

Fon Teen Kission

Appellant

v.

The Commissioner of Income Tax

Respondent

FROM

THE SUPREME COURT OF MAURITIUS

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE  
29TH NOVEMBER 1988  
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*Present at the hearing:-*

LORD TEMPLEMAN  
LORD HAVERS  
LORD ACKNER  
SIR JOHN STEPHENSON  
SIR ROBERT MEGARRY

*[Majority Judgment delivered by Lord Templeman]*

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The appellant taxpayer, Fon Teen Kission, submitted to the respondent, the Commissioner of Income Tax, income tax returns to which were attached accounts of the taxpayer's trading activities. The Commissioner rejected the accounts as unreliable and made the following assessments:-

| " YEAR OF<br>ASSESSMENT | CHARGEABLE<br>INCOME | TAX         |
|-------------------------|----------------------|-------------|
| 1976/1977               | Rs 114,986           | Rs 46,970   |
| 1977/1978               | Rs 117,069           | Rs 39,932   |
| 1978/1979               | Rs 123,194           | Rs 51,707   |
| 1979/1980               | Rs 126,353           | Rs 58,141   |
| 1980/1981               | Rs 124,046           | Rs 52,047   |
| 1981/1982               | Rs 135,537           | Rs 66,371." |

The aggregate chargeable income upon which tax was levied by the assessments amounted to Rs 741,185. The taxpayer appealed to the Tax Appeal Tribunal against the assessments. There were effectively only two grounds of appeal put forward by the taxpayer. The first ground of appeal was that the Commissioner had "failed to give proper consideration" to the taxpayer's lottery winnings which he alleged were:-

| " YEAR OF ASSESSMENT | DATE      | ACCOUNT WON  | LOTTERY              |
|----------------------|-----------|--------------|----------------------|
|                      | September |              |                      |
| 1977/1978            | 1976      | Rs 10,731.25 | Poupard              |
|                      | 8.11.76   | Rs 10,500.50 | Merven               |
| 1978/1979            | 26.7.77   | Rs 3,040.25  | Poupard              |
|                      | 12.6.78   | Rs 17,340.25 | Poupard              |
| 1978/80              | 11.9.78   | Rs 15,378.25 | Poupard              |
|                      | 17.10.78  | Rs 99,398.41 | Mauritius Lotteries  |
| 1980/1981            | 16.10.79  | Rs 3,349.50  | Mauritius Lotteries  |
| 1981/1982            | 5.8.80    | Rs177,206.87 | Mauritius Lotteries" |

The alleged lottery winnings total Rs 336,945.28. The taxpayer contended that an increase in his assets was attributable to lottery winnings. The Commissioner disbelieved this explanation and alleged that the taxpayer had purchased winning lottery tickets from the owners and then proceeded to collect the winnings with the object of camouflaging the amount of his business profits.

The second ground of appeal was that the Commissioners "ignored without appropriate reasons" the accounts submitted by the taxpayer. The taxpayer was thus asserting that his accounts were reliable.

By section 10 of the Tax Appeal Tribunal Act 1984:-

"Notwithstanding any other enactment, the burden of proof that any tax has been paid or any assessment is incorrect or what the amount of any tax payable should be shall lie on the person -

(a) liable to pay the tax; or

(b) claiming that the tax has been paid."

The taxpayer's appeal raised a simple issue of credibility and the onus lay on the taxpayer. Was the taxpayer telling the truth? The taxpayer could prove his veracity by evidence that his accounts were full and accurate or by evidence that the relevant lottery tickets were purchased by him before the winners were drawn. The Tribunal consisted of three members. The Chairman and the Vice-Chairman were members of the Tribunal. Both the Chairman and the Vice-Chairman must by section 3 of the Act be Barristers-at-law of not less than ten years'

standing appointed by the Public Service Commission. There can be no doubt therefore of the qualification or experience of the Tribunal which assembled to determine the issue involved.

The taxpayer gave oral evidence and produced photo-copies of certificates to the effect that the lottery organisers had remitted the respective lottery prizes to him. The authenticity of the certificates was not challenged by the Commissioner but the certificates themselves were not evidence of the dates when the taxpayer purchased the lottery tickets. No other evidence was adduced to the Tribunal.

The Tribunal concluded that the taxpayer could not be believed and "must have purchased winning tickets after the respective draws from bona fide winners in order to camouflage his taxable business profits". The Tribunal accordingly upheld the assessments. The taxpayer appealed by way of Case Stated and his appeal was dismissed by the Supreme Court of Mauritius (Sir C.I. Moollan Chief Justice and V.J.P. Glover Acting Chief Justice). The taxpayer appeals to Her Majesty in Council with the leave of the Supreme Court.

On behalf of the taxpayer Mr. Ollivry submitted that the taxpayer was not given a sufficient opportunity to deal with an allegation which amounted to a charge of fraud. Miss Montgomery, who also appeared for the taxpayer, submitted that the Tribunal should have hesitated long before reaching a decision which involved a finding of fraud. But it must have been plain to the taxpayer from the moment that the Commissioner rejected the taxpayer's explanation for the increase in his assets that the taxpayer was accused, in the current jargon, of laundering his business profits by purchasing lottery tickets which had already become entitled to prizes. The Tribunal could not shrink from the responsibility of deciding whether the taxpayer was telling the truth and the Tribunal came to a firm conclusion adverse to the taxpayer.

Mr. Ollivry submitted that the Tribunal misdirected themselves when they commented that the taxpayer:-

"... had made no attempt to prove that his accounts genuinely reflected his business transactions, with the result that the only issue which had to be determined was

whether the Appellant should be believed when he stated that he had won at the lotteries. If he had established the veracity of these accounts, it would have provided support for his contention that the increase in his assets was attributable to lottery winnings."

Mr. Ollivry pointed out that the Case Stated recorded that:-

"At the hearing the parties agreed that the only issue which the Tribunal should determine was a factual one i.e. whether appellant should be believed when he stated that he won at the lotteries ..."

On behalf of the taxpayer it was contended that this agreement prevented the validity of the taxpayer's accounts from being in issue, and made it unjust for the Tribunal to take them into account. That argument cannot be accepted. Where the issue is whether the taxpayer is to be believed in asserting that increases in his assets were due to winnings on lotteries, there are many matters that are or may be relevant in determining the truth of his assertion. Among these there is evidence of his receipts from other sources. If these are small, that will tend to support his assertion; if they are great, they will tend to refute it. The taxpayer's accounts may thus be an important matter for consideration, not as constituting an issue in their own right, but as being relevant to the agreed issue, namely, the credibility of the taxpayer's assertion of lottery winnings. The taxpayer, carrying the burden of proof before the Tribunal, will thus have to consider whether or not to produce and support his account, and what effect of this will be, and the Tribunal must consider it in reaching a decision. It was the taxpayer acting under legal and no doubt prudent advice who alone decided not to produce any evidence that his business transactions were conducted and recorded in a manner which might give a touch of verisimilitude to a bald and unconvincing narrative of his lottery transactions. The Commissioner of Inland Revenue adhered to his view that the taxpayer's accounts were unreliable. The Tribunal commented truly that had the taxpayer established the veracity of his accounts it would have provided support for his contention that the increase in his assets was attributable to lottery winnings. This comment does not cast any doubt on the decisive finding that the Tribunal did not believe the taxpayer's evidence. It is hard

to see how the Tribunal could have reached a conclusion in favour of the taxpayer who asserted without any supporting evidence that the admitted increase in his assets was not due to his trading activities but was due to eight separate lottery wins in four years whereby the goddess of fortune showered him with Rs 336,945.28 in return for a trifling expenditure of only Rs 20 to Rs 40 every time he bought lottery tickets.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The Appellant must pay the Respondent's costs.

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*Dissenting Judgment by Lord Ackner*

I have the misfortune to find myself reaching a different conclusion from that reached by the Supreme Court and by the majority of their Lordships.

The appellant, Fon Teen Kission, appealed against assessments to income tax for the years of assessment 1976/1977 to 1981/1982 made by the respondent, the Commissioner for Income Tax of Port Louis. Being dissatisfied with the decision of the Tax Appeal Tribunal he required the Tribunal, to state and sign a Case so that he might appeal to the Supreme Court. That Case Stated dated 6th May 1985 records, that the appellant put forward four grounds of appeal, two of which have particular relevance:-

"(1) Because the respondent [the Commissioner of Income Tax of Port Louis] failed to give proper consideration to all receipts regarding capital gains i.e. from lotteries and remittances from abroad which had been submitted to him.

...

(4) Because the accounting records kept by the Appellant appeared to have been ignored without appropriate reason thus causing prejudice to him; it has always been the requirement of the respondent's department for accounting records to be maintained to show the results of the business activities of a taxpayer. Ignorance of [? ignoring] the accounting

records is in contradiction with the principle that a taxpayer should be encouraged to maintain accounting records."

Thus so far as is relevant to this appeal, the appellant was complaining of two quite distinct matters namely:-

- (a) that the respondent was not accepting that he had won money on lotteries;
- (b) that the respondent was not accepting that his accounts genuinely reflected his business transactions.

At the hearing the parties agreed to limit the issues. I quote from the Case Stated, paragraph 2(c):-

"At the hearing the parties agreed that the only issue which the Tribunal should determine was a factual one i.e. whether the Appellant should be believed when he stated that he won at the lotteries on the following occasions -"

There is then set out in respect of the years 1977/78 to 1981/82 various sums alleged to have been won on different dates at different lotteries. The total of these sums varied from year to year from Rs.3,040.25 up Rs.177,206.87.

It seems to me abundantly clear that the parties, as a result of thus limiting the issue for the Tribunal to determine, focused their attentions solely upon whether or not the appellant bought his lottery tickets before the lotteries, thus achieving genuine wins or bought his tickets after the results of the lotteries had been declared from persons who had been successful in the lotteries. I base this conclusion upon the following material derived from the Case Stated:-

1. Under the heading "Facts proved or admitted before the Tribunal" it is stated:-

"(a) Appellant produced photocopies of certificates to the effect that the lottery organisers had remitted the respective lottery prizes to him. The authenticity of the certificates was not challenged by the respondent.

- (b) Appellant spent only Rs.20 to Rs.40 each time he purchased lottery

tickets. Appellant had ceased to buy lottery tickets for the last two or three years despite his luck because the Income Tax authorities said that "he was lying when he said he had won at these lotteries" [I have set out the substance of the quotation in Creole.]

From the above quotation from the Case it will be seen that although the appellant in his fourth ground of appeal had complained that the respondent ought to have accepted the genuineness of his accounts and no doubt was in a position to put forward facts and matters to justify that complaint, he had limited his oral and written evidence to the genuineness of his wins on the lotteries.

Under the heading "Submission of the Parties" it was recorded as follows:-

"(a) It was submitted on behalf of the Appellant that he had discharged the burden of proof incumbent upon him on a balance of probabilities because -

(i) his evidence had not been rebutted;

(ii) no evidence was adduced by Respondent to show from whom Appellant purchased the winning tickets;

(iii) the Respondent without adducing any evidence put in issue a genuine transaction which had been proved by sworn and documentary evidence viz. the certificates of payment by organisers of lotteries."

The above summary of the appellant's submissions again makes it clear that all the appellant was seeking to do and, doubtless thought he was obliged to do, was to establish not only that he received the lottery prizes, but that he had genuinely won them.

The submission of the respondent was recorded in the following terms:-

"It was the contention of the Respondent that certain taxpayers try to explain the increase in their assets over a certain period of time by claiming that the increase is not on account of profit in business but because they have been lucky

at gambling or betting and consequently their winnings should not be taxed as trade profits. Respondent contended that Appellant bought the winning tickets from the owners of those tickets and then proceeded to collect the winnings with the object of camouflaging the amount of his business profits. Respondent had rejected as unreliable the accounts which the Appellant had attached to his income tax returns."

Again it seem to me to be abundantly clear that the respondent was urging the Tribunal to reject the appellant's evidence that he had won money from the lotteries. He contended that the appellant had purchased winning tickets in order to collect their proceeds and thereby committed a fraud on the Revenue. There is no hint of a submission to the Tribunal that the appellant should have not only have directed his evidence to the lottery winnings and how they had been achieved, but should in addition, have gone through his accounts and sought to establish that they genuinely reflected his business transactions. The final sentence in the summary of the respondent's submissions set out above does no more than record the fact that the appellant had attached accounts to his income tax returns, which had been rejected by the respondent.

The Case set out the decision of the Tribunal under four paragraphs as follows:-

"(a) The Appellant had made no attempt to prove that his accounts genuinely reflected his business transactions, with the result that the only issue which had to be determined was whether the Appellant should be believed when he stated that he had won at the lotteries. If he had established the veracity of these accounts, it would have provided support for this contention that the increase in his assets was attributable to lottery winnings.

(b) The Appellant could not be believed especially as he stated that he had stopped buying lotteries for the last two or three years because Respondent was not prepared to accept that he won at the lotteries and that his alleged winnings did not represent business profit. Appellant spent very little money on the purchase of



lottery tickets. According to him he was a consistent winner. He stood to lose very little and had everything to gain by continuing to buy lottery tickets whether or not Respondent accepted his claim. Accordingly, the Tribunal did not accept his explanation as to why he stopped buying lottery tickets and came to the conclusion that he was not a reliable witness.

- (c) The Appellant must have purchased winning tickets after the respective draws from bona fide winners in order to camouflage his taxable business profits.
- (d) The Tribunal concluded that the moneys claimed by Appellant to have been won at the lotteries were not so won but came from his business and formed part of his taxable business profits."

The first sentence of paragraph (a), it is common ground, does not make sense. The limiting of the issues which had to be determined, to whether or not the appellant should be believed when he stated that he had won at the lotteries, was the result of the agreement made between the parties at the hearing, as recorded in the Case and quoted earlier in this judgment. It was not the result of the appellant making no attempt to prove that his accounts genuinely reflected his business transactions. The second sentence in paragraph (a) clearly records that one of the reasons why the Tribunal had refused to believe the appellant, was his failure to establish "the veracity of these accounts". However, as is apparent from the quotations which I have made from the case, and in particular:-

- (a) from the grounds of appeal;
- (b) as to the one issue which the parties agreed at the hearing to leave to the Tribunal;
- (c) from the evidence adduced by the appellant;
- (d) from the submissions made the parties;

the veracity of the accounts was never in issue, save if and in so far as they recorded money alleged to have been won from lotteries.

When the appeal was heard in the Supreme Court in November 1986 the minute of submissions of counsel clearly records:-

- (1) That Sir Hamid Moollan Q.C. on behalf of the appellant clearly took the point that the genuineness of the accounts was not an issue before the Tribunal. The issue before the Tribunal, as he submitted, had been limited in the terms set out in paragraph 2(c) of the Case, as quoted above.
- (2) Mr. Boolell, on behalf of the respondent, not only did not join issue with Sir Hamid on this submission, but is recorded twice as contending that there were only two factors which led the Tribunal to its conclusion, namely the frequency of the alleged winnings by the appellant and his reason for stopping buying tickets in spite of his good luck. Mr. Boolell did not seek to rely upon any failure by the appellant to establish the genuineness of the accounts which he had provided to the respondent.

The Supreme Court (Moollan C.J. and Glover Ag. C.J.) in its judgment given on 2nd February 1987, while failing to deal with Sir Hamid's submission referred to above, strongly emphasised that it was the failure of the appellant to justify his accounts which essentially was the cause of his downfall. I quote from the final paragraphs of the judgment:-

"It seems to us that the Appellant's contention, based as it is on the sole line of argument that a taxpayer, who adduces evidence which prima facie shows that he has won at lotteries and which is not contradicted, should be believed, overlooks the first part of the Tribunal's reasoning as set out above. This is to the effect that a taxpayer who makes no attempt to show that his accounts genuinely reflect his business transactions cannot expect to be blindly believed if he seeks to cover up the unexplained transactions by producing receipts of winnings at lotteries

.....

So that while we agree that where an apparently honourable person whose trading or other accounts are otherwise unimpeachable establishes that he has a

receipt for a win at a lottery should not lightly be disbelieved, we are unable to find fault with the Tribunal's decision in the present case."

It cannot be, and it has not been, disputed that the Tax Appeal Tribunal, in reaching its conclusion that the appellant must have purchased winning tickets after the respective draws from bona fide winners, in order to camouflage his taxable business profits, relied substantially upon his failure to establish that his accounts genuinely reflected his business transactions. But the issue of the validity of those accounts, for reasons which I have endeavoured to set out, was not comprised in the agreed issue in paragraph 2(c) of the Case. Thus the appellant has been found to have committed a serious fraud upon a basis which he never had an opportunity of disputing. That that is a breach of natural justice is self-evident, but if authority is required, it will be found in Mahon v. Air New Zealand Limited [1984] A.C. 808, Sabey & Co. Ltd. v. Secretary of State for the Environment and Others [1978] 3 All E.R. 586, Fox and P.G. Wellfair Limited [1981] 2 Lloyds L.R. 514 and R. v. Mental Health Review Tribunal ex parte Clatworthy [1985] 3 All E.R. 699.

I would accordingly have advised allowing this appeal, setting aside the decision of the Tax Appeal Tribunal and ordering that the appeal be reheard so as to allow the appellant the opportunity to establish the genuineness of his accounts.





