

IN THE PRIVY COUNCIL

No.4 of 1961

ON APPEAL

FROM THE FEDERAL SUPREME COURT

THE WEST INDIES  
OF BRITISH GUIANA

B E T W E E N :

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

Appellants

68209

- and -

THE COMMISSIONERS OF INCOME TAX

Respondents

RECORD OF PROCEEDINGS

SIMMONS & SIMMONS  
1 Threadneedle Street,  
London, E.C.2.  
Solicitors for the Appellants.

CHARLES RUSSELL & CO.  
37 Norfolk Street,  
Strand,  
London, W.C.2.  
Solicitors for the Respondents.

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

18, 1962

IN THE PRIVY COUNCILNo.4 of 1961ON APPEAL

FROM THE FEDERAL SUPREME COURT  
THE WEST INDIES  
OF BRITISH GUIANA

B E T W E E N

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

Appellants

- and -

THE COMMISSIONERS OF INCOME TAX

RespondentsRECORD OF PROCEEDINGSINDEX OF REFERENCE

No.	Description of Document	Date	Page
	<u>IN THE SUPREME COURT OF BRITISH GUIANA</u>		
1	Summons on Appeal	8th April, 1954	1
2	Judgment of Mr. Justice Date	27th February 1958	4
	<u>IN THE FULL COURT OF THE SUPREME COURT OF BRITISH GUIANA</u>		
3	Case stated by Date J.	9th July, 1958	14
4	Judgment	13th December 1958	17
5	Formal Order allowing Appeal	20th August 1959	31

No.	Description of Document	Date	Page
6	Order granting leave to Appeal to Federal Supreme Court	15th October 1959	32
<u>IN THE FEDERAL SUPREME COURT</u>			
7	Notice of Appeal by Commissioners of Income Tax.	26th October, 1959.	33
8	Judgment (a) Wylie J. (concurring in by Rennie J.)	14th June 1960	36
	(b) Archer J.	14th June 1960	52
9	Formal Order allowing Appeal	14th June, 1960	53
10	Order Granting Final Leave to Appeal to Her Majesty in Council.	23rd November, 1960.	54
LIST OF DOCUMENTS TRANSMITTED BUT NOT REPRODUCED.			
<hr/>			
Affidavit of Service of Notice of Appeal		29th October, 1959	
Petition for leave to Appeal to Privy Council		20th June, 1960	
Notice of hearing of Petition		20th June, 1960	
Order granting Conditional Leave to Appeal		21st June, 1960	

IN THE PRIVY COUNCIL

No.4 of 1961

ON APPEAL

FROM THE FEDERAL SUPREME COURT

B E T W E E N

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

Appellants

- and -

10 THE COMMISSIONERS OF INCOME TAX

Respondents

RECORD OF PROCEEDINGS

No. 1

SUMMONS ON APPEAL

No.385 of 1954 DEMERARA

IN THE SUPREME COURT OF BRITISH GUIANA

In the matter of the Income Tax Ordinance,  
Chapter 38, and amending Ordinances.

In the Supreme  
Court of British  
Guiana

B E T W E E N

S. DAVSON & COMPANY LIMITED

Appellants

- and -

20

THE COMMISSIONERS OF INCOME TAX

Respondents

No.1

Summons on  
Appeal  
8th April, 1954

TAKE NOTICE that the abovenamed S. Davson  
and Company Limited intend to appeal against  
the decision of the Commissioners of Income Tax  
given on the 1st day of April, 1954, and served  
on the said Company by registered post on the

In the Supreme  
Court of British  
Guiana

3rd day of April, 1954, on objection to Assessment No.178D/50.

No.1

Summons on  
Appeal  
8th April, 1954  
continued

AND FURTHER TAKE NOTICE that you are required to attend the Judge in Chambers at the Victoria Law Courts, Georgetown, Demerara, on the day and at the time notified by the Registrar on the hearing of an appeal by the said S. Davson & Company Limited against the decision of the said Commissioners.

AND FURTHER TAKE NOTICE that it is the intention of the said S. Davson & Company Limited to attend the Appeal by Counsel. 10

The Grounds of the Appeal are as follows :-

(1) The said S. Davson & Company Limited (hereinafter referred to as the Company) is a company incorporated in the United Kingdom and was in the year 1949 carrying on business at Lot 17, Water Street, Georgetown and elsewhere in this colony.

(2) The Company was in 1949 a shareholder of the Rupununi Development Company Limited (hereinafter referred to as the Rupununi Company) and held 600 shares therein. 20

(3) In 1949 the Rupununi Company made a capital profit of \$123,889.25 from the sale of its immovable property at No.27 Berbice.

(4) At an Extraordinary General Meeting of the Rupununi Company held on the 4th November, 1949, the following resolution was passed viz :

"That subject to the approval of the Company's Auditors - Messrs. Fitzpatrick Graham and Company - a cash distribution of \$2.00 per share be made from the capital profits derived from the sale of No.27, the balance of such profits remaining thereafter to be placed on reserve and used at the discretion of the directors for the purchase of bulls, etc." 30

(5) Messrs. Fitzpatrick Graham and Company having by letter dated 8th November, 1949, stated that they could raise no objection to the proposed distribution, the directors of the Rupununi 40

Company at a meeting held on 10th November, 1949, passed the following resolution namely :-

In the Supreme  
Court of British  
Guiana

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

No.1

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."

Summons on  
Appeal  
8th April, 1954  
continued

10

(6) On or about the 12th November, 1949, the Company received in British Guiana from the Rupununi Company the sum of \$1,200:- in payment of the said distribution of capital profits in respect of the Company's shares, and in an accompanying circular the following statement was made by the Secretary of the Rupununi Company namely :-

20

"I am directed to inform you that the Commissioner of Income Tax has intimated that this distribution is not subject to income tax and therefore the above amount should not be included in your return of income for the year ending 31st December, 1949".

30

(7) The said sum of \$1,200:- has been added by the Commissioners to the chargeable Income of the Company but such sum being a distribution of capital is not income within the meaning of the Income Tax Ordinance and is not taxable.

(8) The Commissioners have erred in assessing the said sum of \$1,200:- as part of the chargeable income of the Company for the year of Income 1949 and the said assessment is accordingly excessive and wrong.

Dated the 8th day of April, 1954.

H.C.B. Humphrys

40

Solicitor for the said S.Davson  
& Company Limited.

The address for service of Hugh Cecil Benjamin

In the Supreme  
Court of British  
Guiana

Humphrys, Solicitor for the abovenamed  
Appellants, is at the office of Cameron &  
Shepherd, Lot 2, High Street, Newtown,  
Georgetown, Demerara.

No.1

Summons on  
Appeal  
8th April, 1954  
continued

No.2

Judgment of  
Mr. Justice  
Date.  
27th February,  
1958.

No.2

JUDGMENT OF MR. JUSTICE DATE

Before Date J. (In Chambers)

1957: July 22.

1958: January 8 and 11.

J.H.S. Elliott for Appellants.

10

G.S. Gillette, Crown Counsel, for Respondents.

JUDGMENT

This is an appeal against a decision of  
the Commissioners of Income Tax. The facts  
giving rise to the appeal are not in dispute,  
and may be summarised as follows.

The appellants are a company incorporated  
in the United Kingdom and were in the year  
1949 carrying on business in this colony. They  
held 600 shares in the Rupununi Development  
Company, Ltd. (hereinafter referred to as the  
Rupununi Company), a cattle-ranching company  
incorporated in the Colony under the Companies  
(Consolidation) Ordinance.

20

In 1949 the Rupununi Company sold certain  
immovable property which they owned in Berbice  
and realised a profit of \$123,889.25. They  
were not dealing in properties, and it is ac-  
cepted that the profit on this sale, in so far  
as the Rupununi Company is concerned, was a

30

capital profit and, as such, not liable to assessment to income tax in their hands.

In the Supreme  
Court of British  
Guiana

No.2

Judgment of  
Mr. Justice  
Date.  
27th February,  
1958  
continued

10 At an extraordinary general meeting of the Rupununi Company it was resolved to make a cash distribution of \$2.00 per share to be paid out of the profit of \$123,889.25, subject to the approval of the auditors. The auditors approved the distribution and the appellants were paid \$1,200 in respect of the 600 shares held by them.

The sole question for determination by me is whether this sum of \$1,200 received by the appellants in 1949 as cash distribution on the shares held by them in the Rupununi Company should be included in computing the appellants' chargeable income for the year of assessment 1950. The Commissioners submit that it should be so included, on the grounds that -

20 (a) the distribution by the Rupununi Company was made in cash and not in the course of liquidation or in the course of an authorised reduction of capital;

(b) the shares of the recipient shareholders are still intact;

(c) the sum distributed by the Rupununi Company out of their capital profits to the appellants was income in the hands of the recipients;

30 (d) such income is exigible to income tax under section 5 (c) of the Income Tax Ordinance which provides, inter alia, that income tax shall be payable on the income of any person accruing in or derived from the Colony in respect of "dividends".

40 An exactly similar question came before Savary J. in 1935 in Bollers v. Commissioners of Income Tax, L.R.B.G. (1931-1937) 271. In that case it was conceded, as it has been in the instant case, that under the English Acts a shareholder of a company resident in the United Kingdom is not assessable to income tax or surtax in respect of capital profits distributed by such company but it was urged on behalf of the Crown that the scheme of the



In the Supreme  
Court of British  
Guiana

No.2

Judgment of  
Mr. Justice  
Date.  
27th February,  
1958  
continued

local enactment differs from that of the English acts; it was then contended that, though not reached by the English acts, a distribution of capital profits, where not made in the course of liquidation of a company or in the course of an authorised reduction of capital, is, in the light of In re Bates, (1928) Ch. 682, and Hill v. Permanent Trustee Co. of New South Wales Ltd. (1930) A.C. 720, in the nature of income in the hands of the recipient shareholders, and within the meaning of the expression "dividends" in section 5 (c) of our Ordinance.

10

Commenting on In re Bates and Hill v. Permanent Trustee Company of New South Wales Ltd., Savary J. said :-

"The first observation I have to make is that these were cases brought to determine the question whether cash bonuses or dividends, distributed out of capital assets, were to be treated as income or corpus of the respective trust estates, in other words, they were cases between tenants for life and remaindermen, and not revenue cases."

20

Savary J. considered that these cases laid down no principle that was applicable to income tax law. He also took the view that the local Income Tax Ordinance was similar in scheme to the English Acts so far as companies were concerned and, on the strength of that analogy, held that a dividend distributed by a company from profits realised from the sale of its capital assets is not assessable to income tax when received by the shareholders.

30

The more recent case of Commissioners of Inland Revenue v. Trustees of Joseph Reid (deceased), (1949) 30 T.C. 431, makes it clear, however, that even for the purposes of income tax law what may properly be regarded as capital in the hands of a company may yet be income in the hands of a shareholder. In that case the respondent trustees held 3,433 shares in a South African trading company. The company sold certain warehouses and office premises, which it occupied for the purposes of its trade, at a profit out of which it declared and paid a dividend of 20% "payable from capital profits". The dividend (£6,866) was received by the trustees

40

without deduction of income tax, and the dividend on shares held for liferenters of the trust was credited by the trustees to the revenue accounts of the liferenters. On an appeal to the Special Commissioners against an assessment to income tax under Case V of Schedule D, (which imposes tax on income arising from possessions out of the United Kingdom) in respect of the dividend, the trustees contended that the dividend, having been paid out of profits of a capital nature, was not assessable to income tax. The Special Commissioners upheld the trustees' contention and discharged the assessment. On appeal to the House of Lords, however, it was held that the dividend received by the trustees was income arising from foreign possessions assessable to tax under Case V Schedule D. At pp. 442 and 443 of the report Lord Normand is recorded as having said this:-

In the Supreme  
Court of British  
Guiana

No.2

Judgment of  
Mr. Justice  
Date.  
27th February,  
1958  
continued

10

20

30

40

"In law capital cannot be returned to shareholders by a mere money distribution whether called a dividend or by some other name, and there was in this instance no return of capital. The shares of the Company remained after the distribution intact and precisely as they were before it. The payment wears on the face of it, therefore, the appearance of an income receipt in the hands of the shareholders. It is not irrelevant to consider how similar dividends have been dealt with in a question between liferenter and fiar or tenant for life and remainderman. It has been held that, according to the law of England, a payment received by way of dividend out of the proceeds of a sale of the company's assets prima facie goes to the tenant for life as income of the trust estate. In In re Bates (1928) Ch.682, the sum distributed represented profits on the sale of steam trawlers previously owned and operated by the Company. Eve, J., at page 687, held that it was a fund which the company 'could treat as available for dividend and could distribute as profits, or 'having regard to its power to increase capital could apply to that purpose by, for 'example, increasing the capital, declaring 'a bonus and at the same time allotting to 'each shareholder shares in the capital of

In the Supreme  
Court of British  
Guiana

No.2

Judgment of  
Mr. Justice  
Date.  
27th February,  
1958  
continued

'the company paid up to an amount equivalent  
'to his proportion of the bonus so declared.  
'Unless and until the fund was in fact capi-  
talisated it retained its characteristics of  
'a distributable profit.' In Hill v. Per-  
manent Trustee Company of New South Wales,  
Ltd., (1930) A.C. 720, Lord Russell of Kill-  
owen, delivering the opinion of the Privy  
Council, expounded the law in a series of  
propositions of which it is enough here to  
cite the following (page 731): '(2) A  
'limited company not in liquidation can make  
'no payment by way of return of capital to  
'its shareholders except as a step in an  
'authorised reduction of capital. Any other  
'payment made by it by means of which it  
'parts with moneys to its shareholders must  
'and can only be made by way of dividing pro-  
'fits. Whether the payment is called 'divi-  
'dend' or 'bonus', or any other name, it  
'still must remain a payment on division of  
'profits. (3) Moneys so paid to a share-  
'holder will (if he be a trustee) prima  
'facie belong to the person beneficially en-  
'titled to the income of the trust estate.  
'If such moneys or any part thereof are to  
'be treated as part of the corpus of the  
'trust estate there must be some provision  
'in the trust deed which brings about that  
'result. No statement by the company or its  
'officers that moneys which are being paid  
'away to shareholders out of profits are  
'capital, or are to be treated as capital,  
'can have any effect upon the rights of the  
'beneficiaries under a trust instrument  
'which comprises shares in the company.'"

10

20

30

At pp. 445 and 446 Lord Morton of Henryton  
said :-

"The trustees owned the 3,433 shares, and  
the 'possession' from which the sum of  
£6,866 'arose' was the shares.

40

"This sum must be either income arising  
from that possession or part of the capital  
of that possession. Despite the ingenious  
argument of Counsel for the Respondents, I  
am clearly of opinion that it cannot be part  
of the capital of that possession. No part

In the Supreme  
Court of British  
Guiana

No.2

Judgment of  
Mr. Justice  
Date.  
27th February,  
1958  
continued

of that possession has been sold; no part  
of the capital paid up on that possession  
has been returned. Before the payment was  
made the Respondents held 3,433 shares of  
\$10 each fully paid in the company; after  
the payment was made their holding was  
exactly the same. All that happened was  
that certain cash belonging to the Company,  
and representing part of the profit realised  
by the sale of a capital asset belonging  
to the company, was paid away as a dividend.  
Your Lordships are not concerned to consider  
whether the company could or could not have  
given its shareholders the benefit of this  
profit in a form which would have been capital  
in the hands of the Respondents. The  
directors, having this sum in their hands  
representing a profit which they were at  
liberty to distribute, very naturally decided  
to utilise it in paying a dividend.

"For the reasons which I have briefly stated,  
I must reject the contention that this  
dividend came to the Respondents as part of  
the capital of the 'possession'. It follows,  
I think, inevitably that the dividend is income  
arising from the 'possession'. Prima facie  
a dividend paid on shares is income.  
It has been held that, even if a distribution  
by way of dividend has been made out of  
profits arising from some dealing with the  
company's capital assets, the distribution  
is income, as between the persons beneficially  
interested in capital and income respectively  
(see In re Bates, (1928) Ch.682; Hill v. Permanent Trustee Company of New South Wales, Ltd., (1930) A.C. 720; In re Doughty, (1947) Ch.263). None of these cases is binding on your Lordship's House, but I see no reason to differ from any of them. These cases are not decisions as to the incidence of Income Tax, and, of course, the destination of sums paid to the trustees of a will must depend upon the language used by the testator. The decisions are, however, helpful as showing that the word 'income', when used in its ordinary sense, includes a dividend paid out of a profit of the kind that is sometimes called 'a capital profit'."

In the Supreme  
Court of British  
Guiana

No.2

Judgment of  
Mr. Justice  
Date.  
27th February,  
1958  
continued

Then there is this passage from the judgment  
of Lord Simonds at p. 439 of the report :-

"The claim of the Appellants is founded on Case V of Schedule D. They say that this sum of £26,866 is 'income arising from possessions out of the United Kingdom', that the shares in a South African company are possessions out of the United Kingdom, and that the sum in question is income arising from those shares. They say that there is no tertium quid. This sum is either capital or income. How can it be capital if the shares remain intact, so many shares of £10 each in the capital of the company? There is a way of distributing a dividend while leaving the capital intact, and there is a way of returning part of the capital; it is the former course that has here been taken. This then, they say, is income. When Lord Macnaghten reminded this House in an oft-quoted phrase that Income Tax is a tax upon income, he did not mean that that only was income which fell within Case I of Schedule D, but he intended a wider and more popular test, a test which is here satisfied by the fact that the sum has been without question treated not as capital but as income of the trust, and that this treatment has legal sanction in relevant decisions of high authority, see, for example, R.A. Hill v. Permanent Trustee Company of New South Wales, Ltd., (1930) A.C. 720; In re Bates (1928) Ch. 682; Re Doughty (1947) 1 All E.R. 207; Forgie's Trustees v. Forgie, 1941 S.C. 188.

10

20

30

"My Lords, this is the short and simple case made by the Appellants and I see no answer to it. The learned Lord President (Cooper) accepted an answer which he thus stated (p. 437 ante) : 'The short answer 'of the Respondents accepted by the Special Commissioners after investigating the facts, 'is that this sum is not the income of any-one, and never was. I agree.' My Lords, I must say, with great respect, that I think that this conclusion can only be reached by ignoring that what may be regarded as capital in the hands of the payer may yet be income in the hands of the payee. It is

40

begging the question to say that this sum is not income in the hands of the shareholders; by every practical test it has proved to be income."

In the Supreme  
Court of British  
Guiana

No.2

It is clear, I think, that Reid's Case obliges me to hold that the sum received by the appellants as cash distribution on their shares in the Rupununi Company was income in their hands.

Judgment of  
Mr. Justice  
Date.  
27th February,  
1958  
continued

10

Nevertheless, there is no provision, statutory or otherwise, to the effect that any and every thing in the nature of income is assessable to income tax. It therefore remains for consideration whether this particular income is exigible to tax under our law, or whether it is shielded from taxation by a "merciful if somewhat anomalous dispensation" akin to that which, under the English law, "disregards the juristic personality of the incorporated (English) company, and, in effect treats its taxation as the taxation of its members" (Lord MacDermott, at p. 447 of Reid's Case.) This brings us back to the argument from analogy which was successfully urged before Savary J. in Boller's Case and is again relied upon by the appellants in the instant case.

20

30

40

The sections of our Ordinance to which Savary J. alluded as placing local companies on a footing analogous to that of companies under the English Acts are sections 23 (1), 24 and 25. Now, section 23 (1) merely prescribes the flat rate of tax to be paid by companies other than life insurance companies. Section 24 provides that a 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 on the income out of which the dividend is paid, and requires the company upon payment of the dividend to furnish to the shareholder a certificate setting forth the amount of tax which the company has deducted or is entitled to deduct in respect of that dividend. Section 25 makes provision for setting-off any tax which a company has deducted or is entitled to deduct from a dividend, against the tax charged on the chargeable income of the shareholder when that dividend is

In the Supreme  
Court of British  
Guiana

No.2

Judgment of  
Mr. Justice  
Date.  
27th February  
1958  
continued

included in his chargeable income. Provisions along these lines are to be found in the English Acts; but is it really from those provisions of the Acts that the deliverance from taxation flows? I think not. Nor is the English law founded on some equitable principle as modifying the Statute; it is founded on the provisions of the Statute itself (Bradbury v. English Sewing Cotton Company Ltd., 8 T.C. 481, per Lord Phillimore at p.519). 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 his dividend. (Canadian Eagle Oil Company, Ltd. v. The King, (1946) A.C. 119, per Lord Simonds at p. 158). In Reid's Case, Lord MacDermott deals with this aspect of the matter, at pp.448 and 449, thus :-

10

"The main argument for the Respondents depended on a comparison with the position which arises when a British company distributes capital profits as dividend. In that case there is no liability on the shareholders to pay Income Tax, either at the standard rate or in the form of Sur-tax, on such a dividend. But the reason for that is not that what the shareholder receives is capital. It is that a shareholder is never directly assessable in respect of any dividend paid by a British company and that the Sur-tax provisions in the Income Tax Acts do not impose any liability to pay Sur-tax in respect of dividends paid by a British company out of profits which were not of a kind which is taxable in the hands of the company."

20

30

Under section 5 (c) of our Ordinance, however, dividends as such are directly assessable to tax, and it seems to me that on a proper construction of the Ordinance as a whole an individual is obliged to include in his income tax return any income received by him in respect of dividends from a company (local or foreign), irrespective of whether tax is payable by the company on the profits out of which the dividend is paid. If the company is registered in the Colony and tax is payable by it, then the provisions for set-off in sections 24 and 25 of the Ordinance come into play; but there is nothing in these or

40

any other sections that can reasonably be construed as negating or modifying the express provisions of section 5 (c) in so far as liability to assessment is concerned.

In the Supreme  
Court of British  
Guiana

---

No.2

Judgment of  
Mr. Justice  
Date.  
27th February  
1958  
continued

10 The English Acts contain no provision corresponding, in substance, to the provisions of section 5 (c) of our Ordinance. This fundamental difference in the charging sections of the respective Statutes is, in my view, fatal to the argument from analogy on which the appellants' case is based.

20 It was also submitted on behalf of the appellants that the sum received by them from the Rupununi Company was not a "dividend" within the meaning of section 5 (c) of the Ordinance. In my opinion there is no merit in this contention. Stroud's Judicial Dictionary (Third Edition), Vol. 1 p.859, points out that the word "dividend" carries no spell with it and is not intelligible without knowing the matter to which it is meant as referring, but that its ordinary meaning is "share of profits". I can think of no reason for not giving the term its ordinary meaning in the context in which it appears in section 5 (c).

30 I regret having to differ from the conclusion reached by Savary J. in Bollers' Case. I regret it not only because of the great respect I have for the judgments of that learned Judge, but also because his ruling in that case, against which no proceedings by way of appeal were instituted, has stood for almost twenty-three years, during which period people have ordered their affairs by it. It will also be seen from the Statement of Material Facts in the present appeal that in 1949, before the resolution for the distribution from capital profits was passed, the Rupununi Company were informed by the then Commissioner of Income Tax that tax would not be payable on such distribution. This point was not taken before me; I therefore express no opinion on it except to say that I consider it a factor to be taken into account, together with all the other relevant circumstances, in dealing with the question of costs.

40

I hold that the sum of \$1,200 received by



In the Supreme  
Court of British  
Guiana

the appellants as cash distribution on their  
shares in the Rupununi Company is exigible to  
income tax.

No.2

This appeal is accordingly dismissed and the  
assessment of the Commissioners confirmed. Each  
party must, however, bear their own costs.

Judgment of  
Mr. Justice  
Date.  
27th February  
1958  
continued

W.A. Date

Puisne Judge.

Dated this 27th day of February, 1958.

Solicitors:

10

H.C.B. Humphrys for Appellants.

P.M. Burch-Smith, Crown Solicitor, for Respondents.

In the Full  
Court of the  
Supreme Court  
of British  
Guiana

No.3

CASE STATED BY DATE J.

1958 No. 1007A DEMERARA

IN THE FULL COURT OF THE SUPREME COURT OF  
BRITISH GUIANA

No.3

Case stated  
by Date J.  
9th July 1958

BETWEEN

S.DAVSON AND COMPANY, LIMITED,

Appellants

20

- and -

THE COMMISSIONERS OF INCOME TAX

Respondents.

Case stated under the Income Tax Ordinance,  
Cap. 299.

1954 No. 385 DEMERARA

1. On the 31st October, 1951, the Respondents  
assessed the Appellants to tax for the Year of

Assessment 1950 on a chargeable income of \$357,920.34.

In the Full  
Court of the  
Supreme Court  
of British  
Guiana

2. In computing the Appellants' said chargeable income the Respondents included as investment income \$1,200.00 received by the appellants as a cash distribution from the Rupununi Development Company Limited (hereinafter called the Rupununi Company).

\_\_\_\_\_  
No.3  
Case stated  
by Date J.  
9th July 1958  
continued

10 3. On the 3rd November, 1951, the Appellants, by their accountants, Messrs. Fitzpatrick, Graham and Company, Chartered Accountants, served on the Respondents notice of objection in writing to the said assessment.

4. On the 23rd February, 1954, the Respondents confirmed the said assessment in so far as it included the said cash distribution as part of the chargeable income of the Appellants.

20 5. The appellants appealed to a Judge in Chambers, and the appeal was heard on the 22nd July, 1957, and the 10th and 11th January, 1958. (No. 385 of 1954).

6. At the hearing of the said appeal the following facts were proved or admitted :-

(1) The Appellants are a company incorporated in the United Kingdom and were at all material times carrying on business at lot 17, Water Street, Georgetown, and elsewhere in the Colony.

30 (2) The Appellants were at all material times a shareholder in the Rupununi Company (a company incorporated in this Colony) and held 600 shares therein.

(3) In the year 1949 the Rupununi Company made a capital profit of \$123,889.25 from the sale of its immovable property at No.27 in the County of Berbice.

40 (4) At an extraordinary general meeting of the Rupununi Company held on the 4th November, 1949, the following resolution was passed, viz:

In the Full  
Court of the  
Supreme Court  
of British  
Guiana.

\_\_\_\_\_  
No.3

Case stated  
by Date J.  
9th July 1958  
continued

"That subject to the approval of the Company's Auditors - Messrs. Fitzpatrick Graham and Company - a cash distribution of \$2.00 per share be made from the capital profits derived from the sale of No.27, the balance of such profits remaining thereafter to be placed on reserve and used at the discretion of the directors for the purchase of bulls, etc.".

10

(5) Messrs. Fitzpatrick Graham and Company having by letter dated the 8th November, 1949, stated that they could raise no objection to the proposed distribution, the directors of the Rupununi Company at a meeting held on the 10th November, 1949, passed the following resolutions, namely:

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

20

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 \$2.00 per share to be made to the shareholders, to be paid out of capital reserve."

(6) On or about the 12th November, 1949, the Appellants received in British Guiana from the Rupununi Company the sum of \$1,200.00 in payment of the cash distribution resolved upon by the directors on 10th November, 1949.

30

7. On the 27th February, 1958, the Judge dismissed the said appeal and confirmed the assessment in the terms set out in his decision hereto annexed.

8. The Appellants being dissatisfied with the decision applied to the Judge to state a case on questions of law for the consideration of the Full Court pursuant to section 57 of the Income Tax Ordinance, which case the Judge states accordingly.

40

9. The questions of law for the consideration of the Full Court are as follows :-

In the Full Court of the Supreme Court of British Guiana

No.3

Case stated by Date J. 9th July 1958 continued

- (a) Whether or not the said sum of \$1,200.00 was a "dividend" within the meaning of section 5 of the said Ordinance.
- (b) Whether or not the said sum of \$1,200.00 was "income" of the Appellants within the meaning of the said section 5.
- (c) Whether or not, even if the said sum of \$1,200.00 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 \$1,200.00 was paid out of capital profits.

10

20

W.A. Date  
Puisne Judge.

Dated this 9th day of July, 1958.

No.4

No.4

J U D G M E N T

Judgment  
13th December  
1958.

BEFORE Holder, C.J., Stoby J., Phillips J.

1958: September 25, 26, 29.

J.H.S. Elliott for the Appellants

G.M. Farnum, Solicitor General, for the Respondents.

30

JUDGMENT

The case stated under the Income Tax

In the Full  
Court of the  
Supreme Court  
of British  
Guiana

\_\_\_\_\_  
No.4

Judgment  
13th December  
1958.  
continued

Ordinance, Cap. 299 (1954 No.385 Demerara) is as follows :-

1. On the 31st October, 1951, the Respondents assessed the appellants to tax for the Year of Assessment 1950 on a chargeable income of \$357,920.34.

2. In computing the Appellants' said chargeable income the respondents included as investment income \$1,200.00 received by the Appellants as a cash distribution from the Rupununi Development Company Limited (hereinafter called the Rupununi Company). 10

3. On the 3rd November, 1951, the Appellants, by their accountants, Messrs. Fitzpatrick, Graham and Company, Chartered Accountants, served on the Respondents notice of objection in writing to the said assessment.

4. On the 23rd February, 1954, the Respondents confirmed the said assessment in so far as it included the said cash distribution as part of the chargeable income of the Appellants. 20

5. The Appellants appealed to a Judge in Chambers, and the appeal was heard on the 22nd July, 1957, and the 10th and 11th January, 1958. (No. 385 of 1954).

6. At the hearing of the said appeal the following facts were proved or admitted :-

(1) The Appellants are a company incorporated in the United Kingdom and were at all material times carrying on business at lot 17, Water Street, Georgetown, and elsewhere in the Colony. 30

(2) The Appellants were at all material times a shareholder in the Rupununi Company (a company incorporated in this Colony) and held 600 shares therein.

(3) In the year 1949 the Rupununi Company made a capital profit of \$123,889.25 from the sale of its immovable property at No.27 in the County of Berbice. 40

(4) At an extraordinary general meeting of the Rupununi Company held on the 4th November, 1949, the following resolution was passed,

viz. :

"That subject to the approval of the Company's Auditors - Messrs. Fitzpatrick Graham and Company - a cash distribution of \$2.00 per share be made from the capital profits derived from the sale of No.27, the balance of such profits remaining thereafter to be placed on reserve and used at the discretion of the directors for the purchase of bulls, etc."

In the Full  
Court of the  
Supreme Court  
of British  
Guiana

\_\_\_\_\_  
No.4

Judgment  
13th December  
1958  
continued

10

- (5) Messrs. Fitzpatrick Graham and Company having by letter dated the 8th November, 1949, stated that they could raise no objection to the proposed distribution, the directors of the Rupununi Company at a meeting held on the 10th November, 1949, passed the following resolutions, namely :

20

"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 \$2.00 per share to be made to the shareholders, to be paid out of capital reserve."

30

- (6) On or about the 12th November, 1949, the Appellants received in British Guiana from the Rupununi Company the sum of \$1,200.00 in payment of the cash distribution resolved upon by the directors on 10th November, 1949.

7. On the 27th February, 1958, the Judge dismissed the said appeal and confirmed the assessment in the terms set out in his decision hereto annexed.

40

8. The Appellants being dissatisfied with the decision applied to the Judge to state a case on questions of law for the consideration of the Full Court pursuant to section 57 of the Income Tax Ordinance, which case the Judge states accordingly.

9. The questions of law for the consideration of the Full Court are as follows :-

In the Full  
Court of the  
Supreme Court  
of British  
Guiana

\_\_\_\_\_  
No.4

Judgment  
13th December  
1958  
continued

- (a) Whether or not the said sum of \$1,200.00 was a "dividend" within the meaning of section 5 of the said Ordinance.
- (b) Whether or not the said sum of \$1,200.00 was "income" of the appellants within the meaning of the said section 5.
- (c) Whether or not, even if the said sum of \$1,200.00 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 \$1,200.00 was paid out of capital profits.

10

The facts giving rise to the appeal are not in dispute, and may be summarised as follows :-

The Appellants are a company incorporated in the United Kingdom and were in the year 1949 carrying on business in this Colony. They held 600 shares in the Rupununi Development Company Ltd. (hereinafter referred to as the Rupununi Company), a cattle-ranching company incorporated in the Colony under the Companies (Consolidation) Ordinance.

20

In 1949 the Rupununi Company sold certain immovable property which they owned in Berbice and realised a profit of \$123,889.25. They were not dealing in properties, and it is accepted that the profit on this sale, in so far as the Rupununi Company is concerned, was a capital profit and, as such, not liable to assessment to income tax in their hands.

30

At an extraordinary general meeting of the Rupununi Company it was resolved to make a cash distribution of \$2.00 per share to be paid out of the profit of \$123,889.25, subject to the approval of the auditors. The auditors approved the distribution and the appellants were paid \$1,200 in respect of the 600 shares held by them.

The sole question for determination is whether this sum of \$1,200 received by the Appellants in 1949 as cash distribution on the shares held by them in the Rupununi Company should be included in computing the Appellants' chargeable income

40

for the year of assessment 1950. The Commissioners submit that it should be so included, on the grounds that

In the Full  
Court of the  
Supreme Court  
of British  
Guiana

\_\_\_\_\_  
No.4

Judgment  
13th December  
1958  
continued

- 10 (a) the distribution by the Rupununi Company was made in cash and not in the course of liquidation or in the course of an authorised reduction of capital ;
- (b) the shares of the recipient shareholders are still intact;
- (c) the sum distributed by the Rupununi Company out of their capital profits to the Appellants was income in the hands of the recipients ;
- 20 (d) such income is exigible to income tax under section 5 (c) of the Income Tax Ordinance which provides, inter alia, that income tax shall be payable on the income of any person accruing in or derived from the colony in respect of "dividends".

30 It was agreed that an exactly similar question came before Savary J. in 1935 in Bollers v. Commissioners of Income Tax, L.R.B.G. (1931-1937) 271. In that case it was conceded, as it has been in the instant case, that under the English Acts a shareholder of a company resident in the United Kingdom is not assessable to income tax or surtax in respect of capital profits distributed by such company, but it was urged on behalf of the Crown that the scheme of the local enactment differs from that of the English Acts; it was then contended that, though not reached by the English Acts, a distribution of capital profits, where not made in the course of liquidation of a company or in the course of an authorised reduction of capital, is, in the light of In re Bates, (1928) Ch. 682, and Hill v. Permanent Trustee Co. of New South Wales Ltd., (1930) A.C. 720, in the nature of income in the hands of the recipient shareholders, and within the meaning of the expression "dividends" in section 5 (c) of our Ordinance.

40

After a review of the relevant authorities



In the Full  
Court of the  
Supreme Court  
of British  
Guiana

-----  
No.4

Judgment  
13th December  
1958  
continued

Savary J. in Bollers' case concluded as follows:-

"In the result, my view is that the income Tax Ordinance is similar in scheme to the English Acts so far as companies are concerned, and that I should apply what appear to me to be the principles laid down in the English Courts on this point, that is, where income tax is not deductible from a dividend by the company distributing it, it is not assessable to income tax in the hands of the shareholders or recipient. That being my view, it is unnecessary to refer to any other authorities cited to me nor do I feel called upon to define the ambit of the word 'dividend' in section 5 (c) of the Ordinance."

10

With this conclusion the Judge disagreed and relied mainly for his decision on the English case (not before Savary J.) of

Commissioners of Inland Revenue v. Trustees of Joseph Reid (deceased) 30 T.C. 431.

20

In that case -

"The Respondent Trustees held shares in a South African trading company. The Company sold certain warehouses and office premises, which it occupied for the purposes of its trade, at a profit out of which it declared and paid a dividend of 20 per cent. 'payable from capital profits'. The dividend was received by the Trustees without deduction of Income Tax, and the dividend on shares held for liferenters of the trust was credited by the Trustees to the revenue accounts of the liferenters.

30

"On an appeal to the Special Commissioners against an assessment to Income Tax under Case V of Schedule D in respect of the dividend; the Trustees contended that the dividend, having been paid out of profits of a capital nature, was not assessable to Income Tax. The Special Commissioners upheld the Trustees' contention, and discharged the assessment.

40

"HELD, that the dividend received by the

Trustees was income arising from foreign possessions assessable to tax under Case V of Schedule D."

In the Full  
Court of the  
Supreme Court  
of British  
Guiana

The claim of the Appellants in that case was founded on Case V of Schedule D, and the interpretation of the words "Income arising from possessions out of the United Kingdom."

\_\_\_\_\_  
No.4

Judgment  
13th December  
1958  
continued

10 It did not deal with dividends declared by an English Company. The present case deals with a company incorporated in British Guiana and dividends declared here.

After citing certain passages of the judgment the Judge said :-

"It is clear, I think, that Reid's case obliges me to hold that the sum received by the Appellants as cash distribution on their shares in the Rupununi Company was Income in their hands."

20 Mr. Elliott for the Appellants contended that the decision of Savary J. was correct and ought not to be disturbed after 23 years.

He further submitted that:

(A) Reid's case was inapplicable for the reason that :

(1) It dealt with trust administration.

(2) It was concerned primarily with income arising from possessions out of the United Kingdom.

30 (3) That it was a decision of the House of Lords not binding on this Court.

(B) That the Trial Judge ought not to have rejected the Appellants' contention that the sum received from the Rupununi Company was not a "dividend" within the meaning of section 5 (c) of the Ordinance, and that the same was meant to refer to dividends received from Revenue Profits.

(C) That the Judge was wrong in concluding

In the Full  
Court of the  
Supreme Court  
of British  
Guiana

No.4

Judgment  
13th December  
1958  
continued

that the Local Income Tax Ordinance is not similar in scheme to the English Acts as far as companies are concerned. (See sections 29 and 30 of the Ordinance).

(D) That the decision of Savary J. in Bollers' Case which has not been overruled for twenty-three years should not now be disturbed unless upon very special considerations or by statutory enactment. He urged that people had regulated their affairs and course of action as a consequence of that decision and were it now to be overruled it would have the effect of retrospective legislation.

10

Pugh v. Golden Valley Railway Company (1880)  
15 Ch. D. pp.330, 334 and 336.

The Solicitor General's argument for the Respondents was the same as that contended for by the Crown in Bollers' case, but he further submitted that the question whether the distribution of profits by the Company is income cannot now be open to doubt in view of the facts and judgment in Reid's case. He urged that in Reid's Case there was a distribution of a dividend on revenue profits as well as a dividend of 20% on capital profits resulting from a sale of four properties; that no question was there raised as to whether this cash distribution of the capital profits was not a "dividend", and the Lords treated the cash distribution as a "dividend" and income liable to tax in the hands of the taxpayers; and finally that section 10 of the Local Ordinance provides no exemption or modification of dividends on which income tax is imposed by section 5 (c); that the enactments of section 29 and section 30 would not justify the Court in importing words to qualify the unequivocal language of section 5.

20

30

40

Rule 20 of the General Rules is as follows:

" 20. The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any

share, right or title thereto, and the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto."

In the Full  
Court of the  
Supreme Court  
of British  
Guiana

Rule 20 does not apply to foreign Companies.

Canadian Eagle Oil Co. Ltd. v. The King.

No.4

Sections 29 and 30 of the Local Income Tax Ordinance, Chapter 299, enact as follows:-

Judgment  
13th December  
1958  
continued

10 "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:

20 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.

30 "(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.

..

..

..

40 "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."

In the Full  
Court of the  
Supreme Court  
of British  
Guiana

No.4

Judgment  
13th December  
1958  
continued

These sections of course refer to companies registered in the Colony.

It will be necessary therefore to review the decision in Reid's case.

Lord Simonds in his judgment says at page 440 :-

"While under Rule 20 of the General Rules an English Company may, if it thinks fit, deduct tax from the dividend that it pays, that Rule has no application to the case of foreign company whether or not it has in fact paid tax on some part of the profits out of which the dividend is paid. It is not, I think, going too far to say that for the determination of the question, whether under Case V the dividend payable upon the shares of a foreign company is taxable income, it is irrelevant and, more than that, misleading to look to the analogy of an English company. And here, too, I would remind your Lordships of the observation of Lord Phillimore in Bradbury v. English Sewing Cotton Co., Ltd., (1923) A.C. 744, at page 770, that, in regard to the income arising from foreign possessions, 'The officers of the Crown do not know and do not care what is the character of the sources from which the money comes.'"

10

20

It must not be lost sight of that what Reid's case was dealing with was income arising from possessions out of the United Kingdom, and Lord Normand makes that perfectly clear in his judgment at page 443 where he says :-

30

"But then the Respondents say that, though the dividend may be of the nature of income, it is not taxable income. They say justly that a profit derived from the sale of a capital asset would neither have been taxed in the hands of the company if it had been registered in the United Kingdom, nor have been taxed by deduction when the dividend was paid. The company would not have been taxed on this profit, for it would not have been reckoned part of the profits and gains of the company's business

40

under the rules by which the profits and gains of the company would have been computed if it had been a British Company. The shareholder would not have suffered any deduction because the dividend was not paid out of profits and gains brought into charge. The argument for the Respondents then attempted an elaborate analogy between the taxation of the British company and its shareholders and the taxation of a foreign company and its shareholders. It assumed an overriding principle of taxation consistently applied both to British and to foreign companies and their respective members.

In the Full  
Court of the  
Supreme Court  
of British  
Guiana

\_\_\_\_\_  
No.4

Judgment  
13th December  
1958  
continued

"The Income Tax Act is an unpromising field for the argument from analogy, and it has been said in authoritative expositions of the law in this House that there is no analogy between the provisions for taxing the profits of British companies and the provisions for taxing the profits of foreign companies, and no overriding principle common to both."

And again at page 444 he says :-

"The position of foreign companies and their shareholders resident in the United Kingdom is entirely different. The foreign company is beyond the jurisdiction and is not assessable and cannot be taxed; the British shareholder is directly assessable and is taxed on the full amount of the dividend received by him (Rule 1 of the Rules applicable to Case V). In Canadian Eagle Oil Co., v. The King, (1946) A.C. 119, Viscount Simon said, at page 133: 'The provision of the Income Tax Act, 1918, by which deduction at the source is authorised in the case of dividends in respect of shares in companies resident in the United Kingdom, stands in sharp contrast to the rules which relate to dividends of foreign companies.'"

It was conceded in the present case that the dividend was paid out of capital profits.

In the Full  
Court of the  
Supreme Court  
of British  
Guiana

\_\_\_\_\_  
No.4

Judgment  
13th December  
1958  
continued

In Gimson's case (Gimson v. Commissioners of Inland Revenue 15 T.C. 595) it was also conceded that so much of the dividend as was paid out of profits on realisation of investments should be treated as of a capital nature and not assessable to income tax. In Neuman's case (Neuman v. Commissioners of Inland Revenue, (1934) A.C. 215) Lord Tomlin says at page 222:-

"The relative positions of a company and the shareholders of the company in relation to income tax, under the Income Tax Acts have always been recognised as special in character. It was never, I think, doubted that under the Act of 1842 the profits of a business carried on by a company were taxable against the company under Sch. D, and were not taxable again after distribution in the hands of the shareholders under Sch. D or any other schedule. At the same time it was permissible to the company under s.54 of the Act of 1842 to deduct from the dividend the proportionate part of the tax paid to the tax collector, and the shareholders entitled to exemption from or abatement of income tax could upon the footing of the deduction obtain the necessary return of tax."

10

20

At page 228 he says :-

"It is not disputed that if a dividend is paid out of the profits produced by a sale of a capital asset it is not made out of profits or gains charged on the Company, and therefore no deduction from the dividend is authorised and the dividend itself is not liable to be taken into account in fixing the liability to surtax of a shareholder."

30

And finally, to quote the words of Lord Reid at p. 450:

"It is true that, owing to the special provisions of the Income Tax Acts which distribute liability for Income Tax (including Sur-tax) between a British Company and its shareholders, a dividend paid by a British company out of its capital profits is not taxable. But there are no provisions

40

applicable to a foreign company which bring about this result.

"I can find no satisfactory alternative to the view that, if a foreign company chooses to distribute its surplus profits as dividend, the nature and origin of those profits do not and cannot be made to affect the quality of the receipt by the shareholder for the purpose of Income Tax."

In the Full  
Court of the  
Supreme Court  
of British  
Guiana

\_\_\_\_\_  
No.4

Judgment  
13th December  
1958  
continued

It would seem clear that in that case the distinction was being drawn between English and foreign companies. The relevant words in the charging section being "Income arising from possessions out of the United Kingdom."

The distinction between capital profits and trading profits for this purpose was clearly drawn by Lord Simonds at page 438 when he said :-

" On the same 23rd October, 1943, the board of directors also resolved that a dividend of 20 per cent. be declared from capital profits realised on the sale of properties during the past financial year. This dividend also was duly declared and paid. No deduction of Income Tax was made in the hands of the paying agent or otherwise. The sum of £6,866 now in question represents this dividend of 20 per cent. upon the 3,433 shares held by the Respondents. I am content to state thus shortly the facts which are set out in great detail in the Case because I do not understand it to be denied by the Crown that the dividend of 20 per cent. was in fact paid out of what are conveniently called "capital profits", that is to say, profits which were derived from a sale of capital assets at an enhanced value, and would not, if the company were being assessed to tax under Case I of Schedule D, be included in the computation of its trading profits."

Where, in England, by virtue of the General Rules no tax is exigible as on a



In the Full  
Court of the  
Supreme Court  
of British  
Guiana

-----  
No.4

Judgment  
13th December  
1958  
continued

sale of capital assets because the profits are not taxable income and for the reason that they are not derived from annual profits or gains or trading profits; the same position would obtain here as by reason of sections 29 and 30, in our view, the "dividends" in so far as companies are concerned were not intended to mean dividends derived from the sale of capital assets or from capital profits but from trading profits and such as would be reflected in the ordinary Profit and Loss Account of a company.

10

In other words, in our opinion, the scheme, in this regard, of both enactments (in England and in British Guiana) are the same.

In our judgment the view taken by Savary J. in Bollers' case was not erroneous. We therefore, do not find ourselves in agreement with the conclusions arrived at by the Judge herein and the appeal is allowed with costs.

The questions asked are therefore answered as follows :-

20

As to question (a)

The answer is in the negative.

As to question (b)

The sum of \$1,200 was not taxable income.

As to question (c)

The answer is in the negative.

F.W. Holder  
Chief Justice.

Kenneth S. Stoby  
Puisne Judge.

R.R. Phillips  
Puisne Judge.

30

Dated the 13th day of  
December, 1958.

---

No.5

FORMAL ORDER ALLOWING APPEALBEFORE THE HONOURABLETHE CHIEF JUSTICEMR. JUSTICE STOBY, PUISNE JUDGE andMR. JUSTICE PHILLIPS, PUISNE JUDGE.THURSDAY THE 20TH DAY OF AUGUST, 1959ENTERED THE 1ST DAY OF DECEMBER, 1959.In the Full  
Court of the  
Supreme Court  
of British  
Guiana

No.5

Formal Order  
allowing  
Appeal  
20th August  
1959

10 UPON READING the case stated in the above  
matter by the Honourable Mr. Justice Date under  
the Income Tax Ordinance, Chapter 299 in which  
he stated for the consideration of the Full  
Court the following questions :

- (a) Whether or not the said sum of  
\$1,200.00 was a "dividend" within the  
meaning of section 5 of the said Ordinance.
- 20 (b) Whether or not the said sum of  
\$1,200.00 was "income" of the Appellants  
within the meaning of the said  
section 5.
- (c) Whether or not, even if the said sum  
of \$1,200.00 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 \$1,200.00  
was paid out of capital profits.
- 30

AND UPON HEARING Mr. J.H.S. Elliott of  
Counsel for the Appellants and Mr. G.M. Farnum,  
Solicitor General of Counsel for the Respondents  
THIS COURT answers the questions stated  
in the following manner :-

As to Question (a):

The answer is in the negative.

In the Full Court of the Supreme Court of British Guiana

As to Question (b):

The sum of \$1,200.00 was not taxable income.

As to Question (c):

The answer is in the negative.

No.5

AND IT IS ORDERED that the appeal be allowed with costs to the Appellants.

BY THE COURT

Aditya T. Singh

DEPUTY REGISTRAR

Formal Order allowing Appeal 20th August 1959 continued

No.6

No.6

10

Order granting leave to appeal to Federal Supreme Court 15th October, 1959

ORDER GRANTING LEAVE TO APPEAL TO FEDERAL SUPREME COURT

BEFORE THE HONOURABLE

MR. JUSTICE PHILLIPS, Puisne Judge and

MR. JUSTICE DATE, Puisne Judge.

THURSDAY THE 15TH DAY OF OCTOBER, 1959.

ENTERED THE 27TH DAY OF OCTOBER, 1959.

UPON the application by way of motion for special leave to appeal against the decision of the Full Court of the Supreme Court of British Guiana given on the 20th day of August, 1959, AND UPON READING THE said application AND UPON HEARING Mr. K.M. George, of Counsel for the (Respondents) Appellants and Mr. J.H.S.Elliott, of Counsel for the (Appellants) Respondents, IT IS ORDERED that this application be and is hereby granted AND THAT the costs incurred herein abide the event.

20

BY THE COURT

(sgd.) H.Bacchus

DEPUTY REGISTRAR (Ag.)

30

No.7

NOTICE OF APPEAL BY COMMISSIONERS  
OF INCOME TAX

In the  
Federal Supreme  
Court

IN THE FEDERAL SUPREME COURT

No.7

(APPELLATE JURISDICTION)

Notice of  
Appeal by  
Commissioners  
of Income Tax  
26th October  
1959.

CIVIL APPEAL No.27 of 1959 - BRITISH GUIANA

NOTICE OF APPEAL

BETWEEN

THE COMMISSIONERS OF INCOME TAX  
(Respondent) APPELLANT

10

- and -

S. DAVSON AND COMPANY, LIMITED  
(Appellants) RESPONDENTS

TAKE NOTICE that the (Respondent) Appell-  
ant being dissatisfied with the decision more  
particularly stated in paragraph 2 hereof of  
the Full Court of the Supreme Court of British  
Guiana contained in the judgment of the said  
Court dated the 20th day of August, 1959, doth  
hereby appeal to the Federal Supreme Court upon  
grounds set out in paragraph 3 hereof and will  
at the hearing of the appeal seek the relief  
set out in paragraph 4.

20

And the Appellant further states that the  
names and addresses including his own of the  
persons directly affected by the appeal are  
those set out in paragraph 5.

2. (a) That the sum of \$1,200.00 received by  
the Respondents from the Rupūnuni De-  
velopment Company, Limited, is not a  
dividend within the meaning of sec-  
tion 5 of the Income Tax Ordinance,  
(Cap. 299).

30

(b) That the said sum of \$1,200.00 is not

In the  
Federal Supreme  
Court

---

No.7

Notice of  
Appeal by  
Commissioners  
of Income Tax  
26th October  
1959  
continued

taxable income of the Respondents  
within the meaning of the said section  
5.

(c) That even if the said sum of \$1,200.00  
is a dividend and income within the  
meaning of the said section 5, it is  
not 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  
\$1,200.00 was paid out to capital  
profits.

10.

3. Grounds of Appeal :

(i) That the Court erred in holding that  
the sum of \$1,200.00 received by the  
Respondents from the Rupununi Develop-  
ment Company, Limited, is not a divi-  
dend within the meaning of section 5  
of the Income Tax Ordinance.

(ii) That the Court erred in holding that  
sections 29 and 30 of the Income Tax  
Ordinance have the effect of excluding  
from the meaning of dividends in sec-  
tion 5 of the said Ordinance dividends  
derived from the sale of capital as-  
sets or from capital profits.

20

(iii) That the Court erred in holding that  
the scheme of the income tax laws of  
the United Kingdom and the Income Tax  
Ordinance of British Guiana is the  
same with regard to taxation of divi-  
dends.

30

(iv) That the decision of Savary J. in  
Bollers v. The Commissioners of Income  
Tax, L.R.B.G. (1931-1937), 271, was  
wrong in law in so far as it held that  
where income tax is not deductible  
from a dividend by the company distri-  
buting it such dividend is not assess-  
able to tax in the hands of the share-  
holder or recipient, and the Court was  
wrong in holding that the said deci-  
sion of Savary J. was not erroneous.

40

(v) That the Court erred in holding that

the said sum of \$1,200.00 is not taxable income of the Respondents within the meaning of section 5 of the Income Tax Ordinance.

In the  
Federal Supreme  
Court

(vi) That the Court erred in holding that even if the said sum of \$1,200.00 is a dividend and income within the meaning of section 5 of the Income Tax Ordinance, it is nevertheless not chargeable with income tax. If the said sum is a dividend and income within the meaning of section 5 aforesaid, neither the provisions of the said Ordinance relating to dividends, nor any other provisions thereof nor the fact that the said sum was paid out of capital profits limit the liability of the Respondents to pay income tax in respect of such sum.

No.7

Notice of  
Appeal by  
Commissioners  
of Income Tax  
26th October  
1959  
continued

10

20

(vii) That the said sum of \$1,200.00, being income of the Respondents accruing in British Guiana in respect of dividends on shares in the Rupununi Development Company, Limited, is exigible to tax under the Income Tax Ordinance and such tax, not being subject to a set-off under section 30 of the said Ordinance, is payable by the Respondents on the assessment of the Appellant.

30

4. That the decision of the Full Court of the Supreme Court be set aside and the judgment of Mr. Justice Date be confirmed.

5. Persons directly affected by the appeal:

(i) The Commissioners of Inland Revenue of the General Post Office Building, Georgetown, British Guiana.

(ii) S. Dawson and Company, Limited,  
45/53 Water Street, Georgetown,  
British Guiana.

40

Dated this 26th day of October, 1959.

P.M. Burch-Smith  
Solicitor for Appellant.

In the  
Federal Supreme  
Court

No. 8

J U D G M E N T

No.8

BEFORE:

Judgment  
(a) Wylie J.  
(concurring  
in by  
Rennie J.)  
14th June 1960

The Honourable Mr. Justice Rennie  
" " Mr. Justice Archer  
" " Mr. Justice Wylie

11th, 14th, 15th March, 1960.

Mr. S.S. Ramphal, Acting Attorney General,  
instructed by Crown Solicitor  
for Appellants.

10

Mr. J.H.S. Elliott, instructed by Mr. E. de-  
Freitas, for Respondents.

J U D G M E N T

(a) Mr. Justice Wylie: (concurring in by Mr.  
Justice Rennie)

This is an appeal from the decision of the Full Court of the Supreme Court of British Guiana given on an appeal from the decision of Date J. in the Supreme Court. The original proceedings were an appeal by the Respondent Company to the Supreme Court of British Guiana under the Income Tax Ordinance (now Chap. 299 of the Laws of British Guiana 1953) against the decision of the Commissioner of Income Tax on an objection to an assessment to tax. The Respondent company, a company incorporated in the United Kingdom and registered in British Guiana (in this judgment referred to as "the shareholder") was assessed to tax in respect of a sum of twelve hundred dollars received by way of a cash distribution at the rate of two dollars a share on six hundred shares held by the shareholder in the Rupununi Development Company Ltd., a company incorporated and registered in British Guiana (referred to in this judgment as

20

30

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

In the  
Federal Supreme  
Court

No.8

The appeal from the decision of Date J. is by way of a case stated in which the following three questions of law were submitted for the consideration of the Full Court.

Judgment  
(a) Wylie J.  
(concurring  
in by  
Rennie J.)  
14th June 1960  
continued

- 10           "(a) Whether or not the said sum of  
              \$1,200.00 was a 'dividend' within  
              the meaning of section 5 of the  
              said Ordinance.
- (b) Whether or not the said sum of  
              \$1,200.00 was 'income' of the ap-  
              pellants now the respondent com-  
              pany within the meaning of the  
              said section 5.
- 20           (c) Whether or not, even if the said  
              sum of \$1,200.00 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 divid-  
              ends and to the fact that the said  
              sum of \$1,200.00 was paid out of  
              capital profits."

30           The answers to these questions given by the  
              Full Court and from which the appellant has  
              appealed, were as follows :-

"As to question (a)

The answer is in the negative.

As to question (b)

The sum of \$1,200.00 was not taxable  
income.

As to question (c)

The answer is in the negative."

Most of the argument on the hearing of



In the  
Federal Supreme  
Court

No.8

Judgment  
(a) Wylie J.  
(concurring  
in by  
Rennie J.)  
14th June 1960  
continued

the appeal in this court was addressed to the question whether the United Kingdom income tax legislation and the British Guiana Income Tax Ordinance both provide for the same scheme for the taxation of the income of, and dividends paid by, companies. The proper answer to this question has a bearing on all three of the questions in the case stated and I propose therefore to consider first the British Guiana legislation, as did the Full Court, in order to determine whether it does provide for the same scheme as the United Kingdom legislation.

10

The relevant portions of the provisions of the Income Tax Ordinance which require consideration are as follows :-

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 -

20

... ..

(c) dividends, interest or discounts;"

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

The rates are then set out and are on a sliding scale commencing at six cents in the dollar on the first twelve hundred dollars of chargeable income and rising to sixty cents on the chargeable income in excess of \$10,800.

30

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

40

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.

(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".

20 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  
30 the purposes of collection against the tax charged on that chargeable income."

40 The present case concerns two limited liability companies. It is clear from the definitions of "person" and "body of persons" in section 3 that the word "person", when used in the Ordinance, includes a company. At first sight, therefore, section 5 (c) and section 27 (1) combined impose income tax upon any dividends received by a company which form part of its chargeable income. Chargeable income is defined in section 2 as meaning the aggregate amount of income from the various sources specified in section 5 (which include dividends) remaining after allowing the appropriate deductions and exemptions under the Ordinance. These provisions taken on

In the  
Federal Supreme  
Court

                      
No.8

Judgment  
(a) Wylie J.  
    (concurred  
    in by  
    Rennie J.)  
14th June 1960  
continued

In the  
Federal Supreme  
Court

No.8

Judgment

(a) Wylie J.  
(concurring  
in by  
Rennie J.)

14th June 1960  
continued

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, and is liable to tax as part of that chargeable income at the rate set out in section 27 (1), even if the fund from which the dividend has been paid has already been subjected to tax under section 27 (1) as part of the chargeable income of the company which declared the dividend. 10

Moreover, section 30 strongly reinforces this conclusion. For, after referring to the inclusion of the dividend in the chargeable income of the shareholder, it provides specifically for a set off against the tax charged on that chargeable income of the tax which a company paying a dividend has deducted, or is entitled to deduct, from that dividend pursuant to section 29. The Ordinance has expressly provided for tax on the whole of the chargeable income of a company and for a dividend to be included in, and taxed as part of, the chargeable income of a shareholder. The object of section 30 is clearly to preserve the principle found also in the income tax legislation of the United Kingdom, that tax is not to be paid twice on income out of which a dividend is paid, once as part of the chargeable income of the company and once as part of the chargeable income of the shareholder. The view that the object and effect of section 30 is to prevent tax from being paid twice on the same income in consequence of other provisions in the Ordinance, is fortified by the inclusion in its scope of tax on income of other bodies of persons who are assessed under the Ordinance, that is to say, assessed as such before their income is distributed to their members. 20 30

Although this principle of avoiding double taxation on such income may be common to the legislation of both the United Kingdom and British Guiana, it does not necessarily follow that both sets of legislation apply the same scheme in order to give effect to this principle. It was submitted by Mr. Elliott on behalf of the Respondent that the legislation of both the United Kingdom and British Guiana incorporated the same scheme in regard to taxation of dividends, notwithstanding the variation in language in the 40

relevant provisions. He submitted further that dividends were annual profits or gains falling within Case VI of Schedule D and that it was only as a matter of inference from the other provisions of United Kingdom income tax legislation relating to tax on dividends (and more especially section 184 of the Income Tax Act 1952) that the courts had held that a dividend paid by other than foreign companies was not subject to tax at the standard rate in the hands of the shareholder. He submitted that Case VI of Schedule D amounted to an express taxing provision corresponding to section 5 (c) of the British Guiana Ordinance, that section 184 (1) authorising the company to deduct tax corresponded to section 29 (1) of the British Guiana legislation and that section 199 and paragraph 3 of the Sixth Schedule corresponded to sections 29 (2) and 73 (1) of the British Guiana Ordinance. These provisions, it was submitted, showed that the scheme of the two sets of legislation in dealing with dividends was the same and that therefore the same results must follow as would follow in the United Kingdom in the present case - that is to say, that the dividend is not taxable in the hands of the shareholder and that therefore, if it has been paid out of a fund which is not taxable in the hands of the company, it must escape tax altogether in the same manner as it would escape tax in the United Kingdom.

In order to determine whether the scheme of each set of legislation is identical in this respect, it is necessary also to consider what differences there may be in the two sets of legislation, as well as the points of similarity. The Attorney General, in the course of his submissions, drew attention to the provision for a set off in section 30, a provision which, as was conceded on behalf of the respondent, does not exist in the United Kingdom legislation. As the Attorney General submitted, why should a shareholder be entitled to a set off of the tax deducted from a dividend under section 29 (1) if he is not also taxed on the dividend as part of his chargeable income? Indeed, there is a condition in the section that the shareholder is entitled to the set off only when the dividend is included in the chargeable income of

In the  
Federal Supreme  
Court

No.8

Judgment

(a) Wylie J.  
(concurrent  
in by  
Rennie J.)

14th June 1960  
continued

In the  
Federal Supreme  
Court

No.8

Judgment  
(a) Wylie J.  
(concurring  
in by  
Rennie J.)  
14th June 1960  
continued

the shareholder. This condition is probably designed to deny any right of set off in such cases as share-holders beyond the jurisdiction who may not make a return of income, but, whatever its object, it leads irresistibly to the conclusion that the dividend, being included in the chargeable income of the shareholder, is going to be taxed as part of that taxable income, and that there is to be no right of set off until the dividend has been subjected to tax as part of the taxable incomes of both the company and the shareholder, so that the same source of income will have been subjected to tax twice.

10

Moreover, if it is conceivable that a shareholder who has included dividends in his chargeable income, is entitled to a set off but is not liable to be taxed on the amount of the dividends, then the shareholder will have paid no tax at all on his dividend and the revenue authorities will have lost, by way of set off, the equivalent amount of tax paid by the company. The effect would be that the revenue would have lost that amount of tax altogether. If this was the effect of the legislation, then obviously all companies would pay out all their profits by way of dividends, so that shareholders would, in effect, be saved all income tax on the operations of companies. Clearly, this cannot be the intention of the legislation and, in my view, this difference in the two sets of legislation shows conclusively that they do not adopt the same scheme at all. While both recognise the principle in the case of dividends that tax should not be deducted twice from the same source of income, they proceed to give effect to that principle by entirely different methods. The United Kingdom legislation, as interpreted by the Court, imposes 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 imposes tax on the income of the company and again on the dividend in the hands of the shareholder, but permits the latter to set off against his tax that part of the tax paid by the company which is proportionate to the amount of the dividend.

20

30

40

Nor is this difference surprising if, as

In the  
Federal Supreme  
Court

No.8

Judgment  
(a) Wylie J.  
(concurring  
in by  
Rennie J.)  
14th June 1960  
continued

10 should be done, the scheme of each set of legis-  
lation is considered as a whole and not in re-  
lation to the provisions in regard to dividends  
only. English income tax legislation has  
throughout its history been based on the princi-  
ple of taxation at the source. See Simon's In-  
come Tax (Second Edition) Vol.1 at the foot of  
page 97. On the other hand, the British Guiana  
legislation, in common with income tax legisla-  
tion introduced in many overseas territories,  
does not (generally speaking) provide for tax to  
be deducted at source, but for income to be tax-  
ed after it has reached the taxpayer. Conse-  
quently, it would be logical in the first case  
not to tax dividends again in the hands of the  
shareholder whereas in the latter case, it would  
be more consistent with the overall scheme of  
the legislation to tax them, along with all the  
other income of the taxpayer, when in his hands,  
20 and to allow him a rebate of the tax already  
paid by the company on the dividends. More im-  
portant still, when this principle in regard to  
dividends was first established in the United  
Kingdom there was only one tax at the standard  
rate payable by all taxpayers, whether companies  
or individuals, whereas the British Guiana legis-  
lation, again like income tax legislation in sev-  
eral other overseas territories, has provided  
30 for one rate of tax for companies and a differ-  
ent rate for individuals based on a sliding  
scale according to the amount of each individu-  
al's income. Clearly, it would have been quite  
inappropriate in these circumstances to leave  
each individual, in effect, in the position of  
having been taxed on his dividend at the one  
rate applicable to all companies, and the logi-  
cal way of remedying that position was to in-  
clude the dividend in the taxable income of the  
individual, tax him on it again at the rate ap-  
40 propriate to his own income, and allow him to  
set off the tax paid by the company in respect  
of his dividend.

I conclude, therefore, that the British  
Guiana Ordinance does provide for income in re-  
spect of dividends to be taxed as part of the  
income of shareholders and, in view of the reasons  
I have given for this conclusion, there is  
obviously no point in considering the authori-  
ties which decide that this is not the case in

In the  
Federal Supreme  
Court

No.8

Judgment  
(a) Wylie J.  
(concurring  
in by  
Rennie J.)  
14th June 1960  
continued

the United Kingdom in regard to tax at the standard rate on dividends declared by other than foreign companies. Not only the overall scheme of the two sets of legislation, but also the relevant provisions, vary so much that I do not consider the United Kingdom authorities can effect the conclusions set out above based on the scheme and the express language of the British Guiana legislation. For similar reasons, I do not consider it necessary to consider the lengthy arguments that were submitted concerning the different position under the United Kingdom legislation in regard to dividends paid by foreign companies as compared with the position in regard to dividends paid by other companies.

10

Having arrived at the conclusion that the Ordinance does provide for income from dividends to be taxed, I now turn to the three questions submitted for the consideration of the Full Court. The first question is this :-

20

Was the sum of twelve hundred dollars a "dividend" within the meaning of section 5 of the Ordinance? The Full Court answered this question in the negative, concluding that "dividends" was "not intended to mean dividends derived from the sale of capital assets or from capital profits but from trading profits". (P.86 of the record). This conclusion is no doubt based partly on the conclusion arrived at by the Full Court that the scheme of the United Kingdom legislation and the scheme of the British Guiana Ordinance in respect of tax on dividends were the same, but reference is also made to the provisions of sections 29 and 30 as the reason for the foregoing conclusion. This reasoning is not clear to me. It is true that subsection (1) of section 29 does deal only with dividends paid out of income. That is logical enough because the section deals with deduction of tax at the rate paid by the company and the company cannot be liable to income tax except in respect of what is income. The proviso to subsection (1), however, is dealing with dividends paid partly out of taxed income and partly otherwise and the only case included in the proviso is the case where tax is not paid or payable "on the whole income out of which the dividend is paid". If it was in the minds of the members of the Full Court that this language established that the

30

40

word "dividends" in section 5 (c) is confined to dividends paid out of income, within the meaning of income tax legislation, and not to dividends paid out of what have been called for convenience "capital profits", then I cannot agree with this reasoning. The proviso to subsection (1) of section 29 might have been more widely worded, but the whole subsection is dealing with deduction of tax which is payable only on income and therefore does not need to deal with dividends paid out of capital profits because there would have been no income tax on those profits and therefore there could be nothing to deduct from such a dividend. For the reason that such dividends could never be within the scope of the main part of the section, I cannot conclude that the reference in the proviso to income out of which dividends have been paid, can have the effect of excluding from the word "dividends" used elsewhere in the Ordinance dividends which have not been paid out of income.

It is to be noted that the company never referred to this payment as a dividend but as a "cash distribution", and prior to distribution the fund out of which the payments were made was, by resolution, transferred to a capital reserve account. Transferring funds to a reserve account is not the same as capitalising them, so as to put them beyond the reach of the directors to distribute except by way of return of capital, as is indeed shown by what happened in this instance. Nor does the description of the distribution as a "cash distribution" mean that the payment is not a dividend. Stroud's Dictionary of English Law defines dividend as "the payment made out of profits to the shareholders in a company". And in Hill v. Permanent Trustee Company of New South Wales 1930 A.C. 720 at p. 731 the Judicial Committee made this observation :-

"A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorised reduction of capital. Any other payment made by it by means of which it parts with moneys to its shareholders must and can only be made by way of dividing profits. Whether the payment is called 'dividend' or 'bonus', or any

In the  
Federal Supreme  
Court

No.8

Judgment  
(a) Wylie J.  
(concurring  
in by  
Rennie J.)  
14th June 1960  
continued



In the  
Federal Supreme  
Court

No.8

Judgment  
(a) Wylie J.  
(concurring  
in by  
Rennie J.)  
14th June 1960  
continued

other name, it still must remain a payment on division of profits."

This cash distribution was certainly a payment made out of profits (albeit capital profits) and it was certainly not made as a step in any authorised reduction of capital but was a payment made by way of dividing profits. I conclude, therefore, that this cash distribution is a dividend and is therefore within the meaning of section 5 (c) and I would so answer the first question in the case stated.

10

The second question is whether or not the sum of twelve hundred dollars was "income" of the shareholder within the meaning of section 5. On this question, I consider the decision in Inland Revenue Commissioners v. Reid's Trustees (1949) A.C. 361 to be conclusive. In that case, a South African company declared a dividend "payable from capital profits realized on the sale of properties". The House of Lords held unanimously that the dividend was "income arising from" the shares for the purposes of Case V of Schedule D of the United Kingdom income tax legislation, but, in so holding, relied on several authorities, some of which were cases concerning the respective rights of life tenants and remaindermen and some of which also concerned English companies and not foreign companies. Thus Lord Normand says at pp. 374-5 :-

20

30

"There are, in my opinion, valid reasons for treating the dividend as taxable income in the Respondents' hands. The payment was quite properly described as a dividend, and a dividend is at least prima facie income of the recipient. In law capital cannot be returned to shareholders by a mere money distribution whether called a dividend or by some other name and there was in this instance no return of capital. The shares of the company remained after the distribution intact and precisely as they were before it. The payment wears on the face of it, therefore, the appearance of an income receipt in the hands of the shareholders.

40

It is not irrelevant to consider how similar dividends have been dealt with in a question between liferenter and fiar or tenant for life and remainderman. It has been held that according to the law of England a payment received by way of dividend out of the proceeds of a sale of the company's assets prima facie goes to the tenant for life as income of the trust estate. In In re Bates, the sum distributed represented profits on the sale of steam trawlers previously owned and operated by the company. Eve J. held that 'it was a fund which the company could treat as available for dividend and could distribute as profits, or having regard to its power to increase capital could apply to that purpose by, for example, increasing the capital, declaring a bonus and at the same time allotting to each shareholder shares in the capital of the company paid up to an amount equivalent to his proportion of the bonus so declared. Unless and until the fund was in fact capitalized it retained its characteristics of a distributable profit.'

In the  
Federal Supreme  
Court

No.8

Judgment  
(a) Wylie J.  
(concurring  
in by  
Rennie J.)  
14th June 1960  
continued

In re Bates (1928) Ch. 682, referred to in this passage, concerned a distribution by an English company out of capital profits and referred to by the company as a "cash bonus".

Returning to Reid's case, Lord Morton, at p. 379 deals with this point as follows :-

"This sum must be either income arising from that possession or part of the capital of that possession. Despite the ingenious argument of counsel for the respondents, I am clearly of opinion that it cannot be part of the capital of that possession. No part of that possession has been sold; no part of the capital paid up on that possession has been returned. Before the payment was made, the respondents held 3,433 shares of ten pounds each, fully paid, in the company: after the payment was made their holding was exactly the same. All that happened was that certain

In the  
Federal Supreme  
Court

No.8

Judgment  
(a) Wylie J.  
(concurrent  
in by  
Rennie J.)  
14th June 1960  
continued

cash belonging to the company, and representing part of the profit realized by the sale of a capital asset belonging to the company, was paid away as a dividend. Your Lordships are not concerned to consider whether the company could or could not have given its shareholders the benefit of this profit in a form which would have been capital in the hands of the Respondents. The directors, having this sum in their hands representing a profit which they were at liberty to distribute, very naturally decided to utilize it in paying a dividend.

10

"For the reasons which I have briefly stated, I must reject the contention that this dividend came to the Respondents as part of the capital of the 'possession.' It follows, I think, inevitably that the dividend is income arising from the 'possession.' Prima facie a dividend paid on shares is income. It has been held that even if a distribution by way of dividend has been made out of profits arising from some dealing with the company's capital assets, the distribution is income, as between the persons beneficially interested in capital and income respectively. See In re Bates; Hill v. Permanent Trustee Company of New South Wales; In re Doughty. None of these cases is binding on your Lordship's House, but I see no reason to differ from any of them. These cases are not decisions as to the incidence of income tax, and of course the destination of sums paid to the trustees of a will must depend upon the language used by the testator. The decisions are, however, helpful as showing that the word 'income', when used in its ordinary sense, includes a dividend paid out of a profit of the kind that is sometimes called a 'capital profit'.

20

30

40

"My Lords, I see no good reason for giving to the words 'income arising from possessions out of the United Kingdom' some special meaning which would exclude from their scope the dividend now in question. This dividend is, I think, income

according to the ordinary use of the word; it is part of the income of the trust estate in the hands of the Respondents, and in holding it to be income within the meaning of this taxing provision your Lordships would in no way be disregarding the fact that income, and not capital, is the proper subject of taxation under an Income Tax Act."

In the  
Federal Supreme  
Court

No.8

Judgment  
(a) Wylie J.  
(concurring  
in by  
Rennie J.)  
14th June 1960  
continued

10 Lord Reid at p. 386 says :-

"There are many ways in which a company can deal with its profits. If it adopts certain methods the result is the creation of new capital assets. If it adopts other methods the result is the receipt of income by its shareholders. In either case it is immaterial whether the profits were trading profits or capital profits."

20 In the present case, the Company did not proceed by way of creating new capital assets. It adopted "other methods", which, in my judgment, have resulted in the receipt of income by the shareholder.

30 I have mentioned more than once that, on this point, there are references in Reid's case to decisions concerning English companies because the Full Court has drawn attention to the fact that a clear distinction was being drawn in that case between the position of English companies and that of foreign companies. That distinction concerned taxation of dividends and not the question whether the dividend in that case was income. I am unable to arrive at any other conclusion than that the sum received was income in the hands of the shareholder and, so far as the circumstances of this case are concerned, I can see nothing in section 5 or elsewhere in the Ordinance which  
40 would lead to an interpretation of the word "income" in section 5 that would exclude this particular income. I would therefore answer the second question in the case stated in the affirmative.

As to the third question, this has really

In the  
Federal Supreme  
Court

No.8

Judgment  
(a) Wylie J.  
(concurring  
in by  
Rennie J.)  
14th June 1960  
continued

been answered by the conclusion I arrived at earlier in this judgment to the effect that the British Guiana Ordinance does not follow the same scheme as the English legislation, but provides for all income in respect of dividends to be taxed. The specific terms of the legislation do not give rise to any consideration as to whether or not the dividends from which the income is derived, have been paid out of funds which were not taxable in the hands of the company paying the dividend. I would therefore give an affirmative answer to this question also.

10

On behalf of the respondent, it was also submitted that, as it has been decided in 1935 by Savary J. in Bollers v. Commissioner of Income Tax (1931-1937 B.G.L.R. 271) that a dividend distributed by a company from a reserve fund made up of profits realised from the sale of capital assets is not assessable to tax under this Ordinance when received by the shareholders, this Court should not now give a decision contrary to this interpretation which had been acted upon ever since 1935. Reference was made to the passage at pp.334-336 in the judgment in Pugh v. Golden Valley Railway Co. (1880) 15 Ch. D. 330. It is to be noted, however, that, in addition to approving specifically the earlier decision which it was argued should be overruled, the judgment notes that, since that decision, "hundreds of special Acts of Parliament" had been passed sanctioning interference with private rights, presumably on the basis of the earlier decision. The judgment sums up on this aspect at p. 336 in the following terms :-

20

30

"To put the matter in another shape, the Courts should be careful not to overrule decisions which, not being manifestly erroneous and mischievous, have stood for some time unchallenged, and from their nature and the effect which they may reasonably be supposed to have produced upon the conduct of a large portion of the community, as well as of Parliament itself; in matters affecting rights of property, may fairly be treated as having passed into the category of established and recognised law."

40

The present circumstances do not fall within that description. Apart from the question of the correctness of the earlier decision, there is no question of the legislature or a large portion of the community having acted upon it in matters affecting rights of property. Nor is it the case that "obligations with a tract of future time have been undertaken on the faith of it" - to quote the language of Lord Normand in dealing with the same contention in Hill v. Wm. Hill (Park Lane) Ltd. 1949 A.C. 530 at p.567. The present case concerns only liability to income tax in the not very extensive field of company dividends paid out of funds realised from disposing of capital assets, and these are not circumstances which ought to prevail over what is the primary duty of this Court - to ensure that the law is correctly expounded and applied. Viscount Simon L.C., in thus expressing his view of the duty of the court when dealing with this contention in Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, LD. 1943 A.C. 32 at p.44, went on to say :-

"If the view which has hitherto prevailed in this matter is found to be based on a misapprehension of legal principles, it is of great importance that these principles should be correctly defined, for, if not, there is a danger that the error may spread in other directions, and a portion of our law be erected on a false foundation."

A careful examination of the language used in the judgment in Bollers' case and the propositions in it founded on the conclusion that the schemes of the United Kingdom legislation and the British Guiana legislation in regard to taxation of dividends are the same, show how applicable these remarks might become in future cases, if this judgment was confirmed because of the length of time it has remained unchallenged.

I would therefore allow this appeal, set aside the judgment of the Full Court and restore the judgment of Date. J.

In the  
Federal Supreme  
Court

No.8

Judgment  
(a) Wylie J.  
(concurring  
in by  
Rennie J.)  
14th June 1960  
continued

In the  
Federal Supreme  
Court

No.8

Judgment  
(a) Wylie J.  
(concurring  
in by  
Rennie J.)  
14th June 1960  
continued

As to costs, it is to be noted that, prior to making this cash distribution, the company was informed by the Commissioner of Income Tax that tax would not be payable on distribution out of capital reserve and Date J. ordered that each party should bear their own costs. I agree and would order that this should apply to all proceedings, in the Supreme Court, in the Full Court and in this Court.

Dated this 14th day of June, 1960.

Sgd. C. WYLIE  
Federal Justice.

10

Mr. Justice Rennie:

I concur.

(Sgd.) A.B. RENNIE  
Federal Justice.

(b) Archer J.  
14th June, 1960.

(b) Mr. Justice Archer:

Despite Mr. Elliott's ingenious argument, I would answer the question raised in the case stated in the same way as Wylie, J. has done and for the reasons he has given. Mr. Elliott's argument is an attempted rationalisation of the decisions in which the identification, for income tax purposes, of the shareholder with the company is discussed, and postulates a logical development of the law which has, however, been denied by eminent judges and text book authors. If these decisions were reached in the way he has submitted, it is surprising that so simple an explanation should have escaped the attention of the courts for so long a time. Accordingly, I agree that the appeal succeeds. I agree also with the proposed order with regard to the costs of the appeal.

20

30

(Sgd.) C.V.H. ARCHER  
Federal Justice.

No.9

FORMAL ORDER ALLOWING APPEAL

In the  
Federal Supreme  
Court

No.9

BEFORE

THE HONOURABLE MR. JUSTICE RENNIE

THE HONOURABLE MR. JUSTICE ARCHER

THE HONOURABLE MR. JUSTICE WYLIE

Formal Order  
allowing  
Appeal.  
14th June, 1960

DATED THE 14TH DAY OF JUNE, 1960

ENTERED THE 25TH DAY OF JUNE, 1960

10

UPON READING the Notice of Motion on behalf of the Appellants dated the 26th day of October, 1959, and the Judgment hereinafter mentioned

AND UPON READING the Record of Appeal filed herein

AND UPON HEARING Mr. S.S. Ramphal, Acting Attorney General, of Counsel for the Appellants, and Mr. J.H.S. Elliott of Counsel for the Respondents AND MATURE DELIBERATION thereupon had

IT IS ORDERED

20

That this Appeal be allowed and the Judgment of the Full Court of the Supreme Court of British Guiana dated the 20th day of August, 1959, be set aside and the Judgment of the Honourable Mr. Justice Date dated the 27th day of February, 1958, thereby set aside be restored.

AND IT IS FURTHER ORDERED

That each party bear their own costs of



In the  
Federal Supreme  
Court

this Appeal and of the Appeals to the Honourable  
Mr. Justice Date and the Full Court of the Su-  
preme Court of British Guiana.

No.9

BY THE ORDER OF THE COURT

Formal Order  
allowing  
Appeal  
14th June 1960  
continued

ADITYA T. SINGH  
DEPUTY REGISTRAR  
FEDERAL SUPREME COURT  
(AG.)

No.10

No.10

Order granting  
final leave to  
Appeal to Her  
Majesty in  
Council  
23rd November  
1960

ORDER GRANTING FINAL LEAVE TO APPEAL  
TO HER MAJESTY IN COUNCIL

10

IN THE FEDERAL SUPREME COURT  
APPELLATE JURISDICTION

No.27 of 1959 British Guiana

ON APPEAL FROM THE FULL COURT OF THE SUPREME  
COURT OF BRITISH GUIANA  
CIVIL JURISDICTION

BETWEEN :-

THE COMMISSIONERS OF INCOME TAX,  
(Respondents)  
APPELLANTS

20

- and

BICBER LIMITED (IN VOLUNTARY LIQUIDATION)  
(Appellants)  
RESPONDENTS.

BEFORE:

THE HONOURABLE SIR ERIC HALLINAN, CHIEF JUSTICE

THE HONOURABLE MR. JUSTICE LEWIS

THE HONOURABLE MR. JUSTICE MARNAN

WEDNESDAY THE 23RD DAY OF NOVEMBER, 1960

30

ENTERED THE 7TH DAY OF JANUARY, 1961

UPON the petition of the abovenamed Biber

In the  
Federal Supreme  
Court

---

No.10

Order granting  
final leave to  
Appeal to Her  
Majesty in  
Council  
23rd November  
1960  
continued

10

Limited (a company in voluntary liquidation) dated the 23th day of October, 1960 preferred unto this court on the 23rd of November, 1960 for final Leave to Appeal to Her Majesty in Her Majesty's Privy Council against the judgment of this Court dated the 14th day of June, 1960 AND UPON READING the said petition and the order of this Court dated the 21st day of June, 1960 AND UPON HEARING Counsel for the Petitioners and for the Respondents and being satisfied that the terms and conditions imposed by the said Order dated the 21st day of June, 1960 have been complied with THIS COURT DOTH ORDER that final leave be and is hereby granted to the said Petitioners to appeal to Her Majesty in Her Majesty's Privy Council

BY THE COURT

ADITYA T. SINGH

DEPUTY REGISTRAR (Acting).

---