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Judgment
3/1965

IN THE PRIVY COUNCIL No. 45 of 1964

ON APPEAL
FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

BETWEEN: PATRICK ALFRED REYNOLDS
Appellant

- and -

THE COMMISSIONER OF INCOME TAX
Respondent

CASE FOR THE RESPONDENT

Record

1. This is an appeal from a Judgment and Order of the Court of Appeal of Trinidad and Tobago (Sir H.O.B. Wooding C.J.(President) and Hyatali and Phillips J.J.) dated 25th March 1964 dismissing an appeal (by way of case stated) by the Appellant under Section 43 (10) of the Income Tax Ordinance against a decision of Blagden J. By the said decision Blagden J. had dismissed an appeal by the Appellant (by way of summons under the said Section 43) against an assessment made upon him by the Respondent for the year of assessment ended 31st December 1957 in respect of the income of the Appellant and his wife Audrey Jean Reynolds ("Mrs. Reynolds"). pp. 45-70 pp. 37-45 Cap.33 No.1. pp. 2-35 pp. 1-2 Cap.33 No.1.

2. The matter arises in the following way. At all material times the Appellant and Mrs. Reynolds have been living together and have both been in receipt of income from earnings and investments. Section 18 of the Income Tax Ordinance provides that the income of a married woman living with her husband shall, for the purpose of the Ordinance, be deemed to be the income of the husband, and shall be charged in the name of the husband. pp.38 & 39 Cap.33 No.1.

On 28th December 1956 Mrs. Reynolds entered into a Deed of Covenant under which she undertook to make annual payments to a Trustee for the benefit of the four children of the marriage, whose ages at that time ranged from 12 years down to 1 month. The annual payments amounted to $3,500 pp. 72-76

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in respect of each child and the first payment, totalling $14,000, became payable on 31st December, 1956 and was duly made.

pp. 38 & 39

The Appellant's return of income for the year of assessment ended 31st December 1957, which was based on income of himself and Mrs. Reynolds received in the preceding year, showed a total income of $40,164.86, of which $18,202 represented Mrs. Reynold's income. In making his return the Appellant claimed that the aggregate sum of $14,000 paid by Mrs. Reynolds under the Deed of Covenant should be deducted from her income in computing the Appellant's chargeable income for the year ending 31st December 1956, upon which he was assessable to tax for the year of assessment ended 31st December 1957. The Respondent disallowed this claim in making his assessment upon the Appellant for the said year of assessment.

pp. 38 & 39
Cap.33 No.1.

The Appellant thereupon gave notice of objection to the Respondent under Section 42(2), applying for the review and revision of the assessment on the ground that the deduction should be allowed. The Respondent reviewed the assessment but confirmed it by notice dated 4th July 1958. The sole issue for determination on this Appeal is whether (as Blagden J. and the Court of Appeal have held) the Respondent was right in rejecting the Appellant's claim to deduct the payment made by Mrs. Reynolds under the Deed of Covenant in computing his chargeable income.

3. The determination of this issue principally depends upon the answers to the following questions, namely :-

(1) Is an annual payment made by a taxpayer under a deed of covenant deductible in computing his chargeable income by virtue
Cap.33 No.1. of Section 10(1)(f) of the Ordinance read with Section 12 thereof, even though it does not constitute an expense incurred in the production of income ?

(2) If so, then in view of Section 18 is a similar payment made by the wife of a taxpayer similarly deductible?

(3) If so, then is the Respondent unable
Cap.33 No.1. to invoke the provisions of Section 34 (2)

(which deal with transfers to minors to avoid tax) against the payment made by the wife?

The Respondent respectfully submits that this Appeal cannot succeed unless affirmative answers fall to be given to all of these questions.

4. The main relevant provisions of the Income Tax Ordinance, as amended and in force at the material time, are as follows :- Cap.33 No.1

"2. In this Ordinance -

.....

'incapacitated person' means any ... married woman ..."

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

There then follow sub-paragraphs (a) to (g) setting out the various sources of income.

"6. Subject to the provisions of this "Ordinance tax shall be charged, levied, and "collected for each year of assessment upon "the chargeable income of any person for the "year immediately preceding the year of "assessment."

"10. (1) For the purpose of ascertaining "the chargeable income of any person, there "shall be deducted all outgoings and "expenses wholly and exclusively incurred "during the year preceding the year of "assessment by such person in the production "of the income, including -

.....

"(f) annuities or other annual payments "whether payable within or out of "the Colony, either as a charge on "any property of the person paying

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"the same by virtue of any deed or "will or otherwise, or as a reserva- "tion thereout, or as a personal "debt or obligation by virtue of any "contract:

"Provided that no voluntary "allowances or payments of any "description shall be deducted"

"12. (1) For the purpose of ascertaining the "chargeable income of any person, no deduction "shall be allowed in respect of -

"(a) domestic or private expenses;

"(b) any disbursements or expenses not "being money wholly and "exclusively laid out or expended "for the purpose of acquiring the "income"

"18. The income of a married woman living "with her husband shall, for the purpose of "this Ordinance, be deemed to be the income "of the husband, and shall be charged in the "name of the husband and not in her name "nor in that of her trustee:"

" Provided that that part of the total amount "of tax charged upon the husband which bears "the same proportion to that total amount as "the amount of the income of the wife bore to "the amount of the total income of the husband "and wife may, if necessary, be collected "from the wife, notwithstanding that no "assessment has been made upon her"

"34. (2) Where, under or by virtue of a "disposition made directly or indirectly by "any disponer, the whole or any part of "what would otherwise have been the income "of that disponer is payable to or for the "benefit, whether present or future and "whether on the fulfilment of a condition "or the happening of a contingency, or as "the result of the exercise of a power or "discretion conferred on any person, or "otherwise, of a minor, or is deemed under the "provisions of Section 35 of this Ordinance "to have been received by or for the benefit, "whether present or future, and whether on the

"fulfilment of a condition or the happening of
"a contingency, or as a result of the exercise
"of a power or discretion conferred on any
"person, or otherwise, of a minor, such
"disponer shall, nevertheless, during the
"period of the minority of such minor, be liable
"to be taxed in respect of the sums so payable
"as if the disposition had not been made, and
"subsequent to such period of minority, such
"disponer shall continue to be liable to be
"taxed in respect of the sums so payable as
"if such disposition had not been made unless
"the Commissioner is satisfied that the
"disposition was not made for the purpose of
"avoiding tax"

.....

"(7) In this section 'disposition' includes
"any trust, grant, covenant, agreement,
"arrangement, or transfer of assets"

.....

"(9) Nothing in this section shall prevent
"any income under any disposition from being
"treated for the purpose of tax as the
"income of the person making the disposition
"in any case in which this section does not
"apply"

5. The material facts, which have been summarised at paragraph 2 above, appear from the Record and in particular from the Case Stated by Blagden J. for the opinion of the Court of Appeal. pp. 37-45

It should be mentioned that Exhibits C and D were objected to by the Respondent and were not admitted before either Blagden J. or the Court of Appeal. The Statement of Agreed Facts was admitted before Blagden J. but not before the Court of Appeal. pp. 77&79 pp. 82 & 83

6. The Appellant's appeal against the assessment made upon him by the Respondent was commenced by a summons taken out on 15th July 1958 under Section 43 (1) and (2) of the Ordinance. The matter came on for hearing before Blagden J. on 6th March 1959 and on 31st July 1959 the learned Judge gave Judgment dismissing the appeal with costs. pp. 1 - 2 Cap.33 No.1 pp. 3- 35

Record

pp. 3 - 9 In the course of his Judgment Blagden J. first recited the facts, and then reviewed a number of United Kingdom authorities dealing with the construction of taxing Acts. He noted, inter alia, the passage in Whitney v. Commissioners of Inland Revenue, where Lord Dunedin says :-

[1926] A.C. 37 at p.52

> "Now there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next there is the assessment - Liability does not depend on assessment - that ex hypothesi, has already been fixed. But, assessment particularises the exact sum which a person liable has to pay. Lastly, came the methods of recovery, if the person taxed does not voluntarily pay."

pp. 6 - 7

pp.10-17 Blagden J. then turned to the provisions of the Ordinance, and after analysing the terms of Sections 5 and 6 he concluded that Section 5 was the paramount charging Section and that Section 6 embodied both charging and machinery provisions. Section 6 specified the actual portion of the income (i.e. the chargeable income) upon which the general charge laid down by Section 5 was to be imposed in practice.

p. 18

p. 19

pp.20 & 21 Section 18, on the other hand, was purely a machinery provision. A married woman, although an incapacitated person within the meaning of Section, 2, is included in the category of "any person" for the purposes of Sections 5 and 6: as such her income is subject to the charge imposed by Section 5 and is likewise subject to Section 6. Accordingly she does have a "chargeable income" but the charge, when assessed, is recovered from her husband and not from her. This is the effect of Section 18 and it is pure machinery.

p.21

pp.24 & 28 Cap.33 No.1 p. 28 Blagden J. next considered the effect of Section 10(1) (f). He decided that Section 10(1) (f) authorised the deduction of the annual payment under the Deed of Covenant in the computation of Mrs. Reynolds' chargeable income. In doing so, he adopted the reasoning of Gilchrist J. in the second part of his Judgment in the Trinidad case of Joseph Kelshall. The word "including" in Section 10(1) was a word of extension, intended to embrace the deductions

pp.27 & 28 No.443 of 1939 Cap.33 No.1.

specified in sub-paragraphs (a) to (h) in addition to deductions of expenses incurred in the production of income.

(It was common ground that the first part of Gilchrist J.'s Judgment in the Kelshall case, in which he held that a deed of covenant to make annual payments was an effective alienation of income, could not be supported.) pp. 26 & 27 No.443 of 1939

Blagden J. added that Section 12 (1)(b) could not negative or fetter the provisions of Section 10 (1)(f). Nor did the proviso to Section 10(1)(f) apply to payments under a properly drafted deed of covenant. Cap.33 No.1. Cap.33.No.1. Cap.33.No.1.

That brought him to what he considered to be the crucial issue in the case, namely whether the payments by Mrs. Reynolds were brought back into charge to tax by Section 34 (2). He concluded that, in the terms of that subsection the word "disponer" is applicable to the wife of the taxpayer as well as to the taxpayer himself: and that the disposition by the wife is caught by the words "what would otherwise have been the income of the disponer". p. 29 Cap.33 No.1. p.31 p.33

He further concluded that the words "such disponer shall... be liable to be taxed" were applicable to the wife. Those words meant "shall be legally subject to the process of taxation". The effect of Sections 5 and 6 which were discussed earlier in his judgment, was that the income of the wife was liable to the charge of income tax. The learned Judge accordingly held that the annual payments made by Mrs. Reynolds under the Deed of Covenant were brought into tax by Section 34(2), and so were not allowable deductions in calculating the chargeable portion of her income. He dismissed the appeal with costs. p.34 p.35 Cap.33 No.1.

7. It will be noted that Blagden J. in effect gave an affirmative answer to the first and second questions set out in paragraph 2 above, but a negative answer to the third.

On the 4th March 1960, Blagden J. upon the application of the Appellant stated a case for the opinion of the Full Court, under the proviso to Section 43 (10) of the Ordinance, and a pp. 37-45 Cap.33 No.1.

further summary of his Judgment appears in the stated case

8. On 25th March 1964 the Court of Appeal, which
pp.46-69 had as from 31st August, 1962, succeeded to the jurisdiction of the Full Court, gave Judgment unanimously dismissing the appeal with costs.

p. 46 Sir H.O.B. Wooding C.J., who gave the first judgment began by noting that since the decision
No.443 of 1939 of Gilchrist J. in the Kelshall case in 1940 annual payments under covenant had been accepted by the revenue authorities as allowable deductions. The Legislature had subsequently introduced amending legislation making certain dispositions non-deductible. The Appellant contended that the amending legislation was incompetent to deny him the relief claimed: the Respondent had retorted by questioning the decision of Gilchrist J. After reciting the facts, the learned Chief Justice stated that, although
pp.46 & 47 argument had ranged over a wide field, the issues depended upon the construction of the Income Tax Ordinance, which differed fundamentally from the English Income Tax Acts. It was not very practicable to cite cases decided elsewhere, save upon the basic principles of construction: but these were too well known to require authority.

p. 48 The scheme of the Ordinance was as follows. It differentiates between income and chargeable income, the latter being what is left of the income after allowing the permissible deductions. These deductions consist of "income producing expenses"
Cap.33. and "personal allowances". The former are governed
No. 1. by Sections 10,11,12 and 13 and the latter by
Cap.33. Sections 14, 15, 16 and 18A. The income of a
No.1. married woman living with her husband is by Section 18 deemed for the purpose of the Ordinance to be her husband's income, and is consequently chargeable in his name under the same Section. Therefore she has no chargeable income and is not herself chargeable with tax. Consequently it is the husband and not the wife, who must make a
Cap.33. return under Section 27 and Section 36 (1), and this
No. 1. return must include the wife's income which is deemed
p.49 to be his. And it is the husband, and not the wife,
Cap.33 who is assessed under Section 39, and has a right to
No.1. appeal under Section 42. The wife has no such right: she is an "incapacitated person".

Record

Before turning to the allowable deductions, the learned Chief Justice referred to Kelshall's case. Everyone now agreed that the ratio of that case - namely that payments under covenant constituted an alienation of income - was wrong. But Gilchrist J. had held obiter that such payments were deductible under Section 10 (1)(f), notwithstanding the proviso thereto. That decision had alarming potentialities, so the Legislature introduced what is now Section 34(2). p.49 No.443 of 1939 Cap.33.No.1. p. 50 Cap.33.No.1.

That subsection cannot refer to a disposition by a wife. "Such disponer" cannot refer to her because she is not liable to be taxed. Nor, in the contemplation of the Ordinance, has she any income to dispose of. p. 51

Turning then to the allowable deductions, the learned Chief Justice dealt first with the "personal allowance" Sections. The terms of these Sections showed that the "individual" to whom the allowance was given was the husband and not the wife. pp.51 & 52

The provisions governing "income producing expenses" were set out - so far as material - in Sections 10 and 12. These Sections must be read closely together. They are complementary. The governing stipulation in Section 10(1) is that the expenses must be wholly and exclusively incurred in the production of income, and this is complemented in negative terms, by Section 12. The learned Chief Justice was unable to follow the reasoning of Blagden J. upon Section 12. pp.52 & 53 Cap.33.No.1. Cap.33.No.1. Cap.33.No.1. Cap.33.No.1.

The governing stipulation in Section 10(1) does not mean that income must necessarily result from an expense. It will be satisfied if the expenditure is incidental and relevant to the operations or activities regularly carried on for the production of the income. The word "including" in Section 10(1) may be a term of enlargement, but must never lose its association with the governing stipulation. The learned Chief Justice quoted examples of annual payments which would satisfy the governing stipulation. But annual payments for the benefit of one's own children do not satisfy it, and are also prohibited as private expenses by Section 12. p. 54 Cap.33.No.1. p. 55 Cap.33.No.1. pp.55 & 56 Cap.33.No.1.

The learned Chief Justice considered that a husband must be allowed to stand in his wife's p. 57.

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shoes for the purpose of Section 10(1) in relation to expenses incurred in the production of income. He wished to say very plainly that, subject to the validity of the Kelshall decision, Section 10(1) could only apply to such expenses. But that decision must not be extended to payments under covenant by a wife. It is not competent for a wife to give away what is deemed to be her husband's income; nor for the husband to claim a deduction for payments given by her.

pp.57 & 58
No.443 of 1939

He strongly disapproved both of the ratio and of the dicta in the Kelshall case, but he did not expressly overrule it. What made him hesitate to do so was that he regarded it as an open question, and one which it was unnecessary to decide, whether the subsequent legislation gave retrospective validity to that decision.

pp.59-61
p.62
Cap.33.No.1.

9. Hyatali J., after reciting the statutory provisions, and the contentions of the parties, concurred in the view that Section 34(2) did not apply to Mrs. Reynolds. This was so, not because she was not liable to be taxed as the Appellant contends, but because she could not be a disponer of income which, in the contemplation of Section 18, belonged to another.

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p.62
Cap.33.No.1.

The Appellant's argument that the income referred to in Section 18 was the chargeable income of the wife had already been effectively answered, and the learned Judge would merely add two observations. First, the Ordinance is concerned with taxing the chargeable income of a person chargeable to tax. The wife was not such a person and therefore the income referred to in Section 18 cannot be her chargeable income. Secondly, it is inconsistent for the Appellant to urge in one breath that the wife escapes Section 34 because she is not liable to be taxed, and in the other that Section 10(1)(f) must be applied to ascertain her chargeable income. Income in Section 18 means the whole income accruing to the wife from the sources specified in Section 5.

Cap.33.No.1.
Cap.33.No.1.
Cap.33.No.1.
Cap.33 No.1
Cap.33.No.1.

pp.62 & 63
Cap.33.No.1.

The wife is debarred from invoking Section 10(1)(f) because she has no chargeable income. The Appellant is similarly debarred because Section 10(1) contemplates payments made by the person chargeable to tax. Hyatali J. agreed with

Cap.33.No.1.

the conclusion reached by the learned Chief Justice upon this matter

Hyatali J. declined to consider the validity of the dicta in the Kelshall case, though he added that he would be loth to overrule them. P. 63 No.443 of 1939

10. Phillips J., having considered Section 18 agreed that it referred to the whole of the wife's income, and not to her chargeable income: she had no chargeable income. pp. 65 & 66 Cap.33 No.1.

10. It followed that there could be no question of making allowable deductions from the wife's income qua her income: though in appropriate cases payments made by her could be deducted in computing her husband's chargeable income. p. 66

Phillips J. then referred to Section 10(1) and agreed with the learned Chief Justice's strictures upon the Kelshall case. But even if the Judgment in that case had been right, it would have no application to the present case pp. 66 & 67 p.33 No.1. 443 of 1939

20. because the taxpayer is not the covenantor. Nor was this a case in which (apart from the Kelshall judgment) the taxpayer could deduct the payments made by the wife, because they were not expenses incurred in the production of income. p. 68 443 of 1939

It followed that, since the annual payments were not allowable deductions under Section 10(1), they could not possibly be affected by Section 34(2) The learned Judge added that Section 34(2) could only apply to dispositions by the taxpayer himself. p. 69 Cap.33.No.1. Cap.33.No.1. Cap.33.No.1.

30. It could not apply to dispositions by the wife, who was an incapacitated person not chargeable with tax, and who could not therefore be a disponer for the purposes of the Ordinance.

11. An Order in accordance with the Judgment of the Court of Appeal was made on 25th March 1964, and against the said Judgment this Appeal is now preferred, the Appellant having been granted final leave to appeal by an Order of the High Court of Justice dated 29th July 1964. p. 70 p.71

40. 12. It will be noted that the Court of Appeal did not think it necessary to answer the first of the questions specified in paragraph 2 above, because they unanimously (and, the Respondent submits, rightly) took the view that even if an affirmative

answer were given to the first question, the second question must be answered in the negative.

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It is respectfully submitted none the less that the dicta of Gilchrist J. in the Kelshall case, upon which Blagden J. founded his affirmative answer to the first question, were wrong in law, cannot have been retrospectively validated by the subsequent amending legislation, and should be overruled.

The Respondent further submits, in reliance upon all the Judgments in the Courts below, that even if an affirmative answer is given to the first question, either the second question or the third question must be answered in the negative. If the Appellant is entitled to a deduction for the annual payments made by Mrs. Reynolds under the Deed of Covenant, it can only be on the basis that the Covenant constituted a disposition of income to which Section 34(2) applies. If he is not so entitled, then, of course, Section 34(2) can have no application. The Respondent respectfully adopts the view expressed by Hyatali J. upon the inconsistency of the Appellant's argument in this respect.

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Cap.33. No.1.
p. 62
ll. 30-40

13. The Respondent humbly submits that this Appeal should be dismissed with costs, and the Order of the Court of Appeal dated 25th March 1964 affirmed, for the following among other

R E A S O N S

(1) BECAUSE an annual payment made under a deed of covenant can never be allowed as a deduction under Section 10(1)(f), read with Section 12, of the Ordinance unless it constitutes an expense incurred in the production of income: and BECAUSE the dicta to the contrary effect of Gilchrist J. in the Kelshall case were wrong and should be overruled

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(2) BECAUSE in any event the annual payment made by Mrs. Reynolds under the Deed of Covenant cannot be deducted in computing the chargeable income upon which the Appellant has

been assessed by the assessment under appeal

(3) FOR the reasons given by the Court of Appeal

(4) IN the alternative, BECAUSE even if the said annual payments were otherwise deductible in computing the said chargeable income, the deduction would, for the reasons given by Blagden J., be nullified by the provisions of Section 34(2) of the Ordinance. Cap.33 No.1

10.

F. HEYWORTH TALBOT
MICHAEL NOLAN

No.45 of 1964

THE PRIVY COUNCIL

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CASE FOR THE RESPONDENT

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