Privy Council Appeal No. 42 *of* 1953

The Commissioner of Income Tax - - - - - - *Appellant*

v.

H. Bjordal - - - - - - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH JANUARY, 1955

Present at the Hearing:

LORD OAKSEY
LORD TUCKER
MR. L. M. D. DE SILVA

[*Delivered by* MR. L. M. D. DE SILVA]

This is an appeal from a judgment of the Court of Appeal for Eastern Africa dated the 28th April, 1952, which reversed a decision of the High Court of Uganda dated the 29th June, 1951, to the effect that Bjordal Mines Limited, a limited liability company registered in Uganda, of which the respondent is a shareholder and director was not at the relevant time a company in which "the public were substantially interested" within the meaning of section 21 of the Income Tax Ordinance 8 of 1940 of Uganda.

Section 21 just referred to reads:—

"Section 21 (1) Where the Commissioner is satisfied that in respect of any period for which the accounts of a company resident in the Protectorate have been made up, the profits distributed as dividends by that company up to the end of the sixth month after the last date upon which its accounts for that period are required by virtue of the provisions of the Companies Ordinance, to be laid before the company in general meeting, increased by any tax payable thereon are less than sixty per cent. of the total income of the company ascertained in accordance with the provisions of this Ordinance for that period, he may, unless he is satisfied that having regard to losses previously incurred by the company or to the smallness of the profits made, the payment of a dividend or a larger dividend than that declared would be unreasonable, by notice in writing order that the undistributed portion of sixty per cent. of such total income of the company for that period shall be deemed to have been distributed as dividends amongst the shareholders as at the said last date and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purposes of this Ordinance:

Provided that—

(*a*) * * * *

(*b*) this subsection shall not apply to any company in which the public are substantially interested or to a subsidiary company

of such a company if the whole of the share capital of such subsidiary company is held by the parent company or by the nominees thereof.

(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."

There follow five subsections to which it is not necessary to make reference.

Section 21 in the form in which it appears above was the result of a substitution effected by an amending Ordinance of 1943. In its original form it read :—

"21. Where it appears to the Commissioners that with a view to the avoidance or reduction of tax a company controlled by not more than five persons has not distributed to its shareholders, as dividend, profits made in any period ending after the 1st January, 1939, which could be distributed without detriment to the Company's existing business, he may treat any such undistributed profits as distributed ; and the persons concerned shall be assessable accordingly."

It will be seen that when the conditions stated in subsection (1) of existing section 21 are satisfied the Commissioner has the power to make an order under which the undistributed portion of 60 per cent. of the total income of a company for a period specified in the subsection is notionally to be regarded as having been distributed, and the "proportionate share thereof of each shareholder" is to be regarded as having been received by the shareholder for purposes of assessing the amount of income tax payable by him. Clause (*b*) of the proviso to the subsection takes away the power of the Commissioner to make such an order with regard to a company "in which the public are substantially interested".

Subsection (2) of section 21 lays down a set of conditions upon the satisfaction of which a company is to be "deemed" to be one in which the "public are substantially interested".

The question for decision by their Lordships is whether Bjordal Mines Limited, satisfies the conditions laid down in subsection (2).

The difficulty in deciding this question lies in the words "the public" appearing in the subsection. There is no definition of this term in the ordinance. Section 21 of the English Finance Act 1922, similar in object to the Uganda statute under consideration, contains a reference in terms to "control" of a company by an individual or individuals, and the words "the public" which occur in the English Act have been understood as meaning all persons other than the controlling individual or individuals (*Tatem Steam Navigation Company* v. *The Commissioner of Inland Revenue* [1941] 2 K.B. 194). There is no such reference to "control" in the existing statute law of Uganda although the original section 21 of Ordinance 8 of 1940 (*vide* above) now repealed, did contain a reference in terms to "control".

In the main argument before their Lordships both sides proceeded on the basis of a view expressed by the trial judge (Pearson J.) and accepted to a substantial extent by the Court of Appeal. The trial Judge said :—

"I think 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."

It was common ground that it was necessary first to decide which member or group of members possessed a controlling interest. It was agreed that the remaining members were members of "the public" within the meaning of subsection (2). Their Lordships were invited to decide in which member or group of members of Bjordal Mines Limited the controlling interest resided.

The facts relating to the holdings of shares in Bjordal Mines Limited are set out fully in a judgment of the Court of Appeal. For the purposes of their decision their Lordships need only say that at the relevant time 12,007 shares, some designated "A" shares and the others "B" shares, had been issued. The "A" shares were not transferable without the consent of the directors. The "B" shares were freely transferable. They carried equal voting rights. Of the 12,007 shares the respondent held 8,881 shares (7,632 "A" and 1,249 "B"). His brother Sverre Hendrik Bjordal held 3,121 "B" shares. Five other persons held one "B" share each. Thus the respondent held 73·96 per cent. of the voting power and Sverre Hendrik 25·99 per cent. The five others held the remaining very small percentage of ·04 (the decimal places beyond the second are not material and are not mentioned).

The 3,121 "B" shares held by Sverre Hendrik had been purchased from the respondent, his brother, for full value. It is not suggested that Sverre Hendrik was a nominee of the respondent, and there is nothing to show that he was acting in concert with the respondent as a shareholder or as a director.

It was argued for the appellant that a member or group of members of a company could be said to have a controlling interest only if they commanded 75 per cent. or more of the total voting power. It was said that the respondent did not possess the requisite percentage of voting power as he possessed only 73·96 per cent. but as the respondent and Sverre together possessed over 75 per cent., and as no other combination of shareholders possessed over 75 per cent., the respondent and Sverre together must be held to have the controlling interest. If this argument were correct then as the respondent and Sverre held between them over 99 per cent. of the shares, 25 per cent. could not be held by the public, and the company could not under subsection (2) be deemed to be one in which the public were substantially interested.

It was argued for the respondent that in order to have a controlling interest the requisite percentage was 51 or over. That as the respondent alone possessed this percentage no other member or group of members could possess the requisite percentage and that therefore, in the absence of concerted action between the respondent and any other member, the respondent by himself must be held to have a controlling interest. If this argument be correct then as the shares of the other members carried more than 25 per cent. of the voting power the company must be held to be one in which the public were substantially interested within the meaning of subsection (2) of section 21.

It was not disputed that the shares possessed by members other than the respondent had been "allotted unconditionally to or acquired unconditionally by" those owning them, that at the end of the relevant period they had been "held beneficially" by those owners and had been "freely transferable" by the owners as stipulated by subsection (2) of section 21.

Both the appellant and the respondent agree that the chief factor determining the question where the controlling interest resides is percentage of voting power although they are not agreed as to what figure of percentage is requisite for the purpose.

For the purposes of a decision upon the arguments addressed to them their Lordships are of opinion that 51 should be adopted as the figure of percentage requisite to confer a controlling interest. A member or group of members holding 51 per cent. of the voting power would succeed

in fulfilling his or their wishes with regard to the ordinary resolutions which come up before meetings of shareholders. They would generally have a dominant voice in the election of directors when such elections fell due. Although they would not be able without support from others to secure the passing of a special resolution nevertheless they would be able to resist a special resolution which was not in accordance with their wishes. They would be able generally to control the company though their capacity to do so would not be as ample as that accompanying the possession of 75 per cent. of the voting power. The fact that the ability to control enjoyed by an individual or group holding 51 per cent. of the voting power is limited in some ways does not persuade their Lordships that the requisite percentage is 75.

There is another consideration directly connected with section 21 which points to 51 being the correct figure of percentage. By subsection (2) of section 21 the legislature appears to have created a category of companies which, despite the existence of a controlling interest, are, by reason of compliance with its provisions, excluded from the operation of subsection (1). If the argument of the appellant is correct the controlling group (or individual) must have (*a*) 75 per cent. of the voting power or (*b*) over 75 per cent. of the voting power. In case (*b*) the provisions of subsection (2) cannot be complied with as the 25 per cent. of the voting power required to be held by others does not exist. Consequently there is only one case which will fall into the category, namely the case in which the controlling interest is constituted by exactly 75 per cent. of the voting power. It is improbable that the legislature enacted a subsection to provide for this one solitary case.

Upon the arguments addressed to their Lordships they are of opinion that the respondent must be held to have a controlling interest. If any of the other shareholders had been shown to have been acting in concert with the respondent they would, with the respondent, have fallen into a group holding the controlling interest. The remaining shareholders would have been members of " the public ". There is nothing to indicate that Sverre was acting in concert with the respondent. He must therefore be regarded as a member of " the public " within the meaning of the subsection.

The fact that Sverre is a brother of the respondent was pointed out as a reason why Sverre and the respondent should be regarded as a group in combination and not as two separate individuals in respect of their holdings of shares. Their Lordships are unable to accede to this suggestion. They do not think that relationship by itself affords a sufficient reason for grouping relatives together in the process of determining where the controlling interest resides. They are supported in this view by the decision in *Tatem Steam Navigation Company* v. *The Commissioner of Inland Revenue* (referred to above). In that case the principal shareholder had given to his niece the greater part of the shares held by her and it was contended, on the ground of relationship among other grounds, that the niece could not be regarded as holding these shares independently of the principal shareholder. Rejecting the argument Scott L.J. said: " I cannot understand why the fact that she was a niece, or that it was a gift, or that it was for the purpose of her marriage settlement, makes any difference at all." He went on to say that there was no implication of control by a relative except where such implication arose under the special statutory provision made by the English Act in respect of certain relatives. There is no similar statutory provision in the Uganda Ordinance under consideration.

Sverre held shares commanding more than 25 per cent. of the voting power and consequently it must be held that Bjordal Mines Limited is a company which complies with the provisions of subsection (2) and therefore is a company in which " the public are substantially interested ".

It was said in the course of the argument that if the requisite percentage of voting power is not held by one individual but held by more than one individual, a controlling interest cannot be said to arise unless it is shown that the individuals who together hold the requisite percentage are acting

in concert. In the case before their Lordships over 51 per cent. of the voting power was held by the respondent, a single individual, and consequently the question does not arise. Their Lordships express no opinion upon the questions which would arise when the requisite percentage is not held by a single individual but only by a group, or by overlapping groups, of individuals.

The appellant also argued that neither the respondent nor Sverre could be regarded as members of " the public " as they were directors of the company. It is clear that members of " the public " within the meaning of the section are shareholders in the company. Their Lordships can find no reason for holding that shareholders cease to be members of " the public " because they have become directors.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the respondent the costs of this appeal.

(39242) Wt. 8082—47 100 2/55 D.L.

In the Privy Council

THE COMMISSIONER OF INCOME TAX

v.

H. BJORDAL

DELIVERED BY MR. L. M. D. DE SILVA

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