IN HER MAJESTY'S PRIVY COUNCIL No. 39 of 1968

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON

BETWEEN:

A THE WOODEND (K.V. CEYLON) RUBBER AND TEA COMPANY LIMITED Appellant

- and -

THE COMMISSIONER OF INLAND REVENUE COLOMBO Respondent

B CASE FOR THE RESPONDENT

1. This is an appeal brought by leave from a Judgment and Decree of the Supreme Court of the Island of Ceylon (Tambiah and Siva Supramanian, JJ.,) pronounced on the 18th C December 1967 upon a Case Stated at the Respondent's request by the Board of Review remitting the Case to the Board for tax to be assessed in accordance therewith and, in effect, reversing an Order of the Board of D Review made on the 26th May, 1966, and restoring the original assessments upon the Appellant confirmed by a Determination of the Commissioner of Inland Revenue dated the 13th July, 1965. pp. 20-34 pp. 15-19 pp. 7-13 pp. 1-5

E 2. The assessments were for the years 1958/59 to 1961/62 inclusive and related to remittances admittedly made by the Appellant from its branch in Ceylon to its head office in the United Kingdom. The Appellant was at F all material times a non-resident of Ceylon and a resident of the United Kingdom, and the sole question in issue is whether the remittances of such a Company were properly

taxable in law.

3. The argument that such remittances were not properly taxable is based upon the proposition that the provisions imposing, or purporting to impose, the tax, namely, Section 53 C (1)(a) of the Income Tax Ordinance as inserted by Section 22 of the Income Tax (Amendment) Act, are inconsistent with the provisions of Article VI and/or Article XVIII of the Agreement made between the Governments of the United Kingdom and Ceylon for the avoidance of Double Taxation and the Prevention of Fiscal Evasion (hereinafter called "the Treaty") the provisions of which were given the force of law in Ceylon by Section 2 of the Double Taxation (Relief) Act.

Cap. 242 No.13 of 1959

Treaty Series No.9 of 1950

Cap.244 No.26 of 1950

4. Broadly speaking, according to the terms of Article VI of the Treaty, assuming it to be still effective, there should not have been imposed upon the Appellant any form of taxation on dividends paid by it to non-residents of Ceylon, or chargeable in connection with or in lieu of the taxation of dividends, or any tax on undistributed profits.

Under Article XVIII, again if still effective, the Appellant ought not to have been subjected to any taxation or requirement connected therewith which was "other, higher or more burdensome" than would have been the case if it had been a resident of Ceylon.

No.13 of 1959

By virtue of Section 53 C (1)(a) of the Income Tax (Amendment) Act the tax payable by a non-resident company equals 51 per cent of its taxable income for the preceding year plus a sum equal to one-third of its "remittances" for that year or one-ninth of its taxable income whichever is the less. "Remittances" for this purpose is defined by Section 53 C (2) and includes, inter alia, sums remitted out of profits and the proceeds of products exported from Ceylon and retained abroad.

The tax payable by a resident company

would, by virtue of Section 53 B (1) of the Act be 45 per cent of the taxable profits for the preceding year plus one-third of the gross dividends paid out of those profits.

No point has been taken with regard to the difference between the 51 per cent payable by non-resident Companies and the 45 per cent payable by resident companies since an additional tax not exceeding 6 per cent is allowed by Article IX of the Treaty. Treaty Series No.9 of 1950

5. The debate which has taken place between the parties may be briefly summarised as follows

In reply to the Appellant's argument that Section 53C (1)(a) of the Act is inconsistent with the Treaty provisions and that the latter must prevail, the Respondent has contended that :- No.13 of 1959 Treaty Series No.9 of 1950

(a) there is no such inconsistency with Article VI because the making of remittances, as defined, from Ceylon is quite different from, and has no necessary connection with the declaration of dividends in London; and

(b) there is no such inconsistency with Article XVIII because Section 53 C (1)(a) does not provide an "other" form of tax but merely rules for computing the income tax liability; nor on the facts, was the tax "higher or more burdensome" that it would have been if the Appellant had been resident in Ceylon, - as to which, see paragraph 6 below;

(c) if there were any inconsistency, the provisions of the 1959 Act would prevail over those of the Treaty, first, because they are later in point of time and, second, because they created a new and comprehensive code for levying taxation which must be deemed to have overridden any isolated provisions in the earlier legislation. No.13 of 1959 Treaty Series No.9 of 1950

6. That the provisions of Section 53 C (1) (a) were less burdensome than a tax on dividends under Section 53 B is demonstrated by agreed calculations contained in the Determination of the Commissioners of Income Tax which show that the tax which would have been paid by reference to dividends if the Appellant had been resident would have been Rs. 159, 580 instead of the tax now in dispute of Rs. 35, 893.

p.3 11.19 to 41

A

7. (a) The Acts bearing on the issues are contained in the folder the relevant provisions being those mentioned below.

B

No.26 of 1950 Cap. 244

Double Taxation (Relief) Act

Section 2, subsections (1) and (5)

No.13 of 1959

Income Tax (Amendment) Act

C

Section 22.

Cap.242

(b) The Income Tax Ordinance is also contained in the folder.

Treaty Series No.9 of 1950

(c) A copy of the Double Taxation Agreement between Ceylon and the United Kingdom is also in the folder the relevant Articles being I(1)(b), II(1)(d)-(h) inclusive, VI IX XVI and XVIII.

D

8. Assessments were raised upon the Appellant for the years 1958/59 to 1961/62 inclusive. The Appellant appealed to the Commissioner of Inland Revenue on the ground that the assessments should not include tax on the remittances made by the Appellant. The Commissioner having formed the view that this imposition of tax on remittances under Section 53 C (1)(a) of the Income Tax Ordinance (as inserted by Section 22 of the 1959 Act) was not in contravention of either Article VI or XVIII of the Treaty, confirmed the assessments by a Determination dated the 13th July, 1965.

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p.1 1.19

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p.4 11.29 -31

p.5 11.20 -21

G

9. The Appellant appealed to the Board of

Review which heard the case on the 26th February and 26th April 1966. The Board reached the conclusion that before Act No.13 of 1959 came into force no dividend tax as such was payable and, further, that having regard to passages both in the Budget Speech of 1958/59 and in Sessional Paper IV of 1960 containing Mr. Kaldor's suggestions for the reform of direct taxation, Section 53 C imposed a form of taxation in lieu of taxation on dividends contrary to Article VI of the Treaty. The Board also concluded that Section 53 C imposes a form of taxation or a kind of tax other than that imposed on a resident company since if such a company were to remit profits to a branch in the U.K. no liability to tax would follow; Section 53 C accordingly contravenes Article XVIII as well as Article VI On the 29th May 1966 the Board ordered the case to be remitted to the Commissioner of Inland Revenue for the assessments to be revised in accordance with their opinion.

p.9 l.26 to p.10 l.13

p.12 ll.26-32

Treaty Series No.9 of 1950

p.13 ll.27-32

10. The Respondent duly required the Board of Review to state a case for the opinion of the Supreme Court.

p.14

The Case Stated came before the Supreme Court on the 28th September, 1967, and on the 18th December, 1967, judgment (in which Siva Supramanian, J. concurred) was delivered by Tambiah, J.

Having mentioned that the Appellant's ground of appeal was that the imposition of tax upon remittances was in contravention of Articles VI and XVIII of the Treaty, the learned Judge stated that, following the adoption with modifications of the Kaldor Report, radical changes to the basis of taxation were made by Act No.13 of 1959. He contrasted the basis of taxation of resident companies with that of non-resident companies and said that the only dispute related to the imposition on the latter of tax on remittances set out in section 53 C (1)(a)

p.20 l.34

pp.22 l.1

pp.22 l.15-p.23 l.10

Cap. 242 No.13 of 1959

of the Income Tax Ordinance as amended by Section 22 of the Income Tax (Amendment) Act.

Before the Board of Review it had been conceded on behalf of the Respondent that if there was any conflict between the Ordinance and the Treaty the latter must prevail. Before the Court, however, the Respondent had argued that if, contrary to his submissions, there was a conflict the Ordinance must prevail not only because it was later in point of time but because the Act of 1959 had clearly been intended to introduce a new and comprehensive system of company taxation thereby repealing the Double Taxation (Relief) Act by necessary implication.

No.26 of 1950

p.24 l.19-p.25 l.4

Having summarised the arguments advanced on the Appellant's behalf, the learned Judge dealt first with the question of whether there was in fact a conflict. He gave illustrations showing that there is no relationship between the remittances made by a branch to its head office and dividends paid to outside shareholders and pointed out that a non-resident company can gain a tax advantage by concentrating its remittances into years immediately succeeding lean years. Consequently, there was no conflict with Article VI.

p.25 ll.12-42

p.26 ll. 1-4

The learned judge held that the contents of the 1959 Budget Speech upon which the Appellant relied were inadmissible for the purpose of interpreting the intention of Parliament but admissible for showing what facts prompted the legislation. The Minister having said that the State's finances were in a parlous state he questioned whether Parliament could have intended non-resident companies to have the concession of paying tax at only 51%.

p.27 l.25-p.28 l.23

He considered that Section 53 C provided a method of computing a tax upon profits and was neither a tax in lieu of a tax on dividends nor a tax on undistributed profits.

With regard to Article XVIII, the Appellant had failed to show that non-resident companies paid more tax; undisputed figures before the Board of Review suggested they paid less. Nor did Section 53 C impose a tax other than income tax; the charge was merely a component of the income tax chargeable. There was accordingly no conflict between the amending Act and Article XVIII. p.28 l.24-p.29 l.21 p.3 p.29 l.22 No.13 of 1959

The point having been fully argued, the learned judge then turned to consider whether the amending Act repealed the Double Taxation (Relief) Act 1950. He held that it did since Section 53 A drew no distinction between resident and non-resident companies. The case Ostime v. Australian Provident Society did not assist the Appellant because there the provisions of the Order were specifically preserved by statute. The rule generalia specialibus non derogant is only a presumption and not a rule of law, and the provisions of Section 5 of the amending Act are unambiguous. "After the 1959 Act came into force the taxing authorities can only look at Chapter VIII A for the taxation of both resident and non-resident companies". Nor can Section 2 of the Double Taxation (Relief) Act, 1950, prevail over subsequent Acts since no Parliament of Ceylon can bind a future Parliament. "The presumption in favour of the maxim generalia specialibus non derogant is greatly weakened by the fact that by 1959 either Government could resile from the Treaty". p.30 ll.8-39 No.13 of 1959 Cap.244 pp.31-32 [1960] A.C. 459, [1959] All E.R.245 pp.33-34 No.13 of 1959 Cap. 244

The learned judge accordingly directed that the Case be remitted for tax to be assessed on the basis indicated, and he awarded costs to the Respondent.

11. It is submitted that whether or not Article VI of the Treaty was to be regarded as still in force at the relevant time, it had no bearing on the liability of the Appelant to pay tax under Section 53 C in respect of sums remitted to the United Kingdom. Article VI relates to a company resident in the United

Kingdom which derives profits from sources within Ceylon and pays dividends to shareholders resident outside Ceylon. Such a company is not to be taxed in Ceylon on or in connection with such dividends. The implication of this is that the only tax payable by such a company in Ceylon is tax on the company's own profits derived from sources in Ceylon. Section 53 C, it is submitted, imposes that tax. Relief by way of credit is available to the Appellant in respect of the tax under Article XVI of the Treaty. Sums remitted from Ceylon by the Appellant were in no sense distributions or dividends.

It is further submitted that the Treaty does not override the provisions of the Income Tax (Amendment) Act.

12. The Respondent humbly submits that the decision of the Supreme Court of the Island of Ceylon was right and should be affirmed with costs for the following among other

R E A S O N S

1. BECAUSE the provisions of Section 53 C of the Income Tax Ordinance as inserted by the Income Tax (Amendment) Act No.13 of 1959 are not in conflict with either Article VI or Article XVIII of the Treaty entered into between Ceylon and the United Kingdom;

2. BECAUSE even if they were in conflict the Income Tax (Amendment) Act 1959 impliedly overruled the provisions of Article VI and Article XVIII of the Treaty

3. BECAUSE the Board of Review in reaching the contrary conclusion took into account inadmissible evidence, namely, a Budget Speech and a Sessional Paper, and acted upon erroneous reasoning;

4. BECAUSE the reasoning adopted by Mr. Justice Tambiah was right; and

5. BECAUSE the assessments made upon the Appellant are correct in law and in fact.

H.H. MONROE

PETER ROWLAND

3rd April, 1969

No. 39 of 1968

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CASE FOR THE RESPONDENT

MITCHETT JONES & CO.,
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