

18/1962

ON APPEAL
FROM THE FEDERAL SUPREME COURT
OF THE WEST INDIES

BETWEEN

BICBER LIMITED (IN VOLUNTARY
LIQUIDATION)
(Formerly S. DAVSON AND COMPANY
LIMITED) ... Appellants

10

_____ and _____

THE COMMISSIONERS OF INCOME
TAX ... Respondents

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
30 MAR 1963
25 RUSSELL SQUARE
LONDON, W.C.1.

68210

CASE FOR THE APPELLANTS

RECORD

1. This is an appeal from an Order of the
Federal Supreme Court of the West Indies (Rennie,
J., Archer, J. and Wylie, J.) dated the 14th June,
1960, allowing an appeal by the Respondents from
an Order of the Full Court of the Supreme Court
of British Guiana (Holder, C.J., Stoby, J. and
Phillips, J.) dated the 20th August, 1959,
whereby an appeal by the Appellant Company upon
a Case Stated by Mr. Justice Date was allowed and
his decision reversed.

p. 53.

2. The matter arises upon an assessment to
income tax made upon the Appellant Company for
the year of assessment, 1950, and the question at
issue, shortly stated, is whether a distribution
from capital profits made by the Rupununi
Development Company Limited to its shareholders
was, when received by the Appellant Company as
shareholder, income.

p. 31.

p. 14.

3. The charge of income tax is imposed by
Section 5, of the Income Tax Ordinance, in so
far as relevant to the question as above stated,
in the following terms:-

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Income Tax.....shall be payable...
for each year of assessment upon the
income of any person.....
in respect of -

dividends.....

p.14. 4. The Case Stated by Mr. Justice Date sets out in detail the facts admitted or proved before him; they are summarised in paragraph 5 to 8 following. 10

p.15. 5. The Appellant Company, incorporated in the United Kingdom, carried on business at lot 17 Water Street, Georgetown, British Guiana, and elsewhere in the Colony. At the material time the Company owned 600 Shares in the Rupununi Development Company Limited (hereinafter called "Rupununi") a company incorporated in British Guiana.

p.15. 6. In the year 1949, Rupununi sold certain immovable property, known as No.27 in the County of Berbice. On the sale there accrued to that Company a profit of \$123,889.25. which was admittedly a capital profit. Pursuant to a Resolution of Rupununi, passed at an extraordinary general meeting, held the 4th November, 1949 (that subject to the approval of the Auditors a cash distribution of \$2. per share be made from this profit) the Directors of the Company, at a board meeting held on the 10th November, 1949, passed the following 20

p.16. Resolutions:- 30

"1. That the profit of \$123,889.25. arising out of the sale of No.27, be transferred to a capital reserve account.

"2. That as per the resolution passed by the shareholders at the extraordinary general meeting held on the 4th November, 1949, a cash distribution of \$2. per share to be made to the shareholders, to be paid out of capital reserve".

The Auditors approved the distribution. 40

p.16. 7. On or about the 12th November, 1949, the Appellant Company received, in British Guiana from Rupununi, the sum of \$1200, in payment of the cash distribution thus resolved upon.

8. The aforesaid distribution was treated as investment income received in the year, 1949, by the Appellant Company and, in this view, was included by the Commissioners of Income Tax in the assessment, made upon that Company for the year of assessment 1950, of which the notice was dated the 31st October, 1951.

p.15.

p.14.

10 9. The provisions of the Income Tax Ordinance relevant to the matters in dispute are the following :-

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Section 2. (Interpretation)

"person" includes a body of persons.

"year of assessment" means the period of twelve months commencing on the 1st January, 1929, and each subsequent period of twelve months;

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"chargeable income" means the aggregate amount of the income of any person from the sources specified in Section 5 remaining after allowing the appropriate deductions and exemptions under this Ordinance.

Section 5 (Charge of income tax)

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"Income tax subject to the provisions of this Ordinance, shall be payable at the rate or rates herein specified for each year of assessment upon the income of any person accruing in or derived from the Colony or elsewhere, and whether received in the Colony or not, in respect of...

(c) dividends interest or discounts."

Section 8 (Basis of assessment)

"Tax shall be charged, levied, and collected for each year of assessment upon the chargeable income of any person for the year immediately preceding the year of assessment."

Section 26 (Rates of tax)

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"(1) the tax upon the chargeable income of every person other than a company shall be at the following rates"

Section 27 (Flat rate of tax on companies)

"(1) The tax upon the chargeable income of a company, other than a Life Insurance Company, shall be charged at the rate of 45 per centum of the amount of the chargeable income."

Section 29 (Deduction of tax from dividends of Company)

"(1) Every company registered in the Colony shall be entitled to deduct from the amount of any dividend paid to a shareholder tax at the rate paid or payable by the company (double taxation relief being left out of account) on the income out of which the dividend is paid; 10

Provided that where tax is not paid or payable by the company on the whole income out of which the dividend is paid the deduction shall be restricted to that portion of the dividend which is paid out of income on which tax is paid or payable by the company. 20

"(2) Every company aforesaid shall upon payment of a dividend, whether tax is deducted therefrom or not, furnish to each shareholder a certificate setting forth the amount of the dividend paid to that shareholder and the amount of tax which the company has deducted or is entitled to deduct in respect of that dividend....." 30

Section 30 (Tax deducted from dividend to be set-off against tax on income of shareholder)

"Any tax which a company has deducted or is entitled to deduct under the last preceding Section from a dividend paid to a shareholder, and any tax applicable to the share to which anyone is entitled in the income of a body of persons assessed under this Ordinance, shall, when that dividend or share is included in the chargeable income of the shareholder or person, be set-off for the purposes of collection against the tax charged on that chargeable income." 40

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10. The Commissioners of Income Tax having confirmed the assessment, the Appellant Company appealed to the Supreme Court of British Guiana. The appeal came on for hearing before Mr. Justice Date on the 22nd July, 1957 and the 8th and 11th January, 1958, when judgment was reserved. On the 27th February, 1958, Mr. Justice Date delivered judgment, dismissing the Appellant Company's appeal and confirming the assessment as made. p. 1.
11. The process of reasoning of the judgment may thus be summarised :- p. 4.
- (1) The sole question for determination was whether the sum of \$1200, should be included in the chargeable income of the year of assessment, 1950. pp.4/14.
- (2) The Commissioners of Income Tax had submitted that it should so be included by reason of Section 5 (c), The Income Tax Ordinance, imposing the charge on income in respect of dividends. p.5.(10)
- (3) A similar question had come before Savary, J. in Bollers v. Commissioners of Income Tax. In that case Savary, J had decided (a) that neither in re Bates nor Hill v. The Permanent Trustee Company of New South Wales Limited, laid down a principle applicable to income tax law, and (b) that since the Income Tax Ordinance was similar in scheme to the English Acts (so far as companies were concerned) the dividend in question (from capital profits) was not assessable to income tax. p.5.(30)
- (4) The case of Commissioners of Inland Revenue v. Trustees of Joseph Reid (deceased) made it clear that what, for the purposes of income tax law, could properly be regarded as capital in the hands of the company, might yet be income in the hands of the shareholder. p.5.(40)
L.R.B.G.
(1931-1937)271
p.6.(20/30)
(1928)Ch.682
(1930) A.C.
720
- (5) Date, J. considered himself obliged to hold that the sum received by the Appellant Company, as a cash distribution on its shares in Rupununi, was income in its hands. p.6.(40)
30.A.C.431
- (5) Date, J. considered himself obliged to hold that the sum received by the Appellant Company, as a cash distribution on its shares in Rupununi, was income in its hands. p.11.(10)

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- p.11.(10) (6) Not everything in the nature of income was assessable to income tax and it remained to consider whether this distribution was exigible with tax under the Income Tax Ordinance.
- p.11.(20) (7) In reference to the argument from analogy which succeeded in Bollers' Case, the shareholder in an English company is not taxed upon his dividend, because on the true construction of the Statute no tax is imposed on the dividend; 10
- (1946)A.C.119 Canadian Eagle Oil Company Limited v. The King
- p.13.(10) (8) The English Acts contained no provision corresponding to Section 5(c) of the Income Tax Ordinance, and this fundamental difference in the charging sections of the respective Statutes was fatal to the argument from analogy. 20
- Cap. 299
- p.13.(10/20) (9) The word "dividend" in the context of Section 5 (c) the Income Tax Ordinance should be given its ordinary meaning which was "share of profits".
- Cap. 299
- p.17. 12. The Appellant Company appealed to the Full Court of the Supreme Court of British Guiana. The appeal came on for hearing before the Full Court (Holder, C.J., Stoby, J. and Phillips, J.) on the 25th, 26th and 29th September, 1958, when judgment was reserved. On the 13th December, 1958, the Full Court gave judgment unanimously allowing the Appellant Company's appeal. 30
13. The process of reasoning of the judgment may thus be summarised :-
- p.20.(40) (1) The sole question for determination was whether the sum of \$1200 should be included in the chargeable income of the year of assessment, 1950.
- p.21(10/20) (2) The Commissioners of Income Tax had submitted that it should so be included, by reason of Section 5 (c) of the Income Tax Ordinance, imposing the charge on income in respect of dividends. 40
- Cap. 299

- (3) A similar question had come before Savary, J. in Bollers v. Commissioners of Income Tax. After a review of the relevant authorities Savary, J. had decided that the Income Tax Ordinance was similar in Scheme to the English Acts, so far as companies were concerned. L.R.B.G. (1931-1937)271
- 10 He had declined to define the ambit of the word dividend, in Section 5 (c) of the Ordinance.
- (4) Date, J. disagreed with the conclusion of Savary, J. and relied mainly for his decision on the English Case of C.I.R. v. Trustees of Joseph Reid (deceased) p.22.(20) 30.T.C.431.
- 20 (5) The claim in Reid's Case was founded on Case V of Schedule D, and the interpretation of the words, "Income arising from possessions out of the United Kingdom". It did not deal with dividends declared by an English Company. p.23(10)
- (6) The case under appeal dealt with a company incorporated in British Guiana and to dividends declared in British Guiana. p.23.(10)
- 30 (7) Upon the respective provisions of the Income Tax Ordinance and the United Kingdom Income Tax Acts, reference was made to Sections 5(c), 10, 29, and 30 of the Ordinance, to Rule 20 of the General Rules The Income Tax Act, 1918, and to the decision in Canadian Eagle Oil Company Limited v. The King. (1946)A.C.119
- (8) It was conceded in the present case that the dividend was paid out of capital profits. p.27(40)
- 40 In Gimson v. The Commissioners of Inland Revenue it was conceded that so much of a dividend as was paid out of profits from the realisation of an investment should be treated as having a capital nature not assessable to income tax. 15 T.C.595
- (9) There was a distinction between capital profits and trading profits for this purpose, as drawn by Lord Simonds in C.I.R. v. Trustees of Joseph Reid(deceased) p.29.(20) 30.T.C.431 (at p.438)

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- p.29(40) (10) Where under the English Code no tax was exigible because the profits were not taxable income (as from a sale of capital assets) the same position followed in British Guiana by reason of Sections 29 and 30 of the Income Tax Ordinance.
- p.30.(10) (11) The word dividends in Section 5 (c) of the Income Tax Ordinance was not intended to mean dividends derived from the sale of capital assets or from capital profits but from trading profits, in other words the scheme of both enactments (in England and in British Guiana) was the same. 10
- p.33. 14. The Respondents appealed to the Federal Supreme Court of the West Indies. The appeal came on for hearing before the Court (Rennie, J., Archer, J. and Wylie, J.) on the 11th, 14th and 15th March, 1960, when judgment was reserved. On the 14th June, 1960, the Federal Supreme Court gave judgment allowing the Respondents' appeal. 20
- pp.36/52 15. The process of reasoning of the judgment of Wylie, J. (with whom Rennie, J. concurred without delivering a separate judgment) may thus be summarised:-
- p.38.(10) (1) Whether the United Kingdom Income Tax Acts and the British Guiana Income Tax Ordinance both provided the same scheme for the taxation of the income of, and dividends paid by, companies, had bearing on the proper answer to the questions raised by the Stated Case. 30
- pp. 38/39 (2) Wylie, J. first considered the Ordinance, referring to Sections 5, 25 (1), 27 (1), 29 (1), and 30.
- p.39.(40) (3) At first sight Section 5 (c) and Section 27 (1) combined, imposed income tax upon any dividends received by a company which formed part of its chargeable income. Chargeable income was defined by Section 2 as the aggregate of income from the sources specified in Section 5, which included dividends, after the appropriate deductions and exemptions. 40

- (4) These provisions left no room for doubt that any dividend received by a company as part of its income must be included in calculating its chargeable income, even if the fund from which it had been paid had already been subjected to tax as part of the chargeable income of the company declaring such a dividend. p.40(10)
- 10 (5) Section 30 strongly reinforced this conclusion, its object being clearly to preserve that principle, found also in the United Kingdom Income Tax Acts, that tax was not to be paid twice on income out of which a dividend was paid. p.40 (20)
- (6) Although the principle of avoiding double taxation was common to the legislation of the United Kingdom and British Guiana it did not necessarily follow that the legislation (of each) applied the same scheme in order to give effect to the principle. p.40(40)
- 20 (7) It was necessary also to consider the difference between the two sets of legislation. The right of set-off in Section 30 did not exist in United Kingdom Legislation and its provisions lead irresistibly to the conclusion that a dividend was to be included in the chargeable income of the shareholder to be taxed, with no right of set-off until that dividend had been subjected to tax as part of the taxable incomes of both company and shareholder. p.41(40)
- 30 (8) While both Codes recognised the principle in the case of dividends, that tax should not be deducted twice, they gave effect to this principle by entirely different methods; in the case of British Guiana imposing tax on the income of the company and again on the dividend, permitting the shareholder to set-off against his tax that part of the tax paid by the company proportionate to the amount of dividend. p.42(30)
- 40 (9) The British Guiana Income Tax Ordinance provided for income in respect of dividends to be taxed as part of the p.43(40)

RECORD

income of the shareholder.

pp 45(10)
46(10)

(10) Upon the first question (raised by the Case Stated) the proviso to sub-section (1) of Section 29, could not have the effect of excluding from the word dividends, used elsewhere in the Ordinance, dividends not paid out of income. The cash distribution was therefore a dividend within the meaning of Section 5 (c), of the Income Tax Ordinance.

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30.T.C.431
p.46 (20)

(11) Upon the second question raised (by the Case Stated) whether the sum of \$1200 was income within the meaning of Section 5, he considered the decision in Commissioners of Inland Revenue v. Trustees of Joseph Reid (deceased) to be conclusive.

p.50 (10)

(12) Upon the third question raised, the terms of the British Guiana Income Tax Ordinance did not give rise to any consideration as to whether or not the dividends, from which the income was derived, had been paid out of funds not taxable in the hands of the company paying the dividends.

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p.52

Mr. Justice Archer answered the questions raised by the Case Stated "in the same way".

16. It is contended, whether or not Wylie J, was correct in the conclusion which he reached that the British Guiana Income Tax Ordinance provided a scheme for the taxation of income of, and dividends paid by companies, different from that of the United Kingdom Income Tax Acts, he was wrong in concluding that the proviso to sub-section (1) of Section 29 could not have the effect of excluding from the word "dividends" dividends not paid out of income, and that he was wrong in holding that under British Guiana Legislation there is no right of set-off until dividends have been subjected to tax as part of the taxable incomes of both the company and the shareholder because under Section 73 a shareholder whose income is insufficient to attract tax at less than the company rate is entitled to a refund of the whole or a proportion of the tax deducted at source. It is further contended that Wylie, J.

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was wrong in holding that the sum of \$1200 was income within the meaning of Section 5 and in concluding that the decision in Commissioners of Inland Revenue v Trustees of Joseph Reid (deceased) was conclusive.

10 Finally it is contended that Wylie, J. was wrong in the emphasis he gave to the absence of express terms in the British Guiana Tax Ordinance as to whether or not the dividends, from which the income was derived, had been paid out of funds not taxable in the hands of the company paying the dividends.

17. On the 23rd November, 1960, Leave to Appeal to Her Majesty in Council was granted.

20 18. The Appellant Company humbly submits that this appeal should be allowed and that the judgment and order of the Federal Supreme Court of the West Indies should be set aside and judgment entered for the Appellant Company and that it be awarded costs throughout for the following amongst other

R E A S O N S

- (1) BECAUSE the distribution of \$1200 by the Rupununi Development Company Limited was made from capital profits of that Company.
- (2) BECAUSE the said distribution was made to and received by the Appellant Company in its capacity as owner of shares in the Rupununi Development Company Limited.
- (3) BECAUSE the said distribution was received by the Appellant Company as capital.
- (4) BECAUSE the Income Tax Ordinance imposes the charge of tax upon income only.
- (5) BECAUSE there is no provision of the Income Tax Ordinance which requires the said distribution to be treated as having the quality of income.
- (6) BECAUSE the decision of the Federal Supreme Court of the West Indies and of Mr. Justice Date were wrong, and
- (7) BECAUSE the decision of the Full Court of the Supreme Court of British Guiana was right.

DESMOND MILLER
NEIL ELLES