

- (1) **The Minister of Housing and National Insurance and**
(2) **The Attorney General of the Commonwealth of The Bahamas**

Appellants

v.

Frederick R.M. Smith

Respondent

FROM

THE COURT OF APPEAL OF THE
COMMONWEALTH OF THE BAHAMAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
5TH APRIL 1990

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
LORD GRIFFITHS
LORD OLIVER OF AYLERTON
LORD LOWRY

[Delivered by Lord Griffiths]

The Hawksbill Creek Grand Bahama (Deep Water Harbour and Industrial Area) Act (Cap. 235) was passed to enable the government of The Bahamas to enter into an agreement to encourage development of the Hawksbill Creek area of Grand Bahama. On 5th August 1955 pursuant to this statute the Governor of The Bahamas entered into an agreement with the Grand Bahamas Port Authority Limited ("the Authority"). Under the agreement substantial areas of Grand Bahamas were leased to the Authority and the Authority undertook to construct a deep water harbour and to develop the area. As an incentive to encourage this development extensive tax concessions were granted by the government to the Authority and to licensees of the Authority and to those who might live and work in the area. The agreement was in the first place for thirty years but was later extended to thirty-five years.

In 1972 the government of The Bahamas passed the National Insurance Act (Cap. 320) ("the Act"). The Act provides far-reaching welfare benefits for the population of The Bahamas and follows a pattern familiar in this and many other countries who provide

for the social welfare of their people. The contents of the Act are to be gathered by reading the long title;-

"An Act to establish a system of national insurance providing pecuniary payments in respect of sickness, invalidity, maternity, retirement, death, industrial injury and disablement and death from industrial injury, medical care, and of social assistance for insured and other persons not qualifying for such payments as of right and for purposes connected with or incidental to the matters aforesaid."

The benefit under the Act replaced benefits previously payable under the Workmen's Compensation Act and The Old Age Pension Act and both these Acts were repealed.

Part II of the Act is concerned with the establishment of the National Insurance Board which is to run the statutory scheme. Although it is established as an autonomous body section 7 provides that the Minister may give directions of a general or specific character regarding the discharge of the Board's functions to which the Board shall give effect.

Part III of the Act is headed "Insured Persons and Contributions". Section 12 creates three classes of insured persons namely employed persons, self-employed persons and voluntarily insured persons. Section 13 provides that every person over school-leaving age who is either an employed person or a self-employed person shall be insured under the Act and further provides that any person who has been insured but then ceases to be may become insured as a voluntarily insured person. Sections 14, 15 and 16 make provision for the payment of contributions to be paid by insured persons and employers and voluntarily insured persons to the National Insurance Fund which is to be administered by the Board and out of which benefits will be paid. The government also contributes to the Fund by payments from the Consolidated Fund and the government underwrites the Fund in the case of any temporary insufficiency in the Fund to meet its liability (see section 42). Regulations provide for the rates of contribution to be paid; currently (1984) on a weekly wage up to \$59.99 the contribution of the employee is 1.7 per cent and the employer 7.1 per cent: on a weekly wage of \$60.00 or more the contribution of the employee is 3.4 per cent and the employer 5.4 per cent. In the case of a self-employed person the contribution is 8.8 per cent of insurable income if eligible for industrial benefit and 6.8 per cent if not eligible: in the case of a voluntarily insured person it is 5 per cent in either case.

The contributions are compulsory (with the exception of voluntary contributions) and section 17 provides that in the case of employees they are to be paid by the employer who is entitled to deduct the employee's contribution from his wages.

Part IV of the Act contains provisions identifying the nature and rates of various benefits payable under the Act to an insured person.

Part V of the Act deals with the various types of assistance that may be paid under the Act to persons who do not qualify as insured persons for the receipt of benefit under Part IV. This assistance includes old age non-contributory pension, invalidity assistance, survivor's assistance and sickness assistance.

Part VI is headed "Administration Finance and Legal Proceedings". Section 41 provides for the establishment of the National Insurance Fund and section 42 for the duty of Parliament to provide money to meet any insufficiency in the Fund to which reference has already been made. Section 49 makes it a penal offence to fail to pay contributions.

Part VII of the Act contains a number of miscellaneous provisions of which only section 54 is of relevance to this appeal but which it will be more convenient to consider at a later stage.

So far as their Lordships are aware the Act after its introduction in 1972 was complied with by all employers and insured persons working in the Hawksbill Creek area until the present respondent in 1984 challenged his liability to pay contributions either as an insured person or as an employer.

The respondent is an attorney-at-law. He has practised in Freeport Grand Bahama since 4th September 1978, first as an employee for firms of lawyers who were licensees of the Authority and later as a partner in a firm of lawyers and as such he is himself now a licensee of the Authority. Throughout this time the respondent has paid contributions under the National Insurance Act, first as an employed person and later both as an employer and as a self-employed person.

On 2nd October 1984 the respondent commenced proceedings against the Minister of Housing and National Insurance by way of originating summons in which he sought a declaration that he was not liable to pay contributions under the National Insurance Act on the ground that they were a tax from which he was exempt by virtue of the provisions of clause 2(8) of the Hawksbill Creek Agreement. The respondent also raised an alternative claim that if the contributions which he is compelled to pay are not a tax they amount to a deprivation of his property without compensation in breach of Article 27 of the Constitution.

The Chief Justice dismissed the respondent's application holding that the contributions were not a tax and thus not exempt under clause 2(8) of the agreement and that the obligation to pay contributions did not infringe the Constitution.

The respondent appealed to the Court of Appeal which by a majority allowed the appeal in part granting the respondent (1) a declaration that "a contribution" payable under the provisions of the Act is a tax within the meaning of that word as it appears in clause 2(8) of the agreement as it relates to the respondent's contribution as an employer, (2) a declaration that the respondent being a licensee of the Port Authority in the Port area is therefore exempt from the payment of employer contributions under the Act; and (3) a declaration that the respondent is entitled according to law to a refund of all contributions paid by him as such employer.

Smith and Melville JJ.A. who formed the majority both held the employer's contributions to be a tax but that the contributions of employed and self-employed persons were not taxes and did not offend against the Constitution. Henry P. held that all three types of contributions were taxes. Insofar as the contributions were taxes all three members of the court held that clause 2(8) exempted the respondent from liability to pay them.

The appellants and the respondent both appealed from the judgment of the Court of Appeal.

The first question to be decided is whether the obligation to pay contributions under the National Insurance Act is a form of taxation. Leaving aside the payment of voluntary contributions with which this appeal is not concerned, their Lordships are of opinion that the contributions of employed persons, employers and self-employed persons are properly to be regarded as taxes.

The contributions are the means by which the government raises part of the money necessary to bestow a wide range of benefits on the people of The Bahamas. The essential features of a tax are that it is imposed by or on the authority of the State, that its payment is compellable and that it is raised for a public purpose. The contributions fulfil all these requirements.

It is true that the Act is couched in the language of insurance but it operates in a manner wholly divorced from any commercial concept of insurance. There is no direct correlation between the benefits payable to an individual and his contributions and indeed it provides for assistance to be paid to persons who have never at any time paid any contributions. As Dyer J. said in *Leake v. Commissioner of Taxation (State)* [1933] W.A.L.R. 66 "a compulsory contribution, or an impost, may be nonetheless a tax, though not so-called; the distinguishing feature of a tax being in fact that it is a compulsory contribution, imposed by the sovereign authority on, and required from, the general body of subjects or citizens, as distinguished from isolated levies on individuals".

In many other circumstances compulsory contributions levied by the State have been regarded by the courts as taxes.

In *City of Halifax v. Nova Scotia Car Works Limited* [1914] A.C. 992 the Privy Council held that the contribution imposed by the Halifax City Charter in respect of laying sewers was "taxation" on the company's buildings within the meaning of an agreement granting the company a total exemption from taxation.

In *Workmen's Compensation Board v. Canadian Pacific Railway Company* [1920] A.C. 184 the scheme of the Canadian provincial statute was similar to the present Act as appears from the judgment of Lord Haldane (at page 188):-

"It will be convenient in the first place to turn to the provisions of the Act in question. It was passed in 1916, and its primary purpose is to confer on workmen, out of an accident fund which it established, compensation for personal injury by accident arising out of and in course of their employment. The right of the workman does not, so far as Part I of the Act, with which alone their Lordships are concerned in this case, applies, depend on negligence on the part of the employer, as in ordinary employers' liability legislation, but arises from an insurance by the Board against fortuitous injury. The insurance money is not, as in the case of the British Workmen's Compensation Act of 1906, to be paid by the employer directly, but is provided by the Board from a fund which it collects from certain groups of employers generally. Part II of the Act is separate, and deals with employers' liability of the ordinary type, as a different subject."

The question that fell to be determined by the Board was whether the provincial legislature had power to impose taxes for the payment of compensation in respect of an accident which occurred outside the province. In considering this question it was never doubted either in the arguments by counsel or in the judgment of Lord Haldane that the contributions were a tax. Lord Haldane said (at page 190):-

"Nor can it be successfully contended that the Province had not a general power to impose direct taxation in this form on the respondents if for provincial purposes."

And later (at page 192):-

"For the taxation complained of in the present case is imposed with the object of establishing an institution which shall provide insurance benefits for persons whose contract of employment arises within the Province."

In *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Limited* [1933] A.C. 168 the Privy Council held that levies imposed on dairy farmers in British Columbia to remedy a glut on the market of fluid milk as opposed to milk products were taxes. The levies were imposed from the farmers who sold fluid milk. One levy was distributed by an adjustment committee to farmers who sold milk products, and the other levy met the expenses of the committee. Lord Thankerton said (at page 175) "The fact that the moneys so recovered are distributed as a bonus among the traders in the manufactured products market does not, in their Lordships' opinion, affect the taxing character of the levies made".

In *Carmichael, Attorney General of Alabama v. Southern Coal & Coke Co.* 301 U.S. (1936) 495 an Alabama Statute set up a scheme for providing unemployment benefits for workers employed within Alabama by designated classes of employers. Both employers and employees were required to contribute to a fund created for this purpose. The fund was to be deposited in the Employment Trust Fund of The United States Government, and was to be used as requisition by the State Commission to pay unemployment benefits prescribed by the Statute. One of the issues was whether the Statute came within the state taxing power. The Supreme Court of the United States held that the contributions payable under the Statute were a tax. Mr. Justice Stone, delivering the opinion of the Supreme Court, stated (at page 508):-

"Taxes, which are but the means of distributing the burden of the cost of government, are commonly levied on property or its use, but they may likewise be laid on the exercise of personal rights and privileges. As has been pointed out ... such levies, including taxes on the exercise of the right to employ or to be employed were known in England and the Colonies before the adoption of the Constitution, and must be taken to be embraced within the wide range of choice of subjects of taxation, which was an attribute of the sovereign power of the states at the time of the adoption of the Constitution, and which was reserved to them by that instrument. As the present levy has all the indicia of a tax, and is of a type traditional in the history of Anglo-American legislation, it is within state taxing power, and it is immaterial whether it is called an excise or by another name."

In *Metal Industries (Salvage) Limited v. Owners of the S.T. "Harle"* [1961] S.L.T. 114 it was held that compulsory employers' contributions to a State Health Insurance and Family Benefit Scheme for seamen imposed by French law were to be regarded as taxes. Lord Cameron said (at page 117):-

"... it seems to me that compulsory contributions levied by state organisations, both of which come under the authority of a minister, and which are contributions due by employers in respect of state schemes for health, insurance and family benefits for persons employed, are nothing more nor less than taxes or at least charges or impositions of a like nature, and that the sums so levied form part of the revenues of the state. If this view of the matter is correct then it is unnecessary to proceed any further because the first two claims put forward on behalf of the French Government must necessarily fail as being an attempt to enforce a revenue debt of a foreign country."

The foregoing are but a selection of the authorities that support the respondent's submission that compulsory contributions to the National Insurance Act are a form of taxation and their Lordships agree with the opinion of the President that they are to be so regarded.

The next and determinative question is whether the contributions are a form of taxation from which exemption is given by the agreement. Clause 2 of the agreement gives exemption for a period of thirty years (later extended to thirty-five) from a wide range of taxes which were currently imposed in The Bahamas in 1955 when the agreement was signed. The nature of the taxes is described in sub-clauses (6) to (11) of clause 2. They cover property tax sub-clause (6), capital tax (7), income taxes (8), excise taxes (9), export taxes (10) and stamp and banking taxes (11). Sub-clause (27) of the agreement provides that if a tax is imposed which does not fall within sub-clauses (6) to (11) it shall not be imposed at any greater rate than it is imposed in any other part of The Bahamas.

The respondent relies upon the provisions of sub-clause (8) as exempting him from liability to pay contributions under the Act. Sub-clause (8) provides:-

"(8) That for Thirty years from the date of this Agreement no taxes of any kind shall be levied upon or against the earnings of the Port Authority in the Port Area and outside the Colony or upon or against the earnings of a Licensee in the Port Area and outside the Colony or against any rentals or licence fees paid by any lessee or by a Licensee to the Port Authority or upon or against any interests or dividends paid by the Port Authority or by any lessee company of the Port Authority or by a Licensee to the holders of the evidences of indebtedness and/or shares or other securities of the Port Authority or of the company holding such lease from the Port Authority or of a Licensee or upon or against any salaries and remuneration by way of bonus participation

in profits commission or otherwise paid by the Port Authority or by any lessee from the Port Authority or by a Licensee to any person employed by the Port Authority or by such lessee or by a Licensee within the Port Area. Provided that the person receiving such salary and/or remuneration is ordinarily resident within the Port Area."

The contribution that an employer is required to pay under the National Insurance Act is not a tax on the earnings of the employer. The tax is payable regardless of any earnings of the employer. If the employer made no profit and had no earnings he would still be liable to pay contribution in respect of each of his employees. So far as the employer is concerned the tax is not a tax on earnings or on any of the other specific items mentioned in sub-clause (8). It is in truth a tax on employment; a tax which has to be paid by the employer if he chooses to take a person into his employment.

So far as employed and self-employed persons are concerned, if they are looked at in isolation from employers, a powerful argument can be deployed to support the submission that in their case the contributions are a tax on their earnings. The tax is only payable if they have earnings and it is fixed as a percentage of their earnings. If sub-clause (8) is read literally it would appear to exempt the employed and the self-employed from payment of their contributions. But such an interpretation of sub-clause (8), which treats the tax on employers differently from the tax on insured persons, would have bizarre consequences, which could not have been contemplated at the time the agreement was made nearly twenty years before the introduction of the tax introduced by the National Insurance Act.

The liability under the Act to pay contributions in respect of employed persons rests upon the employer and it includes liability to pay the contribution of the employee as well as that of the employer. Regulations made under the Act empower the employer to recover the employee's contribution by deduction from his wages. If, by reason of sub-clause (8) of the agreement the employee is not liable to pay the contribution what is the result? Either the employer remains liable to pay the whole of the employee's contribution but cannot recover it from him in which case the result of the agreement will be to increase the employer's liability for tax rather than to reduce it or alternatively if the employer is not to be liable for the employee's contribution then, because the employee's contribution will not have been paid, the employee will not be eligible for the benefits provided under the Act to an insured person. In support of the view that, if the employer cannot recover the employee's contribution, the employer should not be required to pay it recourse

can be had to clause 27 which prevents the levy of any tax not specifically covered by the agreement at a higher rate than charged in any other part of the Colony. The employer would no doubt argue that if he cannot recover the employee's contribution he is being taxed more highly than employers in other parts of the Colony who can deduct it. If this argument prevails then the employees whose contributions are not paid by their employer would be gravely disadvantaged by losing the benefits to which an insured person is entitled under the Act; a consequence which cannot have been intended by the parties to the agreement.

All the taxes for which exemption is given in the agreement and which are described in sub-clauses (6) to 11 were current taxes of a familiar kind with which those who worked in the Hawksbill Creek industrial area would be familiar in 1955 when the agreement was signed. The agreement made specific reference to the possibility of taxes being imposed that did not fit into any of these categories of taxation and provided that they should not be imposed at a higher rate than elsewhere in the Colony. Contributions paid under the National Insurance Act were introduced as a new form of taxation nearly twenty years after the agreement was signed to finance wide ranging social benefits. They are more aptly described as a tax on employment than a tax on earnings, income or profits. Their Lordships are satisfied that sub-clause (8) should not be construed as covering a tax of this kind which was not in contemplation at the time the agreement was drafted. Accordingly on its true construction sub-clause (8) does not exempt the respondent from paying contributions under the National Insurance Act either in his capacity as an insured person or as an employer.

Finally it is necessary to note section 54 of the National Insurance Act upon which the respondent relies. Sub-sections 1 and 2 provide:-

"54.-(1) This Act shall apply to persons employed by or under the Crown in right of the Government of The Bahamas in like manner as if the Crown were a private person, with such modifications as may be made therein by regulations for the purpose of adapting the provisions of this Act to the case of such persons:

Provided that regulations may provide that any such person or any class of such persons shall be exempted from the operation of this Act.

(2) Nothing in this Act shall operate to require any person to pay any contribution under this Act if such person is entitled to exemption from payment thereof -

- (a) under any enactment; or
- (b) by virtue of any provision in any agreement entered into by or on behalf of the Government under authority especially enacted for the purposes of that agreement by Parliament."

The respondent draws attention to sub-section 2(b) and submits that this sub-section appears in the Act for the very purpose of exempting contribution payments pursuant to clause 2(8) of the agreement. As has already been pointed out sub-clause (8) could not on any canon of construction apply to employers' contributions and thus would not fall within sub-section 2(b) and their Lordships are not persuaded that it could have been the intention that it should apply to the contributions of employed and self-employed persons. If it had been the intention of the Government to exempt all contributions by virtue of this provision it does seem extraordinary that immediately after the passing of the Act demands should have been made for contributions upon all those within the area of the agreement. It seems to their Lordships more likely that section 2(b) was inserted in the Act to cover the possibility of future "contracting out" arrangements under which either employers or the self-employed made private insurance arrangements which would guarantee superior benefits to those available under the Act. However no such agreements were drawn to their Lordships' attention and this is largely a matter of speculation. Their Lordships are satisfied, nevertheless, that the presence of section 54(2)(b) adds nothing to the argument on construction.

In the light of their Lordships' conclusions it is unnecessary for them to consider the alternative argument based upon the provisions of the Constitution.

Their Lordships will accordingly humbly advise Her Majesty that (1) the appeal ought to be allowed in part and the order of the Court of Appeal varied to the extent that the second declaration sought in the originating summons should be refused and (2) the respondent's cross-appeal ought to be dismissed.