Privy Council Appeal No. 55 *of* 1942

The Trinidad Lake Asphalt Operating Company Limited – *Appellant*

v.

The Commissioners of Income Tax for the Colony of Trinidad and Tobago – – – – – – *Respondents*

FROM

THE SUPREME COURT OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH OCTOBER, 1944

Present at the Hearing:
THE LORD CHANCELLOR (Viscount Simon).
LORD WRIGHT
LORD PORTER
LORD SIMONDS
LORD GODDARD
[*Delivered by* LORD WRIGHT]

This is an appeal from an order made on the 1st April, 1942, by the Full Court of the Supreme Court of Trinidad and Tobago, upon a case stated for the opinion of the Full Court by Perez J. whereby he dismissed an appeal by the appellant against an assessment to income tax made by the Commissioners of Income Tax for the Colony on the appellant under section 30 of the Income Tax Ordinance of 1940, Chapter 33, No. 1, then in force in the Colony. It is also an appeal against the order of Perez J. whereby in accordance with the judgment of the Full Court he formally dismissed the appeal of the appellant against the assessment. The assessment was on the sum of $1,394,227.00, and was for the year 1940, the tax chargeable being $336,424.75. If the appellant fails in its objections in law to the assessment it does not now dispute that the amount is correct.

The assessment was made in respect of a dividend amounting to $1,207,817.06 declared by the appellant in favour of the Barber Asphalt Corporation of New Jersey, U.S.A. (hereinafter called "Barber") as the holder of 499,992 shares out of 500,000 shares constituting the issued capital of the appellant. The business of the appellant was to win and refine asphalt in the colony and sell and deliver it to purchasers, including Barber. The dividend was declared in accordance with a resolution of the appellant's directors dated the 24th November, 1939, on which date Barber owed to the appellant $1,207,817 for asphalt purchased by it from the appellant. The resolution was in the following terms: "Resolved that a dividend in the amount of $1,207,817 be declared payable by cancellation of the Trinidad Lake Asphalt Company's claim in a like amount against Barber Asphalt Corporation and that in addition a cash dividend of equal proportion amounting to $12.10 be paid to local shareholders making a total of $1,207,829.16." It was not in question that the resolution ought properly to be construed as compendiously embodying two items, (1) the declaration of a cash dividend of $1,207,817.06 in favour of Barber, (2) an agreement between Barber and the appellant that the dividend was payable by cancellation of the appellant's claim against Barber for asphalt sold and delivered to him.

Barber was at all material times non-resident in the Colony. It carried on business at its head office in Barber, New Jersey in the United States. It had no place of business in the Colony and has never exercised

or carried on any trade or business in the Colony. Perez J. held that the dividend was income of Barber accruing in, or derived from, the Colony within the meaning of section 5 of the Ordinance and that Barber was accordingly liable to tax on the dividend. The appellant does not dispute that part of the judgment. It is clearly right and is in accordance with principles laid down by the House of Lords in regard to the territorial limits within which the imposition of income tax is permissible. To quote one statement, it was said by Lord Herschell in the leading case of *Colquhoun* v. *Brooks*, 14 App. Cas. 493 at p. 504: "The Income Tax Acts . . . themselves impose a territorial limit; either that from which the taxable income is derived must be situate in the United Kingdom, or the person whose income is to be taxed must be resident there." These words of Lord Herschell were quoted and applied by Lord Wrenbury in *Whitney* v. *Inland Revenue Commissioners* [1926], A.C. 37 at p. 55, where the question was the chargeability to supertax of a non-resident alien—an American subject residing in the United States. He was not in England but he drew a large income from property situated here. It was held that a non-resident alien was chargeable in respect both of income tax and of the additional duty of income tax called supertax. So it was decided by all their Lordships. Other authorities to the same effect need not be quoted. Though the usual ground on which competency to tax is based, namely residence, did not exist in that case, the alternative ground, namely that the income was derived from property in the country which imposed the tax was sufficient. These principles apply to the Ordinance of 1940 which by sec. 5 expressly provides for the imposition of tax upon the income of any person accruing in or derived from or received in the Colony in respect of (*inter alia*) dividends, interest or discounts. The authorities referred to show that there is no general rule of international comity which renders such taxation on non-residents incompetent. Equally in their Lordships' judgment it is not incompetent by reason of the circumstance that the Colony cannot pass extra-territorial legislation. A tax in this form is not extra-territorial, so long as it does not affect to tax property not situate in the Colony. On the ground that this rule was infringed it was held in *London and South American Investment Trust* v. *British Tobacco Co.* (*Australia*) [1927] 1 Ch. 107, that the legislation there in question was extra-territorial inasmuch as it sought to impose or enforce taxation on a non-resident shareholder in respect of property not situate in the Colony, namely, dividends which were an English debt due in respect of shares locally situate in England. This decision was prior to the Statute of Westminster of 1931, the effect of which was discussed in *British Coal Corporation* v. *The King* [1935] A.C. 500 at p. 516. The principle however still applies to a Colony like Trinidad.

Section 30 of the Ordinance, it was also said, if construed as the Full Court has done, might be regarded as extra-territorial in effect. But section 30, under which the assessment is made, seeks legitimately to meet the difficulty that, as Barber is in New Jersey and not in Trinidad, the tax cannot be enforced against him since the Courts of one country will not enforce the revenue laws of another. The section is in the following terms: "Any resident agent, trustee, mortgagor or other person, who transmits rent, interest, or income derived from any other source within the Colony, to a non-resident person, shall be deemed to be the agent of such non-resident person and shall be assessed and pay the tax accordingly." There is in their Lordships' judgment no ground for treating this section as extra-territorial in effect or requiring it to be construed otherwise than in accordance with the ordinary meaning of the words used. It is not extra-territorial merely because its purpose is indirectly to secure payment from the non-resident alien of the tax which is validly imposed upon him. The person directly affected is the statutory agent, in this case the appellant, who is within the Colony. The obligation is imposed directly on him. His liability is complete when within the Colony he does the act which transmits the income to the non-resident. The transmission begins in the Colony, though it continues until delivery to the non-resident alien. Similarly in *Peninsular and Oriental Steam Navigation Coy.* v. *Kingston* [1903] A.C. 471, the penalty was

imposed on the steamer when she came back to an Australian port with the seals upon the bonded stores broken, though they had been broken outside territorial waters. The breaking of the seals and the use of the bonded stores were what it was intended to prevent or punish. But the condition of enforcing the law was the vessel's entering the territorial limits with the seals broken. So here the condition of the liability of the statutory agent was the transmitting of the income to the non-resident. Section 30 was accordingly not open to objection as exceeding the territorial limitations. Indeed Mr. Tucker did not contend that the ordinance was invalid but he sought to impose a narrow construction which he said was necessary to avoid the objection. In their Lordships' opinion the whole objection is baseless and the section must be construed according to its natural meaning whenever it applied. That left the substantial question whether it did apply on the facts in this case. It will now, in order to decide the question, be necessary to examine the facts more closely, with particular reference to the question whether the appellant transmitted the dividend to Barber in New Jersey. That is the second question of law stated for the opinion of the Court, and is in their Lordships' view the only one now material.

The dividend declared in the resolution of the appellant's Board created a debt due from the appellant to Barber. It was, so far as local situation may be attributed to a debt, a debt which was locally situated in Trinidad. It was a debt due from a Trinidad Company created and payable in Trinidad. The shareholder, Barber, was it is true resident in New Jersey, and the debt to him might in normal course have been paid by sending a dividend warrant or similar credit instrument by mail. In this particular case, the arrangement between the parties made previously to the resolution had the effect that instead of this method of payment being adopted the debt should be paid by cancellation of Barber's indebtedness to the appellant. The main contention on behalf of the appellant is that this does not involve a " transmission " of the dividend to Barber and that the conditions of section 30 are not fulfilled, even if the word transmission is construed contrary to the appellant's submission as meaning in its context a transmission beyond the borders of the Colony. This is the gravamen of the argument; certain minor aspects may be left to be discussed later. The appellant's argument does not necessarily involve denying that there was payment of the dividend, though a subsidiary argument was put forward at one stage that the settlement by way of cancelling the debt for goods supplied and setting it against the dividend, was not payment but the antithesis of payment. It was, however, in their Lordships' opinion, payment.

Their Lordships at this stage accept that the word " transmit " means in the context " transmit " to a non-resident outside the limits of the Colony. It is true that " transmit " is in itself not decisive on this point. A dividend may be transmitted by the warrant being sent by post or by messenger to Tobago or any other place in the Colony and it may be so transmitted to a non-resident if he happened at the moment to be temporarily in passage through the Colony. That however would be a somewhat fanciful application of the word in this connection. The object of sec. 30 is clearly to create a statutory agent from whom the tax may be collected. He is made as it were vicariously liable for the tax in place of the non-resident recipient of the revenue with a right of indemnity over against, the person primarily liable for the tax. The company is not bound to deduct the tax, though it is entitled to do so. Such a method is not unknown in modern systems of taxation and can be paralleled from other systems. Section 30 does not expressly in words qualify " transmission " as meaning " from the Colony." But the normal case of transmission to a non-resident alien would be transmission out of the Colony, and that case must at least be covered. Was there then such a transmission? No actual money passed. If the dividend had been transmitted by a banker's draft sent by the appellant to Barber, it could not have been questioned that the dividend had been transmitted. But the two companies might do their own banking transactions between themselves, and dispense with the intervention of banking facilities. The transaction involved the sending to Barber by the appellant and receipt by Barber from the appellant of the

dividend. This was effected by the agreement that payment should be made by cancellation of the debt for goods supplied. This method had been mutually agreed before the dividend was declared. The agreement was carried out by each party making corresponding entries in its books These were not merely book-keeping entries. They represented the actual receipt of the dividend by Barber, and the actual payment of it by the appellant to Barber, and concurrently the actual receipt by the appellant from Barber of payment of his debt for goods supplied. The composite and joint transaction in principle satisfies the description of a payment given by Mellish L.J. in *Spargo's* case, L.R. 8 Ch. App. 407 at p. 414. " Nothing is clearer," he said, " than if parties account with each other and sums are stated to be due on the one side and sums of an equal amount due on the other side of that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on each side had been paid. Indeed it is a general rule of law that in every case where a transaction resolves itself into paying money by A to B, and then handing it back again by B to A, if the parties meet together and agree to set one demand against the other, they need not go through the form or ceremony of handing the money backwards and forwards ". This statement gives a description of what is often called a settlement in account or a set off, the word not being there used in the technical sense of the statutes of set off. There is actual, not merely notional or constructive payment of the indebtedness on either side. There is thus a " transmission " of funds whether the transmission is only across the table or is across the ocean. Transmission involves indeed an intermediate space, but does not depend on the extent of the space. Each party receives payment from the other; each party having received payment in this way makes in his turn the corresponding payment to the other. The transaction is necessarily bilateral. In *Spargo's* case (*supra*) the transaction was capable of being completed within narrow limits of space, for instance, across a table or in a room or by letters sent from one street to another. But the mere space involved is not material. Lord Lindley, in *Gresham Life Assurance Society* v. *Bishop*, [1902] A.C. 287 at p. 296 made some pertinent observations on the topic. He said, " First let us consider what is meant by the receipt of a sum of money. My Lords, I agree with the Court of Appeal that a sum of money may be received in more ways than one, e.g., by the transfer of a coin or a negotiable instrument or other document which represents and produces coin, and is created as such by business men. Even a settlement in account may be equivalent to a receipt of a sum of money, although no money may pass; and I am not myself prepared to say that what amongst business men is equivalent to a receipt of a sum of money is not a receipt within the meaning of the statute which your Lordships have to interpret. But to constitute the receipt of anything there must be a person to receive and a person from whom he receives, and something received by the former from the latter and in this case that something must be a sum of money. A mere entry in an account which does not represent such a transaction does not prove any receipt, whatever else it may be worth.' In the present case, no one could say that the entries in the books of the two companies did not represent a genuine transaction and a receipt of money in the form in which money is transmitted and received as between business men. Since 1902, the transmission of funds has become still more divorced in the minds of business men, and even of lawyers, from the idea of any material embodiment. No document is necessary. Two companies separated by the ocean, may orally agree over the wireless telephone that one's debt may be set against a debt of the other, and both cancelled. The only evidence or material embodiment of the transaction may consist of entries in the books on each side made in pursuance of their agreement. But what has happened is, if so intended, equivalent to a receipt of money, in Lord Lindley's words, and a receipt of anything by a person who is at a distance from the sender, involves a transmission. Hence, in their Lordships' opinion, the transaction in the present case involved a transmission of " revenue " within the meaning of section 30 from the appellant to Barber, with the consequence that the appellant became liable as statutory agent for the amount of the tax.

Lord Lindley goes on a little later to develop the same point. It may be noted that he was dealing with a somewhat different subject matter, namely, the liability of a resident taxpayer in respect of foreign revenue. That liability is in England limited to revenue " received in the United Kingdom." In the *Gresham* case (*supra*) the revenue was received by the company's office abroad and was employed abroad and no part was remitted to this country. It was held that there was in that case no receipt in the United Kingdom. Lord Lindley, however, distinguishing the case before him, referred with approval to *New Mexico Co.*, 14 R. 98 in which it had been held that there had been a receipt in the United Kingdom from the office abroad and thus described the position in the latter case, " Money received by the company's agents abroad was clearly and unmistakably treated by the company as remitted to and received by it here, and money here was treated by the company as remitted abroad in exchange for it. The exchange was effected by a book entry; but that entry was the business mode of carrying out cross remittances which it would have been unbusiness like and even childish to have effected in any other way." Though the application of the principle was different in certain ways from that in question here the difference was not pertinent to the crucial matter of principle now to be decided, namely, whether the mode of operation adopted was a transmission of revenue by the appellant to Barber. Lord Lindley referred to other decisions to the like effect and others have been cited to their Lordships.

Their Lordships accordingly agree with the Courts below in holding that the dividend was transmitted by the appellant to Barber, and that section 30 applies.

The same result would hold if section 30 were construed as applicable to transmissions within the Colonies, as it might well be so far as the actual words go. And the same would be true if the settlement in account were treated as taking place within the Colony, as involving the cancellation of a debt namely the dividend, locally situate in the Colony, in return for the cancellation of another debt also so situate, namely the debt for goods supplied. The difficulty which their Lordships feel about applying this view to the facts is that Barber, a necessary party to the transaction, was outside the colony. They, however, construe section 30 as at least including transmission outside the Colony.

Section 30 was treated throughout the proceedings below as a self-contained section, defining the complete scope of its own operation. Before this Board, however, the appellant sought to raise the further points that section 30 only authorised an assessment on a person who can be deemed to be an agent within the meaning of section 26 (1) and only if an assessment on that footing is otherwise competent. It was further contended that section 30 must also be read as qualified by section 26 (4) which prohibits the making of an assessment on any person who is not an authorised person carrying on the regular agency of a non-resident person. Their Lordships find themselves unable in this appeal to deal with these contentions. They raise important questions of law on the construction of the ordinance which their Lordships feel they could not properly decide without the benefit of the opinion of the Colonial Judges who have not been asked to pass upon them. In addition the contentions seemed likely to involve questions of fact on which evidence might have been, but had not been, given. Their Lordships therefore do not express any opinion on these topics.

It was also suggested that section 30 required for its operation three parties, the debtor, the creditor and an intermediary agent separate from either to transmit. Their Lordships see no ground for this embroidery of the simple and appropriate language of the section. A debtor may be treated as assuming in addition the functions of a statutory agent to transmit the money to the creditor. This, for instance, would obviously be true of a mortgagor, a class specifically mentioned in section 30. The general words " income derived from any other source " are clearly sufficient to include dividends which are particularly mentioned in section 5 (D), though not in section 30 in express terms.

Their Lordships are of opinion that the appeal fails on all points and should be dismissed and that the order appealed from should be affirmed. The appellant will pay the costs of the appeal.

They will humbly so advise His Majesty.

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In the Privy Council

THE TRINIDAD LAKE ASPHALT
OPERATING COMPANY LIMITED

v.

THE COMMISSIONERS OF INCOME TAX
FOR THE COLONY OF TRINIDAD
AND TOBAGO

DELIVERED BY LORD WRIGHT

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