other. In the case of a company, as of an individual, rental income derived by a property investor from the letting of the property is, it is submitted, taxable under Section 5(a)(i) or (b)(ii) and not under Section 5(a)(ii).

The difference between income from property owned and let as an investment on the one hand, and business profits on the other, is reflected in the provisions of Section 8. Thus Section 8(c), which is admittedly applicable to the Respondents, gives relief generally for expenditure on repairs of "buildings ..... employed in acquiring the income": but the relief for exhaustion, wear and tear which is conferred by Section 8(o) is confined to buildings "used by the owner thereof for the purpose of acquiring the income from a trade, business, profession or vocation carried on by him". It is respectfully submitted that Section 8(o) contemplates the active use of premises by the owner in the course of a profit-seeking enterprise, and not mere ownership by a landlord.

14. The Appellant humbly submits that the decision of the Court of Appeal is wrong and ought to be reversed and that the Appeal should be allowed with costs here and below for the

following amongst other

REASONS

1. BECAUSE the Appeal Board misdirected themselves in law in deciding that the Respondents were carrying on a business of renting premises in that the negotiation of leases and the collection of rents cannot constitute the carrying on of a business within the meaning of Section 5(a)(ii) of the Income Tax Law: and Because there was no evidence upon which the Appeal Board could properly arrive at their said decision.

2. BECAUSE the premises owned and let by the Respondents were not used by their owners for the purpose of acquiring income from a business and so do not qualify for an allowance under Section 8(o) of the Income Tax Law.

3. BECAUSE the case of Hendriks v. Assessment Committee 4 J.L.R.60 was rightly decided and should have been followed by the Court of Appeal.

4. BECAUSE the reasoning of the judgments in the Court of Appeal is erroneous and the decision ought to be reversed.

H.H. MONROE

MICHAEL NOLAN

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