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THE HIGH COURT

1986 No. 406 Sp.

IN THE MATTER OF WAYTE (HOLDINGS) LIMITED  
(IN RECEIVERSHIP)

BETWEEN:

ALEX BURNS

APPLICANT

AND

EDWARD N. HEARNE

RESPONDENT

Judgment of Mr. Justice Costello delivered the 9th day of  
October, 1986.

*Mary P. Donoghue  
Regr.*

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The Facts

This application (brought under section 316 of the Companies Act, 1963) raises for determination the liability of a receiver appointed by a debenture holder over the assets of a company for corporation tax payable under the Corporation Tax Act, 1976 on "profits" arising during the receivership.

A company called Wayte (Holdings) Limited executed mortgage debentures on the 2nd September, the 14th October, and 31st October 1974 in favour of Foir Teoranta by which it and certain other named companies charged their assets in favour of Foir Teoranta as security for loans made available by Foir Teoranta. On the 12th September 1975 the applicant was appointed receiver of the company's assets under the terms of the debentures. They were in the usual form appointing him agent of the company (and not of the debenture holder) and empowering him to "enter upon take possession of collect and get in the mortgaged property" (see paragraphs 5(e) and 6(a) of the 2nd Schedule of the debenture deeds). Since his appointment monies have come into his possession which were deposited by him with the Agricultural Credit Corporation. The deposit was in his name as "receiver" of the company. Interest accumulated on the sums deposited and the Inspector of Taxes has claimed (a claim which the receiver has resisted) that the receiver is liable to pay corporation tax on the interest which the money has earned. This is the issue I am now required to determine.

The Corporation Tax Act, 1976

A new tax was created by the Corporation Tax Act, 1976. For years of assessment after the years 1975-'76 the provisions of the Income Tax Acts relating to the charge of income tax

ceased to apply to the income of companies (section 1(2) of the 1976 Act). Instead, there was charged "on the profits of companies a tax, to be called corporation tax" (section 1 (1)) and every resident company in the State became "chargeable to corporation tax on all its profits" (section 6). The 1976 Act contained no express provision imposing a liability on a receiver to pay the corporation tax, but the inspector claims that such a liability arises because of the adoption into the corporation tax code of some of the provisions of the Income Tax Act, 1967. The most relevant section is section 11 of the 1976 Act. Subsection (1) of that section provided that in the computation of the income of a company for the purposes of corporation tax the principles of income tax are to apply, and subsection (6) provided:

"Without prejudice to the generality of subsection (1) any provision of the Income Tax Acts ..... or of any other statute which confers an exemption from income tax, or which provides for the disregarding of a loss, or which provides for a person to be charged to income tax on any amount (whether expressed to be income or not, or whether an actual amount or not), shall, except as otherwise provided, have the like effect for the purposes of corporation tax."

I have underlined the words of the subsection which enact that a provision of the Income Tax Act of 1967 "which provides for a person to be charged" are to have the same effect in relation to corporation tax as they do for income tax because the Inspector's case is that by these words certain provisions of the 1967 Act (to be specific, section 105) which he says imposed an obligation on a receiver appointed by a debenture holder to pay income tax are applied in relation to the payment of corporation tax.

Before considering section 105 of the 1967 Act it is necessary to confront a serious difficulty which the 1976 Act places in the Inspector's way. Quite explicitly corporation

tax is charged on the profits of companies and companies themselves are declared to be chargeable to the tax. How then can it be said that the receiver can be made liable to pay the tax? The Inspector's contention is that a distinction can be made in the 1976 Act between those provisions which charge the tax and those which create a liability to pay it and it is claimed that, although corporation tax is charged on companies, liability to pay the tax is imposed on receivers from the incorporation of the provisions of the income tax code.

I cannot accept that the 1976 Act can be construed in the manner the Inspector suggests. As already pointed out section 6 provides that resident companies are "chargeable" to tax. Every company chargeable to corporation tax which has not made a return for an accounting period is required to give notice to the Inspector that it is chargeable (section 142). A company may be required by a notice served by an Inspector to make a return of profits (section 143). Assessments to corporation tax are to be made by the Inspector and where a company on whose profits the tax is to be assessed is resident in the State the tax "shall be assessed on the company" (section 144). The Collector General "shall collect and levy" the tax charged on all assessments to corporation tax of which particulars have been transmitted to him and all such powers as are exercisable with respect to the collection and levying of sums of income tax under Schedule D of the 1967 Act extend in respect of sums of corporation tax of which particulars are transmitted to the Collector General. (Section 145).

These provisions do not admit of the possibility that someone other than the company might be made liable to pay tax charged on the company. Corporation tax, like income tax,

is charged by making assessments. Assessments under the Act are to be made on the company which has made the profits which are subject to the tax. The Collector-General collects the tax which is assessed and from the company on whom the assessment was raised and from no one else.

In this connection the role of company secretaries in relation to corporation tax is of some relevance. When a company becomes chargeable under the 1976 Act it is required to give notice to the Inspector of this fact and not only the company but also the company's secretary is liable to a fine in the event of default (section 141). Similar sanctions are imposed on company secretaries in relation to returns of profits by companies (section 143), but it is to be noted that the tax is not assessed on the company's secretary - the obligation imposed on him is to ensure compliance by his company with the provisions of the Act. This obligation is similar to that which was imposed on company secretaries under the 1967 Act in relation to income tax. Section 207 (2) provided that the treasurer or other officer acting as such, auditor or receiver for the time being of any body of persons chargeable to tax (a phrase which includes companies) "shall be answerable" for doing all such acts as are required to be done under this Act, for the purpose of the assessment of such body and for the payment of the tax. There was however a special proviso to the subsection dealing specifically with companies which provided that "in the case of a company, the person so answerable shall be the secretary of the company or other officer (by whatever name called) performing the duties of secretary." The secretary was not made personally liable for payment of the income tax. It was not charged on him. He was merely "answerable" for the company's obligation to perform certain acts, and was liable to be

fined if the company defaulted in its obligations (section 503).

Income Tax Act, 1967; section 105

I come now to consider the adoption into the corporation tax code of certain of the provisions of the income tax code which was effected by section 11(6) of the 1976 Act. The Inspector's main contention was that section 105 of the 1967 Act has been applied to corporation tax and that as a result a liability to pay corporation tax was imposed on receivers. In this connection two points arise; (a) did this section impose a liability on a receiver appointed by a debenture holder over the assets of a company to pay income tax under the 1967 Act on the income arising during the period of his receivership? And (b) if so, has that section been adopted by section 11(6) of the 1976 Act?

Section 105 enacts that:

"Tax under Schedule D shall be charged and paid by the persons or bodies of persons receiving or entitled to the income in respect of which tax under that Schedule is in this Act directed to be charged."

As section 1 of the 1967 Act defines a "body of persons" as including a "company" this section means that if a company receives or is entitled to any income in respect of which tax under Schedule D is directed to be charged then tax under Schedule D is charged on the company and the company is required to pay the tax. But the section also refers to persons "receiving or entitled to receive" income in respect of which tax under Schedule D is directed to be charged and when a debenture holder appoints a receiver over the company's assets who then carries on the company's trade a question then arises as to whether by virtue of this section he (and not the company) "receives or is entitled to receive" the

company's taxable income within the meaning of the section. If he does then (unlike the company's secretary) he can be personally assessed for the tax and become personally liable to pay the tax on the income which arises during his receivership.

This question was directly addressed in Inland Revenue Commissioners .v. Thompson (1937 I. K.B. 290) a case in which Rule 1 of the Miscellaneous Rules to Schedule D contained in the Income Tax Act, 1918 (re-enacted word for word by section 105 of our 1967 Act) was required to be construed. The company in that case had created two issues of debentures. The debenture holders under the first issue appointed a receiver who carried on the company's business, paid off the debenture debt and then retired. The same receiver was re-appointed by the second debenture holders and he continued to carry on the company's business. During his period of trading the company made a profit and assessments to income tax were made on the receiver firstly as the receiver under the first debenture and then as receiver under the second debentures. Two points were argued; firstly as to whether the assessments were properly made upon the receiver as being the person "receiving or entitled to the income" under the rule, and secondly (a point which does not arise in this case) as to whether the receiver ought to be assessed on the basis of being a person who had succeeded to the trade of the company. The case is not entirely satisfactory because the two debentures were not identical, the second specifically providing that a receiver appointed under it would be the agent of the company which the first did not. The Court (Lawrence, J.) held that the receiver

was the proper person to be assessed in respect of the profits arising during both periods of his receivership, as he had in each period "received" the income of the company within the meaning of the rule. It was pointed out (p. 301) that under the debentures the receiver was empowered to take possession of the company's property, and to carry on its business and that if he did so he then "received" the income of the company within the meaning of the rule as the words "receiving income" meant receiving in fact the income.

I find these arguments persuasive and respectfully agree with them for even in those cases in which the receiver is declared to be the agent of the company he in fact "receives" the money which his activities generates and remits it to the debenture holder. It follows, therefore, that had the income tax provision of the 1967 Act not been replaced in relation to companies that the receiver in this case would have had to pay income tax on interest earned on the money he deposited in the A.C.C.

But I do not consider that the Inspector can rely on section 105 for the purposes of raising an assessment on the receiver for the corporation tax payable on the interest which has been earned because Section 105 has not, in my judgement, been made part of the corporation tax code by section 11 (6) of the 1976 Act (or by any other section of that Act). The adoption provisions contained in that section are heavily qualified - the provisions in the Income Tax Acts which provide for a person to be charged to income tax are to have the like effect for purposes of corporation tax "except as otherwise provided". "Other provision" has in fact been made in the 1976 Act - as already pointed out, the 1976 Act expressly and unambiguously declared that companies are



chargeable for the new tax on all their profits, and assessments are to be made on companies, and no one else. This being so, provision having been made for charging and assessing companies themselves, it cannot be said that the section operates to adopt into the code an entirely different provision which would entitle an Inspector to assess a person who "receives" the company's income and make such a person liable to pay the tax.

Nor can it be said that there has been a sort of partial adoption into the corporation tax code of section 105, that is, only that part of it which imposes a liability to pay the tax on persons receiving a company's income. It is true that the section provides that income tax is to be charged on persons receiving the income therein referred to and that in addition it provides that such persons are to pay the tax. But this does not mean the section is referring to two separate classes of person - those that are charged and those that are required to pay - and it is clear that liability to pay income tax is only imposed on those on whom it is charged according to the assessment procedures contained in the Act. Furthermore, section 11(6) of the 1976 Act specifically incorporates those provisions of the Income Tax Code which make provision for a person to be charged to income tax, and it would not be permissible, in my view, to adopt for the purposes of the corporation tax code that portion of section 105 which relates to payment of the tax by those who receive a company's income whilst ignoring (because provision for charging corporation tax on companies is already made in the 1976 Act) that portion of section 105 which imposes a charge on such individuals.

If section 105 does not apply it remains to consider

whether any other provisions of the 1967 Act have been incorporated by the 1976 Act so as to impose on the receiver the suggested liability.

Income Tax Act, 1967: sections 207 and 212

I have already mentioned section 207 of the 1967 Act in connection with the responsibilities of a company's secretary under the income tax code. The proviso to section 207 (2) provides that in the case of a company the person answerable for doing the acts referred to in the subsection is to be the secretary of the company, "or other officer (by whatever name called) performing the duties of secretary", and a question was raised as to whether a receiver can be regarded as an officer of the company performing the duties of a secretary and therefore bound by the duties imposed on secretaries by this subsection. But I do not think that I am required to answer that question because I do not think that the subsection was adopted by section 11 (6) of the 1976 Act. As I have already pointed out, section 11 (6) provides that those provisions of the 1967 Act which relate to "persons to be charged" with liability for income tax are to be applied to corporation tax, but section 207 of the 1967 Act is not a charging provision - it merely made a company's secretary (and other officers carrying out the duties of a company secretary) "answerable" for doing the acts referred to in the subsection. In support of this view it is to be noted that in the Thompson case no attempt was made to rely on rule 1 of the General Rules contained in the 1918 Act (which had been re-enacted in section 207 of the 1967 Act) for the purpose of imposing a liability on receivers for income tax on the profits

of the company over whose assets he had been appointed.

Section 212 of the 1967 Act was expressly applied to corporation tax by a different section, section 147 (2) of the 1976 Act. This section however is of no avail to the Inspector here because it only applies to receivers appointed by the Court (who are declared to be assessable and chargeable with tax in like manner and to the like amount as if the property in respect of which the tax is charged was not under the direction and control of the Court).

It follows that I must answer the first question raised in the Summons by stating that the applicant is not liable to pay corporation tax on the interest earned on monies coming into his possession or control as receiver of the company.

*Approved*

*JL*

*9-10-26*