Uganda

3, 1955

In the Privy Council.

No. 42 of 1953.

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA

BETWEEN

THE COMMISSIONER OF INCOME TAX ... ... *Appellant*

AND

H. BJORDAL ... ... *Respondent.*

RECORD OF PROCEEDINGS

INDEX OF REFERENCE.

No.	Description of Document	Date	Page
	IN THE HIGH COURT OF UGANDA.		
1	Memorandum of Appeal	13th February, 1951...	1
2	Decision of Commissioner—Annexure "A" ...	29th January, 1951 ...	2
3	Statement of Facts of Bjordal ...	... ...	2
4	Statement of Facts of Commissioner	... ...	4
5	Notes of Pearson, J. of Proceedings	31st May, 1951 ...	5
6	Reasons for Judgment of Pearson, J.	29th June, 1951 ...	6
7	Decree	29th June, 1951 ...	9
	IN THE COURT OF APPEAL FOR EASTERN AFRICA.		
8	Memorandum of Appeal	30th August, 1951 ...	10
9	Notes of Nihill, P. of Proceedings	10th January and 28th April, 1952 ...	11
10	Reasons for Judgment		
	(a) Worley, Vice-President	28th April, 1952 ...	13
	(b) Nihill, President	28th April, 1952 ...	21
	(c) Ainley, J.	28th April, 1952 ...	21
11	Decree	28th April, 1952 ...	23
12	Order granting conditional leave to appeal to Her Majesty in Council	8th September, 1952	24
13	Order granting final leave to appeal to Her Majesty in Council	28th April, 1953 ...	25

UNIVERSITY OF LONDON
W.C. 1.

-3 JUL 1956

INSTITUTE OF ADVANCED
LEGAL STUDIES

13505

In the Privy Council.

No. 42 of 1953.

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA

BETWEEN

THE COMMISSIONER OF INCOME TAX ... ... *Appellant*

AND

H. BJORDAL ... ... *Respondent.*

RECORD OF PROCEEDINGS

No. 1.

Memorandum of Appeal.

In the High Court of Uganda.

No. 1. Memorandum of Appeal. 13th February 1951.

IN HIS MAJESTY'S HIGH COURT OF UGANDA AT KAMPALA.

Miscellaneous Appeal No. 2 of 1951.

H. BJORDAL, Company Director, c/o P. J. Wilkinson, Esq., Advocate, Kampala ... ... *Appellant*

versus

THE COMMISSIONER OF INCOME TAX ... ... *Respondent.*

10

APPELLANT appeals against the decision of the Respondent dated 29th January, 1951, a certified copy of which is attached hereto and marked " A " upon the following grounds :—

(1) That the Respondent erred in law and fact in holding that Bjordal Mines, Ltd., is a company to which Section 21 (1) applies and in not holding that proviso (b) of the said section applies to the said Bjordal Mines, Ltd.

(2) The Respondent erred in law and fact in holding that Bjordal Mines, Ltd., is not a company in which the public is substantially interested within the meaning of Section 21 (2) of the Income Tax (Amendment) Ordinance, 1943.

20

Dated at Kampala this 13th day of February, 1951.

P. J. WILKINSON,
Counsel for Appellant.

Filed by :
P. J. WILKINSON, ESQ.,
Advocate,
Kampala.

In the High Court of Uganda.

No. 2. Decision of Commissioner. Annexure "A." 29th January 1951.

No. 2.

Decision of Commissioner—Annexure "A."

UGANDA PROTECTORATE

THE INCOME TAX ORDINANCE, 1940.

Re : H. Bjordal—Assessment No. 20831 of 1950.

Certificate of the Commissioner of Income Tax under Rule 4 of the Income Tax (Appeals to the High Court) Rules, 1944.

I, VICTOR HERBERT MERTTENS, the Commissioner of Tax appointed to administer the Income Tax Ordinance, 1940, hereby certify that the decision appealed against in the above matter is as follows :— 10

(a) That Bjordal Mines, Limited, a limited liability Company registered at Kampala, Uganda, on the 25th day of March, 1948, and having its registered offices in the Uganda Protectorate is a company to which Section 21 (1) of the Income Tax Ordinance, 1940, applies and that the provisos (a) and (b) to the said section do not apply.

(b) That Bjordal Mines Limited is *not* a company in which the public is substantially interested as defined by Section 21 (2) of the Income Tax Ordinance, 1940.

Dated at Nairobi this 29th day of January, 1951. 20

(Sgd.) VICTOR H. MERTTENS,
Commissioner for Income Tax.

No. 3. Statement of Facts of Bjordal.

No. 3.

Statement of Facts of Bjordal.

1.—Appellant is a shareholder in Bjordal Mines, Ltd.

2.—The authorized capital of Bjordal Mines, Ltd., is Shs. 250,000/- divided into 12,500 shares of Shs. 20/- each.

3.—The said share capital is divided into 8,125 " A " and 4,375 " B " shares each of 20/- of which the " A " shares are not transferable without the consent of the directors. The " B " shares are freely transferable and have equal voting and dividend rights as have the " A " shares. 30

4.—The said company is a public company.

5.—Appellant is the holder of 7,632 " A " shares and 1,249 " B " shares in the said company.

The following persons are shareholders in the company :

(a) S. H. Bjordal holding 3,121 " B " shares.

(b) H. N. Hoyer holding 1 " B " share.

(c) P. J. Hoyer holding 1 " B " share.

(d) B. Drosopoulos holding 1 " B " share.

(e) L. G. Appendin holding 1 " B " share.

(f) A. Cavedon holding 1 " B " share.

10 6.—The persons named in para. 5 hereof are members of the public and hold between them more than 25 per cent. of the shares of the company and such shares carry full voting rights and are and always have been freely transferable by the holders to other members of the public.

7.—By an agreement dated 25th March, 1948, the Appellant sold to the said company various mining titles and rights then held by him in consideration of the allotment to him of 12,000 shares in the said company being shares of " A " and " B " class in such proportion as Appellant should elect all to be credited to Appellant as fully paid up. The shares were allotted on the 19th April, 1948, consisting of 7,632 " A " shares and 4,368
20 " B " shares.

8.—By an Indenture dated 19th April, 1948, Appellant sold to Sverre Hendrik Bjordal 3,120 " B " shares out of the said 4,368 " B " shares allotted to Appellant as aforesaid, for the sum of £18,720.

9.—There are no restrictions upon free transfer of the shares sold to the said S. H. Bjordal by the said Indenture.

10.—On 13th April, 1947, one " B " share was transferred by E. H. St. John Shelton to S. H. Bjordal.

11.—Appellant will refer to the Memorandum and Articles of Association of Bjordal Mines, Ltd., the minutes and to returns made to the
30 Registrar of Companies from time and to the Indenture mentioned in para. 8 hereof at the hearing.

P. J. WILKINSON,
Counsel for Appellant.

In the High Court of Uganda.

No. 4. Statement of Facts of Commissioner.

No. 4.

Statement of Facts of Commissioner.

1.—The Appellant appeals against an assessment contained in Notice of Assessment No. 20831 for the year of assessment 1950 relating to the year of income 1949.

2.—The said Notice of Assessment included as income of the Appellant the sum of £3,580 being in respect of dividends deemed to have been distributed as dividends among the shareholders under Section 21 of the Income Tax Ordinance, 1940, from the Bjordal Mines Ltd.

3.—The Bjordal Mines Limited is a company incorporated in 1948, 10 and the income of the said company for the year 1949 as computed for income tax purposes was the sum of Shs. 161,340/– of which no portion was distributed as dividends. In exercise of his powers the commissioner of Income Tax served notice under Section 21 of the Income Tax Ordinance, 1940, deeming 60 per cent. of that sum to have been distributed among the shareholders. The said 60 per cent. amounted to a sum of Shs. 96,804/–.

4.—The said sum of Shs. 96,804/– was deemed to have been distributed among the shareholders as set out below:

H. Bjordal	Shs. 71,602/–
S. H. Bjordal	25,162/–
L. G. Appendin	8/–
H. N. Hayer	8/–
J. P. Hayer	8/–
Basil Drossopoulus	8/–
A. Cavedin	8/–
	Shs. 96,804/–

20

5.—The persons mentioned in paragraph 4 hereof are the sole shareholders in the said Company. The Directors of the said Company 30 are H. Bjordal, S. H. Bjordal, and L. G. Appendin, who between them, hold all the issued " A " shares and all but four of the issued " B " shares.

6.—The sole transfers of any of the said shares are those referred to in paragraphs 8 and 10 of the Statement of Facts upon which the Appellant relies.

C. B. NEWBOLD,
Legal Secretary,
Counsel for the Respondent.

Filed by :
C. B. NEWBOLD,
Legal Secretary,
Kampala.

40

In the High Court of Uganda.

No. 5.
Notes of Pearson, J. of Proceedings.
31st May 1951.

No. 5.

Notes of Pearson, J. of Proceedings.

May 31st. WILKINSON for Appellant.

BECHGAARD L.S. High Commissioner for Respondent.

MEMORANDUM OF APPEAL.

WILKINSON. Company in which public are substantially interested Income Act 1922 S. 21 (6) differs slightly S. H. Bjordal is a member of the *public*—he is a director and a brother of *H. B. Tatem S.N. Coy* v. *Inland Revenue* 1941 2 A.E.R. III—616 who are not members of the public ?
10 Submit persons who have control of the company, i.e. majority shareholders. S.S. (6) only applies to a company controlled by not more than five . . . " Deemed to be under control of persons . . . majority of voting power or shares is in hands of those persons or relatives or nominees. These are not members of the public. In this country, no provision restricting to Members—only voting power. S. H. B. though a brother is a member of the public with unconditional right to the shares and to dispose of them. Directors : have not control of the company, only in so far as appointed and maintained by those having voting power. Bechgaard. Sec. 21. *public.*

Commissioner I.R. v. *Blott* 1921 (2) A.C. 171.
20 *Commissioner of I.R.* v. *Sansom* 1921 (2) K.B. 492.

Act 1922 prevented distribution of income as bonus shares Ordinance 1940 S. 21 Coy. controlled by not more than five persons. 1943 substitutes interest of public–percentages.

Surtax. In Uganda, no surtax.

Public. Not defined in the Ordinance: must be members of the company —shareholders. Yet certain shareholders are contrasted *Nokes* v. *Doncaster A. Coys.* 1940 A.C. 1022. Narrow construction permissible.

A company to which Sec. 21 applies is a surtaxable company an expression used in England. Scheme of the Section to prevent companies
30 hiding away their profits: bona fide public companies are exempt from this description.

Cannot define what shareholders are not public : submit an officer of the company is not one of the public—Companies Ordinance distinguishes officer in effect. In Tatem Coy. were three persons Glanely, Dalverton S.S. Coy. and Tatem Coy. who were not members of the public.

S. H. Bjordal is secretary of the Coy.

2.—Relative : relationship material.

3.—Disposition of shares H.B. made his mine a limited Coy. his brother S. H. B. then bought 3,120 B shares at six times per value. These plus
40 shares held by six others made just over 25%.

In the High Court of Uganda.

No. 5. Notes of Pearson, J. of Proceedings. 31st May 1951—*continued.*

S. H. B. is an officer and relative and disposition of shares go to show that he is not a member of the public—collusion—admit that not any one of these grounds support my contention but cumulatively they do.

Inland Revenue Commissioner v. *Scott Ellis* 1947 2 A.E.R. 506 not confined to strict words.

Inland Revenue Commissioner v. *Cape Brandy Syndicate* 1921 1 K.B. 71.

Appeal should be dismissed.

The case of S. H. Bjordal Misc. App. 3/51 will follow the event. Would consolidate the two appeals.

WILKINSON agrees. 10

WILKINSON: In Tatem Coy. Officers of the company are not mentioned or considered. Persons in control—by voting power. English Act clearly intends persons in control as above.

Cur Adv vult.

C. B. PEARSON,
J.
31.5.51.

No. 6. Reasons for Judgment of Pearson, J. 29th June 1951.

No. 6.

Reasons for Judgment of Pearson, J.

IN HIS MAJESTY'S HIGH COURT OF UGANDA AT KAMPALA. 20

Miscellaneous Appeal No. 2 of 1951.

H. BJORDAL ... ... *Appellant*

versus

THE COMMISSIONER OF INCOME TAX ... ... *Respondent.*

June 29th. WILKINSON.

WALTHER, Crown Counsel for Commissioner.

COURT:

This Appellant Hendrik Bjordal was proprietor of a mine whch he turned into a limited company. Bjordal Mines, Ltd. He sold 3,120 shares to his brother Sverre H. Bjordal and six other persons were allotted one 30 share each. These shares are " B " shares which are freely transferable and carry equal voting power with all other shares. The sum of them—3,126—amounts to one share over 25 per cent. of the share capital.

On assessment, the Commissioner of Income Tax has ruled that Bjordal Mines, Ltd., is not a company in which the public is substantially interested as defined by Section 21 (2) of the Income Tax Ordinance—as amended by No. 11/1943. Hendrik Bjordal appeals against his assessment, and S. H. Bjordal appeals against a like assessment. The two appeals are consolidated

by consent: the question in issue in each is whether Sverre Bjordal holds his shares as a member of the public within the meaning of sub-section (2). He, Sverre Bjordal is a director, and the secretary of the company and he is Hendrik Bjordal's brother. He bought the shares at a high premium.

In support of the assessment, Bechgaard submits that Sverre Bjordal is not a member of the public because (1) he is a brother of Hendrik Bjordal who has the controlling interest 75 per cent. of the shares and voting power; (2) he is an officer of the company; (3) the disposition of the shares to him by his brother, on the formation of the company, indicates that Hendrik 10 Bjordal retained control of them. Counsel submits that the Acts and Ordinances contemplate some share holders who are not members of the public, although he admits he cannot define them.

Wilkinson for the Appellants submits that the share holders who are to be distinguished from the *public* for the purposes of this section are such shareholders as have *control*: a holding of shares that gives them a preponderance of voting power. This argument is based on Section 21 (6) of the English Act, 1922. He submits that relationship and the acquisition of the shares from his brother are irrelevant. *Tatem S.N. Coy., Ltd.* v *Commissioner Inland Revenue,* 1941 2 K.B. 194.

20 This case of *Tatem* disposes of Bechgaard's first and third points: there it was held that a shareholder was a member of the public notwithstanding that she was a relative—niece—of the controlling shareholder. The English Act, 1922, Section 21 (2) expressly excludes certain relatives: brothers but not nieces. In the Uganda Ordinance we have no express exclusion of any relative. I take it that relatives of controlling shareholders are not to be excluded or distinguished from the *public* unless by express statutory provision. In the same case, the controlling shareholder had transferred the shares to his niece gratuitously as a present, and moreover he was her trustee: it was held that the gift though without consideration, 30 did not affect her status: the sole matter of importance was that the shares were held unconditionally. Here in this case before me, Sverre bought the shares and paid for them in full—at a high price—and I have no evidence that Hendrik retained any control over them: they are transferable unconditionally.

Bechgaard's second point impresses me as more probable: that officers and directors of a company are distinguishable from the *public.* Bechgaard can give me no authority for his submission: he says that the Companies Ordinance distinguishes directors and officers in effect. That Ordinance refers to directors and managers, Section 140 and to officers, Section 153. 40 Shareholders are referred to as members of the company, not as members of the public. Although the generality of shareholders are members of the public—in a public company—I would hesitate to hold that one ceased to be such on accepting election to the board of directors. Directors and managers are, I should say to be distinguished from the members of the company. I find nothing to distinguish them from the public in this sense.

Now to consider Wilkinson's submission: that those in control are to be distinguished from other shareholders, these latter being the public. The

In the High Court of Uganda.

No. 6. Reasons for Judgment of Pearson, J. 29th June 1951—*continued.*

repealed Section 21 of the Principal Ordinance 1940 prescribed " companies *controlled* by not more than five persons." This company, Bjordal Mines, Ltd., would have been within that provision, but that section is now repealed and the Commissioner of Income Tax in Uganda is no longer concerned about how many persons control a company, whether less or more than five. Section 21 (6) of the English Act (as amended by Section 31 of the F. Act, 1927) states " a company shall be deemed to be under the control " of any persons where the majority of the voting power or shares is in the " hands of those persons . . ." Notwithstanding that we have not now any such provisions as these, I think that the members of a company who are to be distinguished from the *public* for the purposes of this section are those who have control of the company by voting power, as Wilkinson has submitted : I find this construction supported by Scott's, L.J., exposition of the purpose of these provisions as a general statement of the intent of the Legislature—although I bear in mind that we have now no such section as those quoted above.

" The scheme of the subsection undoubtedly was that where the " control of a company is in fact held by not more than five persons, and the " company is not one in which the public are substantially interested in the " manner indicated by the proviso, the persons controlling the company " should be treated as running it in their own interests, and therefore, in " a position which, from the public point of view, ought to make them " liable to pay surtax just as if the company were a firm . . . I can see no " reason whatever for introducing any other notions of control than those " plainly indicated in the sections as constituting *de facto* control." *Tatem S.N. Coy.* v. 1 *Rev. Com.* 1941, 2 K.B. 202.

In this company, Bjordal Mines, Ltd., Hendrik Bjordal certainly has the controlling interest. But cannot more than one person jointly have controlling interest ? Our Ordinance did—before Section 21 was repealed and re-enacted in 1943—contemplate companies controlled by five persons. Is Sverre Bjordal in control jointly with his brother ? He can be, so long as he cooperates with his brother : if he ceases to cooperate Hendrik outvotes him and takes all control out of his hands. I have no evidence that they cooperate, saving that they work together as directors, from which it may be presumed, but perhaps not conclusively. However, in Tatem Steam Navigation Company five shareholders controlled the company : the Law Report does not explain how or state what were their holdings. Certainly not more than one of them could hold more than 50 per cent.—controlling interest—in himself : therefore one can be in joint control with others without himself holding a controlling interest in shares. I can find nothing in this report to distinguish H. Bjordal and S. H. Bjordal from the five controlling shareholders in Tatem S.N. Coy. Bjordal Mines, Ltd., appears to me to be just such a company as contemplated by Scott, L.J. : the control—voting power—is in the hands of two directors and they are running it in their own interests just as if the company were a firm.

I have considered the case of *Inland Revenue Commissioners* v. *Bibby*, 1945 A.E.R. 667 in which controlling interest in a company is discussed, on

Section 13 (9) of the Finance Act No. 2 of 1939. We have no such provision in our ordinance, so the discussion is not applicable ; only it does support my opinion that more than one director can be in control.

I find that Bjordal Mines, Ltd., is a company controlled by two directors and uphold the decision of the Commissioner that the public is not substantially interested in it.

Appeal dismissed with costs.

C. B. PEARSON,
J.
10 29.6.1951.

In the High Court of Uganda.

No. 6. Reasons for Judgment of Pearson, J. 29th June 1951—*continued.*

No. 7.

Decree.

No. 7. Decree. 29th June 1951.

IN HIS MAJESTY'S HIGH COURT OF UGANDA AT KAMPALA.

Miscellaneous Appeal No. 2 of 1951.

H. BJORDAL ... ... *Appellant*

versus

THE COMMISSIONER OF INCOME TAX ... ... *Respondent.*

This Appeal coming on for hearing on the 29th day of June, 1951, before the Honourable Mr. Justice Pearson in the presence of Mr. P. J. 20 Wilkinson, Advocate for the Appellant, and Mr. E. M. E. Walther, Crown Counsel for the Respondent IT IS ORDERED AND DECREED THAT—

(a) The appeal of H. Bjordal from the decision of the Commissioner of Income Tax dated the 29th day of January, 1951, refusing to hold that BJORDAL MINES LIMITED is a Company in which the public is substantially interested within the meaning of Section 21 of the Income Tax Ordinance is dismissed, and

(b) The Respondent's costs of this Appeal be taxed and paid by the Appellant.

Given under my hand and the Seal of the Court this 29th day of June, 30 1951.

C. B. PEARSON,
Judge.

No. 8.

Memorandum of Appeal.

IN THE COURT OF APPEAL FOR EASTERN AFRICA.

Civil Appeal No. 77 of 1951.

Original H.M.H.C. Misc. Appeal No. 2 of 1951.

H. BJORDAL ... ... *Appellant–Original Appellant.*

versus

THE COMMISSIONER OF INCOME TAX *Respondent–Original Respondent.*

MEMORANDUM OF APPEAL.

The Appellant appeals against a judgment of the High Court of Uganda in Miscellaneous Appeal No. 2 of 1951 dismissing the Appellant's appeal against the refusal by the Respondent dated 29th January, 1951, to hold that the company incorporated as Bjordal Mines, Ltd., is a company in which the public is substantially interested within the meaning of Section 21 of the Income Tax Ordinance, upon the following grounds :—

1. The learned Judge erred in law and fact in not holding that one Sverre Bjordal is a member of the public within Section 21 of the Income Tax Ordinance.

2. The learned Judge erred in not holding that although the Appellant and one Sverre Bjordal hold between them a controlling shareholding in the said company the said Sverre Bjordal was a member of the public.

3. The learned Judge erred in holding that the fact that the Appellant and one Sverre Bjordal held between them a shareholding giving them power to control the company was relevant in deciding whether or not the said Sverre Bjordal is a member of the public.

4. The learned Judge erred in holding in the absence of any evidence to that effect, that the company is being run in the interest of two directors as if the company were a firm.

The Appellant prays that the Court may be pleased to reverse the Judgment of the High Court of Uganda and the decision of the Commissioner of Income Tax aforementioned.

Dated the 30th day of August, 1951.

(Sgd.) P. J. WILKINSON,
Counsel for Appellant.

No. 9.

Notes of Nihill, P. of Proceedings.

10.1.52. Coram : NIHILL, P.
WORLEY, V-P.
AINLEY, J.

WILKINSON for Appellant.

NEWBOLD for Respondent.

WILKINSON : High Court refused to remove finding of Income Tax Commissioner. Appellant assessed under Section 21 (Section 5 of Amending Ordinance). See Proviso (G), and sub-section (2). Commissioner held that the Coy. was not a Coy. in which public are substantially interested.

10

Ordinary Shares " A " divided into " A " and " B " shares. " B " only transferable. Appellant holds A & B = 51 per cent. of Capital. Whole case is whether S. H. Bjordal is a member of the public. He does hold more than 25 per cent.

A person who is not a member of the public is a person who can control the company by his voting power. Directors have no control over a company unless they have predominate voting power.

You must distinguish management from control.

20

Tatem S.N. Coy. v. *I. Rev. Comm.*

1941 2 A.E. 616
1941 2 K.B. 202

In Tatem's case no evidence that the Mill was under control of Lord Glanuly.

1942 1 AER p. 619. *Fattorini's* case.

The only person in control is a person who holds a controlling interest.

Not in dispute that S. A. Bjordal can transfer his shares to anyone.

NEWBOLD :

Facts in this case are all important.

(1) Appellant Harold originally owned a mine and formed a company transferring all assets in consideration of company transferring 12,000 out of fully paid up capital of 12,500.

30

(2) Directors hold all A shares.

(3) Entire group of shareholders other than Harold consist of 6 persons five of whom have only one share each the other is the brother and co-director. The brother holds one more share than required 25 per cent.

(4) Company made profit of 161,000/- odd. Did not distribute any dividend.

40 Although profits amounted to 2/3rd of entire share capital of company.

Simons Income Tax Vol. III, para. 738.
See *Tame's case. Civil Appeal* 10 *of* 1949.
In England before section can apply.

Company must be controlled by not more than 5 persons, and public have not more than 25 per cent.

In East Africa only one requirement that public hold less than 25 per cent. of share capital.

Vital question for this Court is what is meaning of the word public. Everybody is a member of the public. This would make nonsense of the section. Legislature must have intended to exclude some people from the term " public." On facts of this case Court should hold As. brother not a member of the public. Two brothers are co-directors. Both of them had together every share except five. Are there any other factors which must lead Court against natural reason. Agree that controlling interest is not the debarring factor.

There are two tests :

(a) Whether Court looking at all circumstances the public was substantially interested. Facts of each case must be looked at.

PRESIDENT : It is a question of fact ?

Sec. 62 of Ordinance 8 of 1940.
There may be difficult cases. This is not one of them.
One factor would be total number of shareholders.

Circumstances in which shares acquired. Directors of the company can never fall within definition of public, because (a) see definition of public. Members of the public cannot include management and staff.

The word " public " occurs many times in Company's Ord. without definition.

NEWBOLD (contd.)

See Chapter 33 definition of the word " Prospectus."
The prospectus is issued by the Directors. See Sec. 38 etc.
Sometimes question arises has " prospectus " been issued to the public.

See *Nash* v. *Lynde* (H.L.) 1929 A.C. 158. Directors cannot be *not* the public for issuing shares and " public " if holding shares.

3 of the 7 persons who hold shares are directors.

WILKINSON.

I have not disguised that this fact that this company was organised to escape payment of sur tax. Moral side does not arise.

Who is not a member of the public ? Judge was very *nearly* right. Brother bought the shares at a high premium. *All* " A " shares held by

Appellant. Relative is defined in English Act. Directors can be changed for day to day. No power unless they hold controlling power.

JUDGMENT RESERVED.

(Sgd.) J. H. B. NIHILL.

28.4.52. Coram : NIHILL P.
WORLEY V-P.
AINLEY J.

C.B. PATEL for WILKINSON for Appellant.

N.B. MEHTA for NEWBOLD for Respondent.

10 Judgment read. Appeal allowed with costs both here and in the High Court of Uganda.

(Sgd.) J. H. B. NIHILL
P.

No. 10.

Reasons for Judgment.

(a) WORLEY—Vice-President.

This is an Appeal against a Judgment of the High Court of Uganda dismissing the Appellant's Appeal from the refusal of the Respondent to hold that a company incorporated as Bjordal Mines Ltd. is a company in which the public is substantially interested within the meaning of Section 21 of the Income Tax Ordinance, 1940 (No. 8 of 1940) as amended 20 by Section 5 of the Income Tax (Amendment) Ordinance 1943 (No. 11 of 1943), hereinafter referred to as the Ordinance.

Sub-section (1) of Section 21 empowers the Commissioner of Income Tax, in the conditions prescribed, to order that certain undistributed profits of a company resident in the Protectorate shall be deemed to have been distributed as dividends amongst the shareholders, and thereupon the proportionate share of each shareholder is to be included in his total income for the purposes of the Ordinance. Two provisos are appended to the sub-section, the second of which is material to this Appeal. It provides, so far as is relevant, that

30 "(b) this sub-section shall not apply to any company in "which the public are substantially interested. . . ."

Then sub-section (2) further provides :—

"(2) For the purpose of this section a company shall be "deemed to be a company in which the public are substantially "interested if shares of the company (not being shares entitled "to a fixed rate of dividend, whether with or without a further

" right to participate in profits) carrying not less than twenty-five " per cent. of the voting power have been allotted unconditionally " to, or acquired unconditionally by, and are at the end of the " said period beneficially held by, the public (not including a " company to which the provisions of this section apply), and " if any such shares have in the course of such period been, in " fact, freely transferable by the holders to other members of the " public."

The relevant facts, as taken from the Statements of Facts filed by the Appellant and the Respondent, are as follows :— 10

1. Bjordal Mines Ltd. is a limited liability company registered at Kampala, Uganda, on 25th March, 1948, and has its registered offices in the Uganda Protectorate. (I refer to it hereafter as the Company.)

2. The authorized capital of the Company is Shs. 250,000 divided into 12,500 shares of Shs. 20/– each. The share capital is divided into 8,125 " A " shares and 4,375 " B " shares, of which the " A " shares are not transferable without the consent of the directors. The " B " shares are freely transferable and have equal voting and dividend rights with the " A " shares. 20

3. The Appellant is the holder of 7,632 " A " shares and 1,249 " B " shares in the Company. The other shares are held by :—
   (i) Sverre Hendrik Bjordal holding 3,121 " B " shares ;
   (ii) L. G. Appenden and four other persons each holding one " B " share.

4. The directors of the Company are the Appellant, Sverre Hendrik Bjordal (who is a brother of the Appellant) and L. G. Appenden ; and these three persons hold between them all the issued " A " shares and all but four of the issued " B " shares.

5. By an agreement dated 25th March, 1948, the Appellant sold to 30 the Company various mining titles and rights, then held by him, in consideration of the allotment to him of 12,000 shares in the Company being shares of " A " and " B " class in such proportion as the Appellant should elect, all to be credited to the Appellant as fully paid up. The shares were allotted on the 19th April, 1948, in the proportion of 7,632 " A " shares and 4,368 " B " shares.

6. By an Indenture dated 19th April, 1948, the Appellant sold to Sverre Hendrik Bjordal 3,120 " B " shares out of the said 4,368 " B " shares allotted to the Appellant for the sum of £18,720.

7. On 13th April, 1947 (Quaere 1949) one " B " share was transferred 40 by E. H. St. John Shelton to S. H. Bjordal. The only transfers of any of the said shares are those set out in this and the preceding paragraph.

8. The Appellant was assessed in Notice of Assessment No. 20831 for the year of assessment 1950 relating to the year of income 1949. The said Notice of Assessment included as income of the Appellant the sum of £3,580 in respect of dividends deemed to have been distributed as dividends among the shareholders of the Company under Section 21 of the Ordinance.
9. The income of the Company for the year 1949 as computed for income tax purposes was Shs. 161,340/–, of which no portion was distributed as dividends. The Respondent served notice under Section 21 deeming 60 per cent. of that sum to have been distributed among the shareholders. This amounted to a sum of Shs. 96,804/–, of which the Appellant's proportionate share was Shs. 71,802/–.

The decision of the Commissioner appealed against was :—

(i) that the Company is a company to which Section 21 (1) of the Ordinance applies and that the provisos (a) and (b) thereto do not apply to the Company ; and
(ii) that the Company is not a company in which the public is substantially interested as defined by Section 21 (2) of the Ordinance.

The Commissioner's reasons are not given in his decision or included in the record. The short question involved in this Appeal is whether (ii) is or is not correct. The shares owned by S. H. Bjordal and the other shareholders (excluding the Appellant) amount to one share over and above 25 per cent. of the voting power, so the question in dispute turns upon whether they, and S. H. Bjordal in particular, are " members of the public." This in turn depends upon the construction to be placed upon the word " public " in sub-section (2).

The provision that the shares must have been allotted to or acquired by the persons holding them unconditionally is not in issue, for it is not disputed that Mr. S. H. Bjordal's shares were acquired by him unconditionally, and were so held for the rest of the time in question.

It is perhaps relevant at this stage to observe that in the course of the argument, Mr. Wilkinson frankly admitted that the whole purpose of the Appellant in forming the Company and transferring a number of shares to his brother, S. H. Bjordal, was to avoid or to lessen his liability to income tax and, in particular, to surtax. It is of course well recognized that there is nothing illegal in such a purpose and the Court is not concerned with the morality of it. The question in each case is whether by the device adopted the taxpayer has succeeded, in the words of Lord Greene, M.R., in *Lord Howard de Walden* v. *Inland Revenue Commissioners* (1942) L.R.1K.B. 389 at page 397 " in throwing the burden of taxation off his own shoulders on to those of his fellow subjects." But I do not think that in determining this question there is any obligation on the Courts to favour the subject by a benevolent construction. I prefer the rule of construction as expressed in Konstam's Income Tax 11th Edition, page 10 :

" It is often said that a taxing Act must be construed strictly " in favour of the subject : it may perhaps be more correct to say " that a taxing Act must be construed either against the Crown or " the person sought to be charged, with perfect strictness—so far " as the language of the Act enables the judges to discover the " intention of the Legislature."

To which perhaps I should add that I respectfully adopt the view expressed by Cohen, L.J., in *Littman* v. *Barron* (1951) 1 Ch. 995 at p. 1003 :—

" The principle that in case of ambiguity a taxing statute " should be construed in favour of a taxpayer does not apply to a " provision giving a taxpayer relief in certain cases from a section " clearly imposing liability."

The question is not one of onus as Mr. Wilkinson suggested. If Mr. S. H. Bjordal is a member of the public within the meaning of Section 21 (2) then the appeal must succeed : If he is not, it fails ; but whether he is or not is a question of the meaning properly attributable to the word " public " and that is a question of construction.

The important thing, then, in this appeal is to ascertain the meaning of the word " public "in the section under consideration. The word in its widest sense includes everyone and anyone, " the members of the community " (per Scott, L.J., in *Tatem S.N. Co., Ltd.* v. *Inland Revenue Commissioners* (1941) 2 All E.R. 616 at p. 619) ; but counsel before us were agreed that the word is used in Section 21 (2) in contradistinction to certain persons or a class or classes of persons who are impliedly excluded and that our task is to determine who is excluded.

On this three views have been put before us. The appellant's contention is that the proper test is *de facto* control of the Company. The person who is *not* a member of the public for the purposes of the sub-section is one who can control the company by voting power, that is to say, who holds more than 50 per cent. of the voting rights. That is the present Appellant's position and therefore, it is said, *vis-à-vis* him the other shareholders are members of the public and, since they hold more than the prescribed minimum of shares, the Company is one in which the public are substantially interested. The facts that S. H. Bjordal is a brother of the Appellant and is a director of the company are irrelevant. The power of management of the Company exercised by the Board of Directors is to be distinguished from the control exercised by the Appellant who holds the majority of voting rights and can remove the directors at any time. As regards the relationship, Mr. Wilkinson relied on the decision of the Court of Appeal in England in the *Tatem S.N. Coy's* case (*supra*) which was a decision on somewhat similar provisions in Section 21 of the United Kingdom Finance Act, 1922. There was no evidence that S. H. Bjordal was under the control of the Appellant nor, in the absence of any statutory presumption, could there be any implication of control in this case, any more than there was in the case of Lord Glanely's niece in the case cited.

In the Court of Appeal for Eastern Africa.

No. 10. Reasons for Judgment.

(a) Worley, Vice-President—*continued.*

The second view is that preferred by the learned trial judge who held that the Company was controlled jointly by the Appellant and his brother and that the public were therefore not substantially interested in it.

In his judgment he says " I think that the members of a company who are to be distinguished from the public for the purpose of this section are those who have control of the company by voting power," and he applies that in the following passage :—

> " In this company, Bjordal Mines, Ltd., Harold Bjordal " certainly has the controlling interest. But cannot more than " one person jointly have controlling interest ? Our Ordinance " did—before Section 21 was repealed and re-enacted in 1943— " contemplate companies controlled by five persons. Is Sverre " Bjordal in control jointly with his brother ? He can be, so long " as he co-operates with his brother : if he ceases to co-operate, " Harold outvotes him and takes all control out of his hands. I " have no evidence that they co-operate, saving that they work " together as directors, from which it may be presumed, but " perhaps not conclusively. However, in Tatem Steam Navigation " Company five shareholders controlled the company. The Law " Report does not explain how, or state what were their holdings. " Certainly not more than one of them could hold more than " 50 per cent. controlling interest—in himself : therefore one can " be in joint control with others without himself holding a con- " trolling interest in shares I can find nothing in this report to " distinguish H. Bjordal and S. H. Bjordal from the five controlling " shareholders in Tatem Steam Navigation Coy. Bjordal Mines, " Ltd., appears to me to be just such a company as contemplated " by Scott, L.J. : the control-voting power—is in the hands of two " directors and they are running it in their own interests just as if " the company were a firm."

With respect, I think the learned judge has misapplied his own test. It is of course true that in many companies the control is shared by more than one shareholder ; that must be so in a company in which no one person holds a majority of the voting power. But, on the facts of this case, that is not the position with this company. It is pointed out in the judgment that S. H. Bjordal can only be jointly in control so long as he co-operates with the Appellant. I apprehend that such precarious control cannot suffice to take him out of the ranks of the public ; for, were it otherwise, the status of the Company as one in which the public are or are not substantially interested would fluctuate according to how he should cast his vote at meetings of the Company. I cannot think that such a curious result could be in accordance with the intention of the Legislature.

The third view, put forward by the Respondent, is that both the Appellant and the learned judge in the Court below have erred in accepting as the test, control of voting power. The English Courts have contrasted " the public " with the person or persons holding the controlling interest

but that, Mr. Newbold argued, is because sub-section (6) of section 21 of the Finance Act, 1922, provides that the section " shall apply to any company " which is under the control of not more than five persons and which is " not . . . a company in which the public are substantially interested." It is wrong in principle, he argues, to import an idea based on a special provision in the English section into Section 21 of the Ordinance, especially having regard to the fact that the Uganda section as originally enacted contained a similar provision as to control by not more than five persons which was omitted when the section was repealed and re-enacted in 1943.

I find support for this argument in Simon's Income Tax, 1948, Vol. III Part XVII, Division 5. After discussing the tests to determine whether a company is controlled by not more than five persons, the learned author explains the reason for the exception for companies in which the public are substantially interested. He says at paragraph 742 :—

> " A case might arise in which a company had made a public issue " of shares, which were quoted on a stock exchange, but by reason " of the directors or others being able to control the company " by voting power or otherwise, the company falls within the " definition of ' control by not more than five persons.' Such " a company would be unlikely to withhold an unreasonable " part of its income from distribution, and accordingly the section " exempts from its provisions a company in which the public " are substantially interested."

The scheme of the United Kingdom section is therefore clear : the first step is to decide whether the Company is controlled by not more than five persons and, by virtue of Section 19 (2) and 21 (6), the number of persons is to be calculated by treating relatives, nominees, partners, beneficiaries, and others as a single person. " Relative " means a husband or wife, ancestor or lineal descendant, brother or sister.

If the number of persons so calculated total five or less, the taxing authority will then consider whether the public are substantially interested and in considering this he excludes all the shares held by the " persons " he has taken into account for the purpose of computing control (see Simon's Income Tax, paragraph 742).

The United Kingdom section itself therefore indicates a clear distinction between persons controlling the Company and the public. In the Uganda section, this clear distinction is no longer drawn and, as so often occurs in these territories, the Courts have to struggle with the interpretation of a section based on an English model but with one or more important provisions omitted or varied.

I think too that Mr. Newbold successfully exposed the fallacy of applying the test of sole control of voting power to the local section by his supposition of a company in which the shares were held by three persons in the proportions of 49 per cent., 49 per cent., and 2 per cent. None of the three would have a controlling interest and all would therefore by this test be members of the public. This would be the type of company likely

to withhold an unreasonable part of its income from distribution and it would seem a reductio ad absurdum to say that it was one in which the public were substantially interested.

Under the United Kingdom legislation, such a company would of course be caught by the provision as to control by not more than five persons. If the repeal of this provision in Uganda in 1943 has opened a way of escape which was previously closed, that is a matter for the Legislature. The Courts cannot put a strained meaning upon the section as it now is in order to repair the breach.

10 The Respondent's argument then proceeds in two stages: the first is that the true and only test to be applied to the local section is whether the Court, looking at all the circumstances of the case, considers that the public is substantially interested. This is a question of fact and this Court is not asked to lay down any general rule but is merely asked to say, on the facts of this case, that Mr. S. H. Bjordal is not a member of the public. It would be, it is said, a travesty of fact to hold that the Company is one in which the public are substantially interested.

The second stage is that, however difficult might be the application of that test in some cases, there is no difficulty in the present case, because 20 there is one class of persons which can never fall within the definition of the public, namely, the directors of a company. Mr. Newbold supported this argument by references to the distinction drawn in the Companies Ordinance between directors and the public in such matters as the issue of a prospectus. In such matters no doubt this clear distinction is drawn but, as a test of whether the public is substantially interested, it seems to me as capricious and precarious as the test of joint control postulated by the trial judge. The Appellant could by the exercise of his voting rights remove all or any of the present directors and replace them by some or all of the nominee holders of one share each. The Appellant and his brother 30 would then become members of the public by this test yet the Company would still be one of the type "likely to withhold an unreasonable part of "its income from distribution." The distinction sought to be drawn would not therefore provide any real safeguard against the mischief the section is intended to remedy.

Reverting to the first stage of the Respondent's argument, the suggestion that the Commissioner or the Court should decide the question of who is or is not a member of the public on the facts of each case is in the absence of any definition or statutory presumptions very attractive, and it may well be that in the present instance to the layman it would seem 40 a travesty upon words to claim or to say that the public is substantially interested in the Company. But it is easy to see how difficult it would be in many cases to find the answer and I think that put so broadly the proposition would in practice come to this, "Does the Commissioner "or the Court think that the Company is one which is likely to withhold "an unreasonable part of its income from distribution?" I think that the Legislature did not intend to confer upon the Commissioner such a wide discretionary power and that some stricter test must be applied. I am

In the Court of Appeal for Eastern Africa.

No. 10. Reasons for Judgment.

(*a*) Worley, Vice-President—*continued.*

conscious that so far I have rejected most of the arguments put before us without getting appreciably nearer to an answer to the question, Who is to be excluded from the category of the public ?

I can agree with Mr. Wilkinson that a person who holds more than 50 per cent. of the voting rights and so controls the company can never be treated as a member of the public for the purposes of the section : but I am not persuaded that it necessarily follows that all the other shareholders automatically fall into the class of " the public." I agree with Mr. Newbold to this extent that the Commissioner is entitled to consider the case of each such shareholder on its merits but subject to the condition that the 10 classification must be made not capriciously but for legal reasons and on settled legal principles. At this stage I am hampered by not having before me the reasons upon which the Commissioner based his decision ; I have therefore to test it by such legal reasons and principles as seem to me appropriate. I do not propose to attempt to lay down any general rules but, approaching the matter as I think I must, from the point of view that Mr. S. H. Bjordal is, *prima facie*, a member of the public, I ask myself on what grounds he can be excluded from that category.

I have already indicated my reasons for rejecting his directorship and the test of joint-control. 20

Then is his relationship relevant ? I think it is clearly implied in the Judgment of Scott, L.J. in the *Tatem Steam Navigation Company's* case (supra), with which the other members of the Court agreed, that but for the special statutory provision as to relatives he would not have excluded any relative of the controlling shareholders, qua relative, from the catergory of the public. I think the same view must prevail here.

Then does Mr. S. H. Bjordal cease to be a member of the public because the Appellant's object in selling the shares to him was to reduce his own liability to tax ? I quote again from Simon's Income Tax :—

> " Both the mode and the purpose of the acquisition of the 30
> " shares are irrelevant in determining whether the shareholder is
> " a member of the public : those factors might be material only
> " on the question of whether the shares were allocated or acquired
> " unconditionally."

In the present case however there is no evidence to support the assumption that S. H. Bjordal's shares are subject to any condition.

In the result therefore, I am forced to the conclusion that the device adopted by the Appellant has been successful. It is true that there does not appear to have been any issue of shares to the public in any real sense of those words but nevertheless, I cannot see any good reason in law for 40 holding that S. H. Bjordal has ceased to be a member of the public by reason of his acquisition of his shares.

I would therefore allow this appeal and direct that the matter be remitted to the Commissioner with a direction that the Company is to be

deemed one in which the public are substantially interested and that he take the appropriate action to amend the assessment complained of. The Appellant to have the costs of this appeal and of the appeal to the High Court.

(Sgd.) N. A. WORLEY,
Vice-President.

Kampala.
28th April, 1952.

(b) Nihill, President.

(*b*) NIHILL—President.

I have had the advantage of reading the Judgment just delivered by my Lord the learned Vice-President. For the reasons he has given, which I adopt as my own, I also am of the opinion that the Company incorporated as Bjordal Mines Ltd., is a company in which the public is substantially interested. I recognize that on a first appreciation of the facts relating to this Company such a finding seems contrary to common sense. It is not however a question of sense, common or otherwise, but a question of construction, and there can be no doubt to my mind, that in omitting to reproduce in the local ordinance a provision similar to sub-section (6) of Section 21 of the Finance Act, 1922, this Company escapes the net spread by sub-section (1) of Section 21 of the Uganda Ordinance.

It is neither the function of this Court to criticize the Legislature nor as the learned Vice-President has pointed out can we repair a breach caused by a legislative enactment, even if the result of that breach occasions loss of revenue.

The appeal is allowed with costs both here and in the High Court of Uganda.

(Sgd.) J. H. B. NIHILL,
President.

Kampala.
28th April, 1952.

(c) Ainley, J.

(*c*) AINLEY—Judge.

The facts of this case have been very fully set out by the learned Vice-President and I shall not repeat them. It is clear from those facts that an attempt has been made to avoid surtax by the expedient of incorporation. The question is whether the attempt has been successful, and in particular whether the Company in question is or is not a Company in which the public are substantially interested within the meaning of Section 21 of the Uganda Income Tax Ordinance.

It is well known what lies behind provisions of the kind contained in Section 21. It is apprehended by those responsible for the revenue of the country that if an individual, or an individual and his close associates,

In the Court of Appeal for Eastern Africa.

No. 10. Reasons for Judgment.

(c) Ainley, J.—*continued.*

form an incorporated company to run a particular business or venture, and retain control by means of voting power, then profits, which cannot be touched by tax until distributed as dividends, may be indefinitely withheld from distribution untaxed, for the eventual benefit of those in control. Plainly it is the small group in control which is to be feared. Where eventual control is widely spread, or where the small group is restrained by the influence of substantial interests outside the group, the danger is lessened or disappears. Section 21 of the English Finance Act of 1922 brings out this idea with great clarity. What is regarded as a dangerous degree of concentration of control is defined. Companies 10 wherein control by voting power can fall into the hands of five or fewer persons are caught by the provisions of the section, unless the public are substantially interested, and a substantial interest is defined as a holding of 25 per cent. of the shares. In England then "the public" are obviously contrasted with the small, defined group who are capable of taking control of the Company.

In Uganda all Companies are caught unless the public are substantially interested, and a substantial interest is defined as in England. No reference is made to control, nor is "the public" defined. Clearly the legislature intend to contrast one class of members with another class of 20 members, but no clear indication is given by the legislature, as to what members of the Company are members of the public, or as to what members of the Company are not members of the public.

I respectfully agree with the learned Vice-President that officers and directors of the Company can scarcely, for the purposes of this section, be regarded as excluded from the public. Is the section meaningless then? We must construe against a lack of meaning.

In view of what is plainly struck at by Section 21 I think the legislature must have meant this at least, that where a company is found in exclusive control of a small group of persons, members of that group, at 30 any rate, are not members of the public. I realise the weakness of this interpretation, but as I see it, it is the only interpretation which makes any sense at all of the Section. The interpretation leaves unanswered however, the question "What is meant by 'small'"? and perhaps the question "What is meant by 'control'." The last question must be answered I think by saying "de facto control." Where it can be ascertained that a small group of persons have joined forces and placed themselves in exclusive control of a company, then I think it would be permissible to say that those within the group were not members of the public. Where nothing was known of the combinations within the 40 Company, and control might lie in the hands of a wide variety of combinations of members, then I think it would be impossible to say who were members of the public, and who not.

More difficult is it to say what degree of concentration of control is to exclude those who exercise it from "the public." That question I think must have been left by the legislature to the common sense of the Commissioner and of the Courts. Thus where in a given company the

managing director held 76 per cent. of the voting power little difficulty would be found in saying that the necessary degree of concentration had been reached, and that the public did not hold 25 per cent. of the shares. In this case H. Bjordal, the Appellant holds 75 per cent. of the voting power, and shares. For that reason, and only for that reason, for I can think of no other reason, I think he must be excluded from "the public." Now his brother Sverre, holds the vast majority of what is left. Apart from Sverre and the Appellant there are only five members of the Company, and they hold one share each.

10 In the absence, however, of provisions, such as are contained in the English Act, it does seem to me impossible to say that Sverre is within the controlling group, and I think that unless one can place him within that group he remains a member of the public. All that one can say with certainty here is that the Appellant controls the Company. If it were possible to infer that these two brothers co-operated, then I think that the Company would be caught, but there is I think insufficient before the Court safely and fairly to make the inference.

I respectfully agree then with the learned Vice-President that there appears no reason to exclude Sverre from the ranks of the public, the public 20 are therefore substantially interested in the Company, and I regretfully conclude that the Company escapes the meshes of Section 21.

I consider that the appeal should be allowed.

(Sgd.) A. J. AINLEY.

28th April, 1952.

No. 11.

Decree.

No. 11. Decree. 28th April 1952.

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA.

Civil Appeal No. 77 of 1951.

(From Original Judgment in Miscellaneous Appeal No. 2 of 1951 of H.M. 30 High Court of Uganda at Kampala.)

H. BJORDAL ... ... (*Original Appellant*) *Appellant*

versus

THE COMMISSIONER OF INCOME TAX (*Original Respondent*) *Respondent.*

This Appeal coming on 28th April, 1952, for hearing before Her Majesty's Court of Appeal for Eastern Africa in the presence of P. J. Wilkinson, Esquire, Advocate on the part of the Appellant, and C. D.

In the Court of Appeal for Eastern Africa.

No. 11. Decree. 28th April 1952—*continued.*

Newbold, Esquire, Advocate on the part of the Respondent: It is ordered that the appeal be and is hereby allowed with costs here and in the High Court of Uganda.

C. G. WRENSCH,
Registrar,
H.M. Court of Appeal for Eastern Africa,
Nairobi.

Dated at Nairobi this 28th day of April, 1952.

Issued at Nairobi this 10th day of August, 1953.

I hereby certify that the Bill of Costs of the Advocates for the Appellant in the above appeal has been certified at Shillings Four thousand (Shs. 4,000/–). 10

Dated this 13th day of October, 1953.

C. G. WRENSCH,
Registrar,
H.M. Court of Appeal for Eastern Africa.

No. 12. Order granting conditional leave to appeal to Her Majesty in Council. 8th September 1952.

No. 12.

Order granting conditional leave to appeal to Her Majesty in Council.

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI.

Civil Appeal No. 77 of 1951. 20

THE COMMISSIONER OF INCOME TAX (*Original Respondent*) *Applicant*

versus

H. BJORDAL ... ... (*Original Appellant*) *Respondent.*

This is an application for conditional leave to appeal to the Privy Council from a judgment of this Court. In his affidavit in support of the application the Commissioner of Income Tax claims leave as of right, but nowhere has it been stated what is the precise amount of tax likely to be lost to the public revenue on account of the decision of this Court which allowed the taxpayers' appeal. As the sum sought to be brought into assessment amounts to Shs. 96,804, of which the Respondent's share is 30 Shs. 71,602, it is highly probable that the tax at stake exceeds Shs. 10,000, but we cannot be sure. Be this as it may this Court has a discretion to grant leave under para. (b) of the Eastern African (Appeal to Privy Council) Order-in-Council, 1951, and we think that there is a proper case for the exercise of this discretion. Counsel for both parties have informed us that the appeal was in the nature of a test case. The point at issue was of some complexity and affects the public revenue. We are therefore satisfied that it is one which ought to be submitted to Her Majesty-in-Council for decision.

In the Court of Appeal for Eastern Africa.

No. 12. Order granting Conditional leave to appeal to Her Majesty in Council. 8th September 1952—*continued.*

The Respondent to the present application does not ask for any security for the due prosecution of the appeal and for any costs payable by the applicant in the event of the applicant not obtaining an order for final leave to appeal or the appeal being dismissed for non-prosecution, or of Her Majesty-in-Council ordering the applicant to pay the costs of the appeal. We therefore order that no security need be furnished. The applicant to take the necessary steps within three months from to-day for the purpose of procuring the preparation of the record for the despatch thereof to England. Costs to follow the event. The Respondent will, however, get
10 the costs of this application should the applicant not prosecute the appeal.

J. H. B. NIHILL,
President.

N. A. WORLEY,
Vice-President.

J. B. GRIFFIN,
(Chief Justice, Uganda).

Kampala.
8th September, 1952.

No. 13.

Order granting final leave to appeal to Her Majesty in Council.

No. 13. Order granting final leave to appeal to Her Majesty in Council. 28th April 1953.

20 IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI.

Civil Appeal No. 77 of 1951.

THE COMMISSIONER OF INCOME TAX ... ... *Applicant–Respondent.*

versus

H. BJORDAL ... ... *Respondent–Appellant.*

The condition set out in the Conditional Order giving leave to appeal has been complied with (see Registrar's Certificate).

In the event of the Applicant not proceeding with the Appeal the Respondent will have the costs of and incidental to the application for leave to appeal. Costs of this application to be costs in this appeal.

30 Final leave to appeal granted.

J. H. B. NIHILL,
President.

N. A. WORLEY,
Vice-President.

ENOCH JENKINS,
Justice of Appeal.

Date. 28th April, 1953.

In the Privy Council.

No. 42 of 1953.

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA.

BETWEEN

THE COMMISSIONER OF INCOME TAX ... ... *Appellant*

AND

H. BJORDAL ... ... *Respondent.*

RECORD OF PROCEEDINGS

CHARLES RUSSELL & CO.,
37 Norfolk Street,
Strand, W.C.2,
Solicitors for the Appellant.

HALE RINGROSE & MORROW,
2 Clements Inn,
Strand W.C.2,
Solicitors for the Respondent.

GEO. BARBER & SON LTD., Printers, Furnival Street, Holborn, E.C.4, and Cursitor Street, Chancery Lane.
(A62593)