

18/1962

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL SUPREME COURT OF THE WEST INDIES

BETWEEN

BICBER LIMITED (IN VOLUNTARY LIQUIDATION) (formerly S. DAVSON & COMPANY LIMITED) ...

- and -

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

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THE COMMISSIONERS OF INCOME TAX

Respondents

68211

CASE FOR THE RESPONDENTS

RECORD

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1. This is an appeal brought by leave from an Order of the Federal Supreme Court of the West Indies dated the 14th June, 1960, allowing the Respondents' appeal from an Order of the Full Court of the Supreme Court of British Guiana dated the 20th August, 1959, which had allowed the Appellants' appeal from the decision of the Judge in Chambers dated the 27th February, 1958, confirming an assessment to income tax for the year of assessment 1950.

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2. This case raises two questions of law. The first is whether or not the recipient of a dividend paid by a British Guiana company out of "capital profits" immune from British Guiana income tax in the hands of the company is chargeable with British Guiana income tax in respect of the dividend. The second is whether or not an interpretation of the British Guiana Income Tax Ordinance based upon a judicial decision in 1935 and acted upon for many years thereafter should prevail notwithstanding that such interpretation is now found to have been erroneous.

3. This appeal is directly concerned with the provisions of the Income Tax Ordinance (Cap.299) of the Laws of British Guiana hereinafter set out:-

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Section 5. "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; 10  
..."

Section 26 (1). "The tax upon the chargeable income of every person other than a company shall be charged at the following rates -

For every dollar of the first 1,200 dollars  
.06 cents

For every dollar of the next 2,400 dollars  
.12 cents

... ..

For every dollar of the remainder of the chargeable income .60 cents" 20

Section 27 (1). "The tax upon the chargeable income of a company other than a Life Insurance Company shall be charged at the rate of forty five per centum of the amount of the chargeable income."

Section 29. "(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: 30

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. 40

(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, .....

10 Section 30. "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".

4. The material facts of the case appear from the original Summons on Appeal and are as follows:-

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20 (1) The Appellant Company, a company incorporated in the United Kingdom and registered in British Guiana, was a shareholder in the Rupununi Development Company Limited (hereinafter called "the Rupununi Company"), a company incorporated and registered in British Guiana.

(2) On or about the 12th November, 1949, the Appellant Company received \$1,200 by way of a cash distribution at the rate of \$2 a share on six hundred shares held by it in the Rupununi Company.

30 (3) This cash distribution had been made out of capital reserve from funds credited to that reserve and consisting of profits made upon the sale of capital assets.

40 (4) The said sum of \$1200 was included by the Respondents in computing the Appellants' chargeable income for the year of assessment 1950 (although it is not disputed that before the resolution for the cash distribution was passed the Rupununi Company had been informed by the then Commissioner of Income Tax that tax would not be payable on such distribution).

5. The Appellants appealed to the Judge in Chambers against the inclusion of the said sum of \$1,200 in their chargeable income and the appeal was heard before Date, J., on the 22nd July, 1957, and the 8th and 11th January, 1958. On 27th February, 1958, Date, J., delivered judgment

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dismissing the appeal, confirming the assessment, and ordering that the parties bear their own costs.

p.5 11.18-34

Date, J., accepted the argument submitted on behalf of the Respondents that, since the distribution made by the Rupununi Company was in cash and not in the course of liquidation or by way of an authorised reduction of capital, the sum distributed was income in the hands of the Appellants exigible to income tax under section 5 (c) of the Income Tax Ordinance.

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p.13 11.26-28

Date, J., declined to follow the 1935 decision of Savary, J., in Bollers v. Commissioners of Income Tax, L.R.B.G. (1931-1937) 271, which raised an exactly similar question. Date, J., was of opinion that the decision of the House of Lords in Commissioners of Inland Revenue v. Trustees of Joseph Reid (deceased) (1949) A.C. 361; 30 T.C. 431, obliged him to hold that the sum received by the Appellants as a cash distribution in respect of their shares in the Rupununi Company was income in their hands.

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p.12 1.36 -  
p.13 1.11

Date, J., rejected the contention that the Income Tax Ordinance of British Guiana was similar in scheme to the United Kingdom Income Tax Acts with the consequence that a dividend distributed by a British Guiana company from profits realised from the sale of its capital assets was not assessable to income tax when received by the shareholders. Notwithstanding the similarity between section 29 of the Income Tax Ordinance and section 184 of the Income Tax Act, 1952, dividends as such were directly assessable to tax in British Guiana under section 5 (c) of the Ordinance, and this provision, not to be found in the English Acts, constituted a fundamental difference fatal to an argument from analogy between the two taxing systems.

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p.13 11.12-25

Date, J., also rejected an argument that the sum received by the Appellants from the Rupununi Company was not a "dividend" within the meaning of section 5 (c) of the Ordinance.

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6. The Appellants appealed by way of case stated to the Full Court of the Supreme Court of British Guiana. The case set out three questions of law for the consideration of the Full Court, namely:-

p.17 11.3-6

(a) Whether or not the said sum of \$1,200 was a "dividend" within the meaning of section 5 of the Ordinance;

(b) Whether or not the said sum of \$1,200 was "income" of the Appellants within the meaning of the said section 5; and p.17 11.7-10

(c) Whether or not, even if the said sum of \$1,200 be a dividend and be income within the meaning of the said section 5, the same is chargeable with income tax, having regard to the provisions of the said Ordinance relating to dividends and to the fact that the said sum of \$1,200 was paid out of capital profits. p.17 11.11-19

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7. The appeal was heard (Holder, C.J. Stoby and Phillips, JJ.) on the 25th, 26th and 29th September, 1958, and on 13th December, 1958, the Court delivered judgment allowing the appeal with costs. pp.17-30

The Full Court considered that in regard to the taxation of dividends the scheme of the Income Tax Ordinance of British Guiana was the same as p.30 11.12-15

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that of the English Taxing Acts. Since it was conceded that, under the English legislation, a shareholder of a company resident in the United Kingdom was not assessable to income tax or surtax in respect of capital profits distributed by such company, it followed that the cash distribution made by the Rupununi Company to the Appellants was not taxable under the Income Tax Ordinance of British Guiana. The Full Court distinguished the decision in Commissioners of p.21 11.22-30

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Inland Revenue v. Trustees of Joseph Reid (deceased) (1949) A.C. 361; 30 T.C. 431 as being a case concerned with the distinction between English and foreign companies. p.29 11.11-13

The Full Court held that the sum of \$1,200 received by the Appellants from the Rupununi Company was not a "dividend" within the meaning of section 5 of the Income Tax Ordinance, that the said sum was not "income" of the Appellants within the meaning of the said section 5, and that, even if the said sum had been a dividend and income within section 5, it would not have been chargeable to income tax, having regard to the provisions of the Income Tax Ordinance relating to dividends and to the fact that the said sum was paid out of capital profits. p.30 11.20-27

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8. By leave of the Full Court the Respondents appealed to the Federal Supreme Court of the West Indies. The appeal was heard (Rennie, Archer and Wylie, JJ.) on the 11th, 14th and 15th March, 1960, p.32 11.10-30

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pp.36-52

and on the 14th June, 1960, the Court gave judgment allowing the appeal but ordering that the parties should bear their own costs.

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p.37 1.38-  
p.38 1.6

Wylie, J., delivered the leading judgment. He said that most of the argument on the hearing of the appeal was addressed to the question whether the United Kingdom tax legislation and the British Guiana Income Tax Ordinance both provided for the same scheme for the taxation of the income of, and dividends paid by, companies. After referring to 10

pp.38 & 39

p.39 11.33-46  
p.40 11.1-10

the relevant portions of the Income Tax Ordinance, Wylie, J., said that the present case concerned two limited liability companies. It was clear from the definitions of "person" and "body of persons" in section 3 of the Ordinance that the word "person" included a company. At first sight, therefore, section 5 (c) and section 27 (1) combined imposed income tax upon any dividends received by a company which formed part of the chargeable income. Chargeable income was defined 20

p.40 11.11-29

in section 2 as meaning the aggregate amount of income from the various sources specified in section 5 (which included dividends) remaining after allowing the appropriate deductions and exemptions under the Ordinance. These provisions, taken on their own, and giving the language used its plain meaning, would leave 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 the dividend had been paid had already been subjected to tax as part of the chargeable income of the company which declared the dividend. Section 30 reinforced that conclusion by providing specifically for a set-off against the tax charged on that chargeable income of the tax which a company paying a dividend had deducted, or was entitled to deduct, from that dividend pursuant to section 29. The object of section 30 was to preserve the principle found also in the income tax 30

p.40 11.38-43

legislation of the United Kingdom, that tax was not to be paid twice on income out of which a dividend was paid. Although this principle of avoiding double taxation on such income might be common to the legislation of both the United Kingdom and British Guiana, it did not follow that both sets of legislation applied to same scheme in order to give effect to that principle. While both recognised the principle in the case of dividends that tax should not be deducted twice from the same source 40

p.42 11.32-48

of income, they proceeded to give effect to that 50

10 principle by entirely different methods. The United Kingdom legislation, as interpreted by the Courts, imposed tax at the standard rate on the income of the company, but not on the dividend in the hands of the shareholder, whereas the British Guiana legislation imposed tax on the income of the company and again on the dividend in the hands of the shareholder, but permitted the latter to set off against his tax that part of the tax paid by the company which was proportionate to the amount of the dividend.

Having concluded that the Ordinance provides for income from dividends to be taxed, Wylie, J., turned to the three questions submitted for the consideration of the Full Court.

On the first question, Wylie, J., held that the cash distribution was a dividend within the meaning of section 5 (c) of the Ordinance. p.46 11.3-12

20 On the second question, Wylie, J., held, on the authority of Commissioners of Inland Revenue v. Trustees of Joseph Reid deceased (1949) A.C. 361; 30 T.C. 431 that the cash distribution was "income" of the shareholder within the meaning of section 5. p.46 11.12-47 pp.47 & 48 p.49 11.1-44

30 On the third question, Wylie, J., said that the specific terms of the British Guiana 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 which were not taxable in the hands of the company paying the dividend. He therefore decided that the cash distribution was chargeable with income tax notwithstanding that it had been paid out of capital profits. p.49 1.45 p.50 11.1-12

40 Wylie, J., rejected the submission that the Federal Supreme Court should not give a decision contrary to the interpretation adopted by Savary, J., in Bollers v. Commissioners of Income Tax, 1931-1937 B.G. L.R. 271 that interpretation having been acted upon ever since 1935. He said that the circumstances of the present case were not such as ought to prevail over the primary duty of the Court to ensure that the law was correctly expounded and applied. p.50 11.13-47 p.51 11.1-43

Rennie and Archer, JJ., concurred. p.52 11.14-35

9. By an Order dated 21st June, 1960, the Federal

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pp. 54 & 55

Supreme Court of the West Indies granted conditional leave to the Appellant to appeal to Her Majesty in Council from the Judgment and Order of that Court and by further Order dated the 23rd November, 1960, granted final leave to appeal.

10. The Respondent humbly submits that the Appeal should be dismissed with costs and that the Order of the Federal Supreme Court of the West Indies should be affirmed for the following among other

R E A S O N S

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- (1) BECAUSE section 5 (c) of the British Guiana Income Tax Ordinance charges "dividends" to income tax.
- (2) BECAUSE the cash distribution of \$1,200 received by the Appellants from the Rupununi Company was a dividend chargeable to tax.
- (3) BECAUSE the scheme of the British Guiana Income Tax Ordinance in regard to the taxation of dividends is different from that of the income tax legislation of the United Kingdom. 20
- (4) BECAUSE the decision of Savary, J., in Bollers v. Commissioners of Income Tax should not be regarded as having established a principle of law to be applied irrespective of the correctness of the decision.
- (5) BECAUSE the decision and reasoning of Date, J., were right. 30
- (6) BECAUSE the decision and reasoning of the Full Court of the Supreme Court of British Guiana were wrong.
- (7) BECAUSE the decision and reasoning of the Federal Supreme Court of the West Indies were well-founded.

F. HEYWORTH TALBOT

RODERICK WATSON