820
131

THE HIGH COURT 1983 No. 718R

(REVENUE)

BETWEEN:

JACOBS INTERNATIONAL LIMITED INCORPORATED

Appellants

and

L. O'CLEIRIGH

Respondent

JUDGMENT delivered the 6th day of April, 1984 by Keane J.

The appellants are a company incorporated in Panama which has carried on the business of providing engineering services in Ireland since May 1974. On October 1st, 1975, they entered into an agreement with the Industrial Development Authority under which that Body agreed to pay them a training grant not exceeding £245,000. The grants were in due course paid and the relevant amounts appeared as follows in the appellants' accounts:-

Year ended September 30th, 1976	£162,009-00
Year ended 30th September, 1977	£53,547-00
Year ended 30th September, 1978	£29,440-00
TOTAL	£244,996-00

The appellants made substantial taxable profits. The

respondent treated the grants in question as revenue receipts and fixed the assessments to tax for the relevant years accordingly. The appellants appealed to the Appeal Commissioners; and, following an appeal meeting on May 7th 1981 the Commissioners accepted the contention put forward by the respondent. The appellants declared their dissatisfaction with the decision as erroneous in point of law and required the Commissioners to state a case for the opinion of the High Court. The Commissioners thereupon stated the case which is now before me and which states the point of law (in paragraph 10) as follows:

> "Whether on the evidence before us, we were correct in holding that the training grant received by the (appellants) from the Industrial Development Authority was a revenue receipt."

It was agreed at the hearing before me that the point of law arising which now has to be determined can be formulated in two parts, viz:-

> "(1) Whether the grants referred to the Case Stated are part of the annual profits or gains arising or accruing.... to (the appellants)... from (a) ...

trade within the meaning of s 52 of the Income Tax Act 1976

"(2) If not, whether the amount of the grants must be taken into account in ascertaining the amount of such profits or gains."

While a number of authorities were cited in the course of the argument in relation to the first question, it seems to me that in the end what has to be determined is whether the words "annual profits or gains arising or accruing ... from any trade" in their ordinary meaning are apt to include grants such as were made to the appellants in the present case.

The grants were made under s 39 of the Industrial Development Act 1969 which empowers the Industrial Development Authority to make grants on such terms and conditions as it thinks proper, for the training of persons in the processes of an Industrial undertaking, provided certain requirements are met. By the argreement of October 1st, 1975, the authority agreed to make such grants to the appellants; and certain clauses of that agreement are material.

Clause (6) provides that the payment of the training grant is to be made on foot of an auditor's certificate certifying the actual number of jobs created in the

undertaking. Clause (8) provides that if at a specified date the total number of permanent full-time jobs created in the undertaking is less than 150, the appellants are to repay to the authority all grant monies received by them in excess of a specified sum. Clause (14) provided that the authority might at any time within ten years from the date of the agreement demand from the appellants the repayment of the grant monies paid to the appellants in the event of any one or more of a number of specified events happening. Clause (15) provided that, upon such a demand being made and not being complied with, the monies due should be recoverable by the authority.

It is obvious that a grant may be made by the authority under the section before any trade is carried on by the recipient; and that the whole or part of the grant may become repayable to the authority in certain circumstances. This consideration alone would suggest that the description of the grants as "profits or gains" arising or accruing from such a trade is inappropriate. Quite apart from that feature of the present case, I do not think it would occur to one to describe grants of this nature given by the Oireachtas for a specified purpose as profits or gains arising from a trade. Accordingly,

unless there was clear authority to the contrary, I would be inclined to the view that the grants in question were not such profits or gains.

Of the Irish authorities cited during the hearing, Robinson -v- Dolan ((1935) I.R. 509) appears most in point. In that case the tax-payer carried on a business as a merchant in Mountmellick and Mountrath which was boycotted by local people from 1921 onwards because he was known to be a supporter of the British Government. He was awarded a grant by the Irish Grants Committee set up by the British Government in 1926 to compensate persons who, because of their support of the British Government prior to July 11th, 1921, had sustained hardship and loss. It was held by the High Court, reversing the decision of the Special Commissioners, that the grant was not part of the profits or gains arising from the trade carried on by the tax-payer. The principal argument advanced on behalf of the Revenue in that case was somewhat different: it was submitted that, as the amount of the grant was calculated by reference to the tax-payer's trading loss, it was in the nature of a trading receipt. It was held by the High Court, however, that, although the grant was calculated by reference to his

trading loss, the test for determining whether it was a trading receipt was the character in which it had been received Since it had been received by him in his capacity as a supporter of the British Government and not in his capacity as a trader, it was, accordingly, not part of the profits or gains arising from the trade. The point is, accordingly, not the same as the point which arises in the present case; but there are some helpful observations in the judgment of Hanna J. as to the principles which should be applied. Referring to the meaning to be given to the words "profits or gains", he says (at p.527):

"They are the ordinary, dictionary, meanings:- 'buying and selling and the result thereof,' 'something earned', 'the reward of capital'. It is important to notice that under the rule these words are linked up by the phrase 'arising or accruing from'. Read in relation to trade and profits these words should give no difficulty. An ordinary paraphrase, if such is necessary, would be 'resulting from the carrying on of the trade' or, to accept Mr FitzGibbon's metaphor, the trade is the tree and the profits are the fruits thereof."

One might extend Counsel's metaphor in that case to say

that the grants in the present instance are the nutrient which enables the tree to grow rather than the fruit thereof.

In the course of his judgment in Robinson -v- Dolan, Hanna J refers to certain principles enunciated as to the meaning of "trade" by the Court of Appeal of Saorstat Eireann in Arthur Guinness Son & Company Limited -v- Commissioners of Inland Revenue ((1923) 2 I R 186). In that case, the argument on behalf of the tax-payer was accepted in the Court of Appeal by O'Connor M R and Ronan L J. It was rejected, however, by Moloney C J and Dodd J in the King's Bench Division and by Pim J., dissentiente, in the Court of Appeal. The decision has, moreover, attracted strong criticism in England from both the Court of Appeal and the House of Lords: see Commissioners of Inland Revenue -v- Newcastle Breweries Limited (12 T.C. 927). It is, however, a decision which should presumably be treated as binding in this country unless and until the Supreme Court say otherwise; and, in any event, it was the application of the principles in question to the facts of the particular case which attracted criticism rather than the principles themselves.

The only other Irish authority referred to was Wing -v-

O'Connell ((1927) I.R. 84, 97) in which the Supreme Court held that a gift to a professional jockey by the owner of a horse which he had ridden to victory was taxable as being part of the profits or gains arising from his profession. That case is clear authority for the proposition that, where payment is received by a person as the result of the exercise of his vocation, it is immaterial that the payment was made voluntarily. It is conceded on behalf of the appellants in the present case that the fact that the authorities were under no obligation to make the grants in question does not necessarily prevent them from being taxable and, accordingly, it is not necessary to consider further the application of Wing's case to the present case.

Of the English cases cited, that most in point is Seaham Harbour Dock Company -v- Crook (16 T.C. 333). In that case, a dock company contemplating an extension of its dock applied to the Unemployment Grants Committee of the British Government for financial assistance. The committee consented to sanction grants from time to time, as the work progressed and was paid for, and the grants were calculated by reference to the interest

on expenditure approved by the Committee out of loans from other parties. It was held that these payments were not annual profits or gains liable to tax; and, while some at least of the judgments proceed on the basis that they were payments in the nature of capital rather than income, there is an observation of a more general nature in the speech of Lord Atkin in the House of Lords, which is of relevance to the present case. He says (at p,353):-

> "It appears to me that when these sums were granted and when they were received, they were received by the appropriate body not as part of their profits or gains or as a sum which went to make up the profits or gains of their trade. It is a receipt which is given for the express purpose which is named, and it has nothing to do with their trade in the sense in which you are considering the profits or gains of the trade".

The next English case referred to was Smart -v- Lincolnshire Sugar Company Limited (20 T.C. 643). In that case, the payments sought to be taxed were subsidies paid to the tax-payer for sugar manufactured by it. It was held that they were taxable, since they were intended to supplement the trading receipts of the tax-payer, so as to enable it to maintain its trading solvency. (See the speech of Lord MacMillan in the House of Lords at p 671). They were, accordingly, wholly

different in character from the grants in the present case. The same must be said of the payments to the tax-payer in London Investment and Mortgage Company Limited -v- Worthingto (38 T.C. 86), another of the English cases referred to, where they represented compensation for war damage to property. Since the property was part of the stock-in-trade of the tax-payer, it was held that they were trading receipts and, accordingly, liable to tax in the ordinary way.

The last of the English cases referred to was Burman -v- Thorn Domestic Appliances (Electrical) Limited (1982) S.T.C That was also a case in which a Government Department made grants to a company which were treated by the Inspector as revenue receipts to be taken into account in determining the amount of a tax loss. The argument on behalf of the company was that the payment was of a capital nature for the purpose of defraying the capital cost of setting up a new factory. It was held that the grant was applied for and received as an "interest relief grant" to relieve the company of some of the interest which it would otherwise have had to pay to the Bank. It was, accordingly, properly taken into account as an income receipt. Seaham Harbour Dock Company -v- Crook wa

distinguished on the ground that in that case the payment was clearly of a capital nature. It is also clearly distinguishable from the present case where the grants were not made in order to relieve the appellants of payments such as interest payments but for the specific purpose of training persons to be employed in an industry intended to be established by the appellants.

I am satisfied that the authorities cited confirm the view which the ordinary meaning of the words would suggest that the grants in this case are not part of "the annual profits or gains arising or accruing ... from any trade...".

The second question raised by the case stated is whether in computing the amount of the profits or gains to be charged and, for that purpose, determining the sum to be deducted in respect of the cost of training incurred by the appellants, the amount of the grants must be taken into account. There would seem to be no reason in principle why in determining whether particular expenses are deductible, account should have to be taken of the fact that the expenses in question may have been defrayed in whole or in part by some person other than the tax-payer. This impression is confirmed when one

finds that the legislature themselves have proceeded on precisely that assumption by making express provision that such defrayment is, in specified circumstances, to be taken into account. Thus, in s 305 of the Income Tax Act 1967 there is provision for the deduction of expenses for income tax purposes incurred by a person on the recruitment and training of local staff before trading actually commences. Sub-section (2) (b) provides that:-

> "Expenditure shall not be regarded as having been incurred by a person insofar as it has been or is to be met directly or indirectly by the State, by any Board established by Statute or by any Public or Local Authority."

Similar provisions are to be found in s 244 (8), s 245 (2) and s 303 (3) of the Act of 1967.

Such relevant authorities as there are tend to support the view that, in the absence of specific legislative provision of this nature, contributions by way of grant towards the relevant expenditure should not be taken into account. Thus in Corporation of Birmingham -v- Barnes (19 T.C. 195)

Lord Atkin said (at p.216):-

"What a man pays for construction or for the purchase of a work seems to me to be the cost to him; and that whether someone has given him the money to construct or purchase for himself, or before the event has promised to give him the money after he has paid for the work, or after the event has promised or given the money which recoups him what he has spent."

In that case, the relevant section had used the words "actual cost to that person"; but the approach adopted lends some support, in my view, to the argument advanced on behalf of the appellants in the present case and none to the argument advanced on behalf of the respondent.

A more recent decision of the Court of Appeal in Northern Ireland (Cyril Lord Carpets -v- Schofield (42 T.C. 637)) was also referred to. In that case, it was held that, in computing capital allowances certain grants from the Government in respect of capital expenditure on plant or machinery had to be taken into account. There, however, the Court had to consider a sub-section in almost identical terms to s.305 (2)(b) of the Act of 1967 to which I have already referred; and the only

question was whether the words "met directly or indirectly" included the reimbursement by the granting authority of expenditure already incurred by the person applying for the grant. The decision is, accordingly, of no assistance in the present case.

The only other case which need be referred to is Westcombe -v- Hadnock Quarries Limited (16 T.C. 137). In that case, the respondent company was the sucessor of a company which had constructed a railway junction and siding to serve the quarry owned by them. The railway company agreed to pay them a certain share of the receipts in respect of the traffic conveyed to or from the siding, as the firm had borne the cost of construction of the siding. The company claimed that they were entitled to deduct the freight charges of the railway company in full for the purpose of computing their profits and gains, without taking into account the allowances made by the railway company under the agreement with their predecessors. They submitted that these were essentially payments in respect of capital. It was held, however, that they were essentially revenue receipts and, accordingly,

properly taken into account in ascertaining the actual expenses which the respondents were entitled to deduct. While the decision undoubtedly is more in favour of the respondent than the other authorities to which I have referred, it seems to me distinguishable from the facts in the present case. In that case, the court was concerned with charges made by one trading company upon another and concluded that it was th net charges only which could be taken into account in arrivir at the sum properly deductible. That seems to me to give ris to different considerations from those in the present case.

I am satisfied that in determining what deductions should be allowed for the purpose of computing the profits or gains of the trade in the present case, the grants paid by the authority should not be taken into account

It follows that the appeal should be allowed.

Counsel agreeing a

following order

For Appellant: T. McCann S.C.

For Respondent: D. Byrne