

judgment no. 23, 11/74



O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR (APPELLATE JURISDICTION)

B E T W E E N:

GERARD PARKES HEYWOOD Appellant

- and -

THE COMPTROLLER-GENERAL OF INLAND REVENUE Respondent

G A S E FOR THE APPELLANT

RECORD

10 1. This is an appeal brought by leave from the Judgment and Order of the Federal Court of Malaya at Kuala Lumpur (Azmi, Lord President, Malaysia, Suffian F.J., H.S. Ong F.J.) dated the 25th of May 1973, dismissing an appeal by the Appellant from an Order of the High Court in Malaya (the Hon. Tan Sri S.S. Gill, F.J.) dated the 19th of August 1972 by which Order the Appellant's appeal against a decision of the Special Commissioners of Income Tax in Malaya

20 dated the 25th January 1972 was dismissed. By their said decision the Special Commissioners had upheld assessments to Income Tax on the Appellant for the years of assessment 1965, 1966, 1968 and 1969 as per notices of additional assessments dated the 12th of October 1968.

30 2. The substantial question raised by the appeal, is whether the sum of \$ 32,000 accorded the Appellant by a letter dated the 31st July 1968 is chargeable to tax as income in respect of gains or profits from an employment within the meaning of Income Tax Act 1967: and if the said sum is so chargeable to tax whether it falls within Section 13(1)(a) of the Act as being a gratuity in respect of the Appellant having or exercising an employment or (as the Appellant contends) it falls within Section 13(1)(e) as being compensation for loss of the

RECORD

employment in which case relief from tax would be granted to the Appellant by paragraph 15 of the 6th Schedule to the Act.

3. The facts of the matter appear from the Record and may be summarised as follows:

(1) The Appellant was employed as a planter by the Straits Rubbert Company from April 1951 to October 1968. The Pattern of his employment was a tour of duty, usually of three years, followed by six months home leave. 10

(2) The Appellant entered into separate agreements, some oral, some written, in respect of each tour of duty. These agreements were as follows:

Agreement dated 24th April 1951 for a term of 4 years from 26.5.51

Agreement for a term of 3 years from 26.2.56 20

Agreement for a term of 3 years from 21.8.59

Agreement for a term of 3 years from 27.3.63

Agreement for a term of 2 years from 26.10.66

(3) The written agreements regulating the Appellant's employment are in the Record and are as follows:

(a) An agreement dated 24th April 1951 providing for: 30

P.24,L.21 Cl. 1 A tour of duty of 4 years

P.27,L.39 Cl. 12 8 months paid leave thereafter

P.28,L. 2 Cl. 13 An option for a further 4 years on the same terms

P.28,L.11 Cl. 14 The employee to be a member of the Company's Provident Fund for permanent employees

(b) An agreement dated 27th March 1962 providing for: 40

P.29,L.29 Cl. 2 A period of service of 3 years and thereafter from year to year determinable at any time by 3 months' notice on either side

- Cl. 7 The employee to be a member of the Company's Provident Fund P.30,L.35
- (c) A letter dated 20th August 1962 offering a further 3 year tour at a specified salary, otherwise on the terms of the service agreement of 27th March 1962. P.58
- 10 (d) A letter dated 14th April 1966 offering a further tour of 2 years at a higher salary, otherwise on the terms of the service agreement of 27th March 1962. P.52
- (4) By a letter dated 31st July 1968 the Company gave the Appellant three months' notice of termination of employment to determine on the expiry of the said 2 year tour. pp.50-51
- 20 (5) By the same letter, the Company accorded to the Appellant the sum of \$ 32,000 expressed to be "as compensation for loss of employment ... ex gratia".
- (6) The Appellant was not re-engaged because, in a reorganisation of the Company's estates, the one of which he had been manager was to be merged with another under the control of a single manager. 30
- (7) The amount of the payment was calculated according to a Company scheme of compensation in case of amalgamation, by reference to age and years of service. p.56
- (8) The Appellant was assessed to Income Tax in respect of the said payment and the Appellant appealed against the additional assessment of income tax on this account. 40

4. The relevant provisions of the Income Tax Act 1967 (Act 47 of 1967) are as follows:

"3. Subject to and in accordance with this Act, a tax to "be known as income tax

shall be charged for each year of assessment:"

"(a) In the case of a person ordinarily resident for the basis year for the year of assessment, upon his income from wherever derived;"

"4. Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of:" 10

"(a) Gains or profits from a business, for "whatever period of time carried on;"

"(b) Gains or profits from an employment"

"13. (1) Gross income of an employee in respect of "gains or profits from an employment includes:"

"(a) Any wages, salary, remuneration, leave pay, fee, commission, bonus, gratuity, perquisite or allowance (whether in money or otherwise) in respect of having or exercising the employment;" 20

"(e) Any amount received by the employee, whether before or after his employment ceases, by way of compensation for loss of the employment, including any amount in respect of;" 30

"(i) A covenant entered into by the employee restricting his right after leaving the employment to engage in employment of a similar kind; or"

"(ii) Any agreement or arrangement having the like effect." 40

"SCHEDULE 6"

"EMPTIONS FROM TAX"

"PART I"

"INCOME WHICH IS EXEMPT"

10 "15. A payment (other than a payment by a controlled company to a director of the company who is not a whole-time service director) made by an employer to an employee of his as compensation for loss of employment or in consideration of any covenant entered into by the employee restricting his right to take up other employment of the same or a similar kind:"

"(a) If the Comptroller-General is satisfied that the payment is made on account of loss of employment due to ill-health; or"

20 "(b) In the case of a payment made in connection with a period of employment with the same employer or with companies in the same group, in respect of so much of the payment as does not exceed an amount ascertained by multiplying the sum of two thousand dollars by the number of completed years of service with that employer or those companies".

30 5. The Appellant appealed to the Special Commissioners of Income Tax claiming that the payment of \$ 32,000 was compensation for loss of office and not a gratuity, and was therefore exempt from tax by virtue of paragraph 15 of Schedule 6 of the Income Tax Act 1967. Alternatively, he claimed, it was a voluntary payment and not a gain or profit from employment under Sections 4(b) and 13(1)(a) of the Act.

40 6. By a Deciding Order dated the 25th day of January 1971 the Special Commissioners dismissed the appeal on the grounds that according to the terms of his service contract, the Appellant had no entitlement to employment after the 25th day of October 1968, was not a permanent employee of the Company and therefore had no entitlement to compensation for loss of office. The payment was therefore a gratuity and was taxable. P.8

7. The Appellant appealed to the High Court in Malaya in Kuala Lumpur and the appeal was heard in open court on the 14th of March 1972

RECORD

by Gill F.J. The learned Judge delivered judgment dismissing the appeal on the 19th of August 1972.

- P.16 He reviewed the facts as found by the Special Commissioners, the contentions of the parties before them and their reasons for reaching their conclusion. The Judge upheld their finding that the Appellant's employment had not been terminated by the reorganisation of the Company's estates; his service contract simply expired; the Company was under no obligation to offer him a further contract and because of the reorganisation it did not do so. 10
- P.16 The Appellant's situation of being employed under a continuous series of separate, short-term contracts must be distinguished from that of an employee under a contract for a general hiring. The Appellant had cited Chibbett v. Joseph Robinson and Sons 9 Tax Cas. 48, 61, and Comptroller-General of Inland Revenue v. Knight /1973/A.C. 428 and prayed in aid various terms of his contract indicating permanent employment, but the fact that certain rules of the Company applicable to permanent employees were also made applicable to the Appellant did not alter the fact that his contracts of service were for fixed periods. The Commissioners had clearly based their Deciding Order on the distinction between this, and a contract of general hiring, as shown by their distinguishing the decision of the Federal Court in Knight's case. In both these cases cited by the Appellant the contract was one for continuous employment. 20 30
- P.18 On the alternative ground of appeal, the Learned Judge referred to Benyon (H.M. Inspector of Taxes) v. Thorpe 14 Tax Cas. 1 Hochstrasse v. Mayes /1960/ A.C. 376 and Commissioners of Inland Revenue v. Wesleyan and General Assurance Society 30 Tax Cas. 11 but in the light of the clearest possible evidence that the payment was made in reference to and by virtue of the Appellant's employment, he could not accept that it was a voluntary payment unconnected with it. 40

8. On the 30th of August 1972 the Appellant gave Notice of Appeal to the Federal Court of Malaysia at Kuala Lumpur against the whole of Gill F.J.'s decision.

9. The appeal came on for hearing in the Federal Court of Malaysia on the 21st of February 1973 before Azmi L.P. Suffian and Ong Hock Sim F.J.J. On the 25th of May 1973 the Federal Court delivered

10 judgment dismissing the appeal. Suffian F.J. reading the judgment of the Court said that the Special Commissioners had found that there were five separate contracts of service between the Appellant and the Company. In giving notice terminating the employment, the Company was exercising the rights under the final contract; there was no agreement for the Appellant to receive any compensation; the Company's scheme for it had been drawn up ex parte. P.63

20 There was no doubt that the Appellant had received compensation. The doubt was whether it was for loss of employment. The Appellant relied on Rowlatt J.'s dictum in Chibbett's case and pointed to various incidents of his employment as showing that it was likely to continue. With respect, the Court preferred the test adopted by Romer L.J. in Henry v. Foster 16 Tax Cas. 605 that compensation was for loss of employment if paid to an employee for deprivation of profits to which he would otherwise have been entitled. On this test the Court accepted the Revenue's argument that the payment to the Appellant was a gratuity. P.67

30 On the alternative ground that it was a voluntary payment, it was conceded by the Appellant that such a payment to the holder of an office by virtue of his employment was taxable, but it was contended that this did not apply to one who had ceased to hold office - see Duncans' Executives v. Farmer (Surveyor of Taxes) 5 Tax Cas. 417 and Benyon's case 14 Tax Cas. 1. However there was clear evidence that the payment was a gratuity in respect of having or exercising employment within the meaning of paragraph (a) of subsection (1) of Section 13. On the test propounded by Viscount Simonds in Hochstrasser v. Mayes it was made in reference to the Appellant's services and something in the nature of a reward for them. The court therefore regretfully dismissed the appeal. P.40

10. On the 7th of January 1974 the Federal Court granted the Appellant final leave to appeal to His Majesty the Yang Dipertuan Agung in Council.

11. The Appellant respectfully submits that the said payment of \$ 32,000 is not income in respect of gains or profits from an employment:

RECORD

accordingly it does not come within any description of chargeable income in Section 4 of the Income Tax Act 1967. If contrary to that submission the said payment is, in principle, chargeable income, the Appellant submits that it is not a gratuity in respect of his having or exercising the employment in question and accordingly does not fall within Section 13(1)(a) of the Act. In so far as the payment is chargeable to tax it is chargeable as compensation for loss of the employment, falling within Section 13(1)(e), and relief from tax is therefore conferred by paragraph 15 of the 6th Schedule. 10

12. The Appellant humbly submits that the decision of the Federal Court was wrong and ought to be reversed and that the appeal ought to be allowed with costs here and below for the following among other

R E A S O N S 20

- (1) BECAUSE the \$ 32,000 payment does not come within the class of gains or profits from an employment in Section 4(b) of the Income Tax Act 1967 and is accordingly outside the scope of charge to income tax.
- (2) BECAUSE the said payment, even if it falls within the expression "gains or profits from an employment" in Section 4(b), is taxable if at all as falling within Section 13(1)(e) and relief is conferred by paragraph 15(b) of the 6th Schedule, and the Federal Court of Appeal erred in law in concluding that the payment was not compensation for loss of employment. 30
- (3) BECAUSE the said payment was not a gratuity in respect of the Appellant having or exercising the relevant employment and accordingly it does not fall within Section 13(1)(a) and the Federal Court of Appeal erred in law in concluding that the said payment was liable to tax as such a gratuity. 40

STEPHEN J.L. OLIVER

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
HOLDEN AT KUALA LUMPUR (APPELLATE
JURISDICTION)

B E T W E E N:

GERARD PARKES HEYWOOD Appellant

-- and --

THE COMPTROLLER-GENERAL OF
INLAND REVENUE Respondent

C A S E FOR THE APPELLANT

SLAUGHTER AND MAY,
35, Basinghall Street,
LONDON EC2V 5DB

Solicitors for the Appellant