

Privy Council Appeal No. 4 of 1961

**Bicber Limited (In Voluntary Liquidation) (Formerly S. Davson
and Company Limited)** - - - - - *Appellant*

v.

The Commissioners of Income Tax - - - - - *Respondent*

FROM

THE FEDERAL SUPREME COURT OF THE WEST INDIES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 19TH JUNE 1962

Present at the Hearing:

LORD EVERSLED.

LORD MORRIS OF BORTH-Y-GEST.

LORD PEARCE.

[*Delivered by* LORD PEARCE]

The appellant company was incorporated in the United Kingdom and carried on business in British Guiana. It owned 600 shares in the Rupununi Development Company Ltd. a company incorporated in British Guiana. That Company by the sale of some property made a profit, which was admittedly a capital profit. It transferred this profit to a capital reserve account from which it paid out a dividend of \$2 per share. Thus the appellant company received \$1,200. The Commissioners of Income Tax in British Guiana (contrary to a previous expression of their intention) treated the dividend as investment income, and confirmed the assessment made on that basis. The appellant company unsuccessfully appealed to Date J. who confirmed the assessment. The Full Court of the Supreme Court, however, reversed his decision. The Commissioners of Income Tax then appealed successfully to the Federal Supreme Court of the West Indies who restored the judgment of Date J. confirming the assessment.

The appellant company contends that the dividend of \$1,200 was not properly chargeable to income tax under the relevant sections of the Income Tax Ordinance (cap. 299) of the laws of British Guiana. Section 5 provides "income tax subject to the provisions of this Ordinance, shall be payable at the rate or rates herein specified for each year of assessment upon the income of any person accruing in or derived from the colony or elsewhere, and whether received in the colony or not, in respect of

(c) dividends, interest or discounts".

By Section 29 "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 . . . on the income out of which the dividend is paid, 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".

By Section 30 tax so deducted shall, when the dividend is included in the chargeable income of the shareholder, be set-off against the tax charged on that income. This set-off is the more necessary because companies pay tax at a higher rate than individuals (Section 27). The Full Court of the Supreme Court of British Guiana in finding for the tax-payer adopted the reasoning of Savary J. in *Bollers v. Commissioners of Inland Revenue*, L.R.B.G. (1931-37) 271, where on facts indistinguishable from those of the present case a

dividend was held not to be taxable. The ratio decidendi in that case was based on the view that a dividend paid out of capital profits would not under the English system of taxation attract tax in the hands of the shareholder, that the Income Tax Ordinance was similar in scheme to the English Income Tax Act so far as companies are concerned, and that therefore no tax was payable under the Ordinance by the shareholder on such a dividend. The Federal Supreme Court were unable to draw any analogy from the English system and Mr. Miller has not asked the Board so to do. Under the English system dividends (other than trading receipts) are not taxed in the hands of the recipient except through deduction by the Company (under Section 184 of the Income Tax Act, 1952) when it is paying the dividends out of profits brought into charge for tax. The Income Tax Ordinance of British Guiana, however, imposes upon the recipient a charge on dividends (in so far as they are "income") with a corresponding right on the tax-payer to take credit for tax deducted by the Company. Therefore no useful analogy can be drawn in this respect between the two systems.

The case turns on the application of the words "income . . . in respect of . . . dividends" to the payment in question. It is not disputed that it was a "dividend". The words "in respect of" are not felicitous but can mean no more than "consisting of" or "namely". It is agreed on both sides that unless the dividend was received as income in the hands of the tax-payer it does not attract tax. Mr. Miller argues that it came from a fund that was capital in the hands of the payer and that nothing has happened to convert it into income in the hands of the recipient.

In *re Bates* [1928] 1 Ch. 682 decided that a cash bonus distributed by a company from profits produced by the sale of capital assets must go as rents and profits to the tenant for life and not as capital to the remaindermen. Eve J. pointed out (p. 687) that profit 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 capitalised, it retained its characteristic of a distributable profit . . . and in the hands of those who received it it retained the same characteristics". That case was approved in *Hill v. Permanent Trustee Company of New South Wales, Ltd.* [1930] A.C. 720 where a similar point arose. Lord Russell of Killowen giving the judgment of the Board said (p. 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 profits. Whether the payment is called 'dividend' or 'bonus' or any other name it must still remain a payment on division of profits. (3) Money so paid to a shareholder will (if he be a trustee) prima facie belong to the person beneficially entitled to the income of the trust estate".

Those cases dealt with what constituted "income" under a trust, but they were adopted as a guide to what constituted taxable income in *Inland Revenue Commissioners v. Reid's Trustees* [1949] A.C. 361. The House there held that a dividend paid out of capital profits by a South African company to shareholders in the United Kingdom constituted "income arising from possessions out of the United Kingdom" under case 5 of Schedule D of the Income Tax Act, 1918. In so holding the House rejected the contrary view of the Court of Session in Scotland summarised by the Lord President in the terms "The short answer . . . is that this sum is not the income of anyone and never was"—a view entirely corresponding to Mr. Miller's submission in the present appeal. Lord Simonds (p. 381) after citing the Lord President's opinion said: "My Lords, I must say with great respect that I think 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 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". And later (p. 373) he said "The shares the respondents held before the distribution of the dividend they still hold intact. The dividend they received was income arising out of those shares". Lord Normand (p. 374) said "There are, in my opinion, valid reasons for treating the dividend as taxable income in the respondent's hand. 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". Lord Morton of Henryton (p. 380) concluded that it followed "inevitably that the dividend is income arising from the possession. Prima facie a dividend paid on shares is income". Lord MacDermott said (p. 383) "But here the shareholding which was the only relevant capital in the respondent's hands rested as it was and the dividend cannot, therefore, be said to have contained an element of capital. No doubt the shares abated in market value after the payment of the dividend but they nevertheless remained intact. The ripe tree loses weight and worth when it sheds its fruit, but the fruit remains fruit and no more unless in its fall it has taken part of the tree with it". Finally Lord Reid said (p. 386) "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".

Mr. Miller sought with ingenuity to distinguish that case on the ground that it was decided on its particular facts and in relation to Schedule D, and that it is not binding on the facts of the present case. Their Lordships cannot see any valid grounds for such distinction. They agree with the judgment of Wylie J. with which the other Judges in the Federal Supreme Court concurred. The sum received by the tax-payer in the present case was "income in respect of dividends" which attracted tax under clause 5 of the Income Tax Ordinance of British Guiana.

Their Lordships will humbly advise Her Majesty that this appeal be dismissed. The appellants will pay the cost of this appeal.

In the Privy Council

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

v.

THE COMMISSIONERS OF INCOME TAX

DELIVERED BY
LORD PEARCE

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