

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL OF THE SUPREME COURT OF THE FEDERATION OF MALAYA.

CITY OF LONDON

FEB 1957

INSTITUT OF ADVANCED
LEGAL STUDIES

45982

BETWEEN

COMPROLLER OF INCOME TAX *Appellant*

AND

10 HARRISONS AND CROSFIELD (MALAYA)
LIMITED *Respondent.*

Case for the Appellant.

RECORD.

1. This is an Appeal (by leave granted by the Court of Appeal of the Supreme Court of the Federation of Malaya on the 12th day of March, 1954) from the judgment of the Court of Appeal of the Supreme Court of the Federation of Malaya (Mathew, C.J., Murray-Aynsley, C.J. and Bellamy, J.) dated the 8th day of June, 1953, dismissing the appeal of the Appellant from the judgment of Wilson, J., dated 11th February, 1953, whereby an appeal by the Appellant from the decision of the Income Tax Board of Review of the Federation of Malaya was dismissed and the determination of the Board of Review was affirmed.

pp. 47-48.

p. 40.

pp. 33-34.

2. The questions arising in the Appeal are concerned with the construction of Section 39 of the Income Tax Ordinance, 1947, of the Federation of Malaya as substituted by Section 2 of the Income Tax (Amendment) Ordinance, 1951, and in particular whether the Appellant's power to grant relief under the proviso to that Section is an absolute discretion which cannot be questioned by appeal, and if it can be so questioned, whether a dividend paid by the Respondent on 18th November, 1950, in respect of its trading year ending on 30th June, 1950, was paid out of its chargeable income of the year 1951.

30 3. Section 39 of the Income Tax Ordinance, 1947, as amended provides as follows :—

“ 39. Subject to the provisions of Section 36 of this Ordinance
[Note: Section 36 contains provisions concerning non-resident

British subjects and is not relevant to this Case] there shall be levied and paid for each year of assessment upon the chargeable income of—

- (a) every company, tax at the rate of thirty per centum on every dollar of the chargeable income thereof ;
- (b) every person not resident in the Federation, trustee (other than the trustee of an incapacitated person), and executor, tax at the rate of twenty per centum on every dollar of the chargeable income thereof :

Provided that where any company proves to the 10 satisfaction of the Comptroller that any dividends have been paid out of such chargeable income, or any trustee proves to the satisfaction of the Comptroller that any beneficiary of the trust is entitled to a share of the trust income, an amount equal to such dividends in the case of a company or a corresponding share of the statutory income of the trustee in the case of a trust may be charged at a lower rate or not charged with any tax as the Comptroller shall determine."

"year of assessment" means each calendar year of 12 months 20 beginning on the 1st January (Section 2 of the Income Tax Ordinance, 1947, as amended, and Gazette Notice No. 8574/47).

"chargeable income" of a company means the full amount of the company's income from all sources computed on the amount of the profits of the company's usual trading year next preceding the year of assessment, called "the basis period," less certain permitted deductions.

The Ordinance achieves this by the following provisions :—

by Section 34 it is provided : " The chargeable income of any person for any year of assessment shall be the remainder of his assessable income for that year after the deductions allowed in this 30 Part of this Ordinance have been made."

by Section 33 (1) it is provided : " The assessable income of any person from all sources chargeable with tax under this Ordinance for any year of assessment shall be the remainder of his statutory income for that year after the deductions allowed in this Part of this Ordinance have been made."

by Section 31 (1) it is provided : " Save as provided in this section, the income of any person for each year of assessment (hereinafter referred to as 'statutory income') shall be the full amount of his income for the year preceding the year of assessment 40 from each source of income possessed by him at any time during the year of assessment, notwithstanding that any such source does not produce income during the year of assessment."

and by Section 31 (2) it is provided : " Where the Comptroller is satisfied that any person usually makes up the accounts of a trade, business, profession, vocation, or employment carried on or

exercised by him to some day other than that immediately preceding any year of assessment, he may direct that the statutory income from that source be computed on the amount of the gains or profits of the year ending on that day in the year preceding the year of assessment."

By Section 75 (1) of the Income Tax Ordinance, 1947, as amended, it is provided, *inter alia*, that any person "being aggrieved by an assessment made upon him" may appeal to the Board of Review.

4. The facts of the present Appeal appear from the Agreed Facts pp. 49-50.
10 and are summarised as follows:—

The Respondent Company in the Report of its Directors dated 18th November, 1950, for its trading year ended 30th June, 1950, declared a net profit of \$973,226, and at its Annual General Meeting held on 18th November, 1950, declared a gross dividend of \$533,333 in respect of its trading year ended 30th June, 1950. As empowered by Section 40 of the Income Tax Ordinance, 1947, the company deducted Income Tax from the gross dividend at 20 per cent., the rate then payable, and paid a net dividend of \$426,667.

20 The Company in respect of the Year of Assessment 1951 submitted a computation of its chargeable income to the Comptroller of Income Tax at the figure of \$1,320,963 (which included the said net profit of \$973,226) based on the income of the Company for its trading year ended 30th June, 1950, and the Comptroller of Income Tax computed such chargeable income as \$1,323,155 and assessed the Company for tax on this sum amounting to \$396,840.75, representing tax at 30 per cent.

30 The assessment of \$1,323,155 as chargeable income is not in dispute. But by virtue of the proviso to Section 39, the Company applied to the Comptroller of Income Tax to charge at a lower rate (namely 20 per cent. instead of 30 per cent.) an amount out of that chargeable income equal to the gross dividend of \$533,333 paid by the Company in November, 1950, and from which tax at the rate of 20 per cent. only had been deducted by the Company.

5. In these circumstances, the contention of the Appellant is that the proviso to Section 39 gives to the Comptroller of Income Tax an unfettered discretionary power which cannot be reviewed by way of appeal.

40 The Appellant contends that it has not been proved "to the satisfaction of the Comptroller" that the dividend paid in November, 1950, was paid "out of" the Company's chargeable income of the year 1951. On the contrary, the Comptroller asserts that the Company's chargeable income for the Year of Assessment 1951 was the income accruing to the Company in that year, notwithstanding that its quantum might be measured by the profits of some other period. Although the statutory income (by reference to which chargeable income is defined) for a Year of Assessment is calculated on the income for the year preceding the Year of Assessment, it is not in fact the income of the Year of Assessment. The income of the preceding year is merely the basis or mode of measurement of the income. Therefore the dividend paid in November, 1950, cannot be said to have been paid "out of" the true income of 1951.

But even if the dividends were proved, to the satisfaction of the Comptroller, to have been paid out of the Company's chargeable income of 1951, the power to charge tax at a lower rate or not at all is permissive and not binding on the Comptroller. The word "shall" in this proviso is used in the future and not in the imperative tense, and no appeal from the discretionary power vested in the Comptroller lies to the Board of Review.

Further, the taxpayer cannot be said to be "aggrieved by an assessment" within the meaning of Section 75, as the assessment is correct. He has therefore no right of appeal to the Board of Review under Section 75. 10

The Comptroller contends that Section 39 is not a relieving section but is designed purely as machinery to avoid overpayment of tax by companies and trustees and subsequent claims for repayment of tax by shareholders and trust beneficiaries.

The history of Section 39 negatives the view that it was intended for relief at least in years when the rate of tax was changed. For example, Section 4 (1) of the Income Tax (Amendment) Ordinance, 1951, is as follows :—

"The income of a person from a dividend (not being a preference dividend) paid, on or after the first day of January, 1951, but before the enactment of this Ordinance, by a company resident in the Federation shall be deemed to be such a sum as would after deduction of tax by reference to a rate of thirty per centum, as reduced by any relief due to the company under section 44 or 46 of the principal Ordinance, be equal to the net amount received." 20

This subsection assumes that the 30 per cent. rate should be payable by companies on dividends paid between January 1st and February 28th, 1951, although the profits out of which such dividends were paid must have been earned before 1951. 30

Moreover, it is to be noted that when the Board of Review is intended to review a discretion vested in the Comptroller, the Ordinance explicitly so provides, as, for example, in Sections 30 and 53 (3) of the Income Tax Ordinance, 1947, as amended.

6. On the other hand, the Company contends that the proviso gives to the Comptroller a discretion either to charge tax at a lower rate or not to charge with any tax, but that he has no discretion to charge at the full rate in the circumstances of the present case : but if the Comptroller has discretion to charge tax at the full rate, then they say that his refusal to reduce the tax is improper in the circumstances of the present case. 40

The Company contends that the Comptroller of Income Tax should, under the proviso to Section 39, charge with income tax at the rate of 20 per cent. which was the rate applicable to companies for the year of assessment up to and including 1950 (instead of 30 per cent. being the increased rate made applicable to companies as from the 1st January, 1951) that part of the Company's chargeable income for the Year of Assessment 1951 (basis period 1950) equivalent to the dividend paid by the Company in November, 1950, which, they assert, was paid, within the meaning of

Section 39, "out of" the said chargeable income for 1951. The Company asserts that it has a right to appeal to the Board of Review under Section 75 against the refusal of the Comptroller to reduce the rate of tax as aforesaid.

7. The history of the Case up to and including the hearing of the Company's appeal by the Board of Review may be summarised as follows :—

On February 27th, 1952, the Company applied to the Comptroller of Income Tax to review and revise the assessment of \$1,323,155 made upon the Company by re-assessing an amount equal to the amount of the dividend paid in November, 1950, and to charge it at a lower rate, namely 20 per cent. instead of 30 per cent. in accordance with the power in that behalf contained in the proviso to Section 39 of the Income Tax Ordinance, 1947.

On March 1st, 1952, it was agreed between the Company and the Comptroller that the amount of tax in dispute was \$53,333.30 and the Company paid the amount of tax not in dispute.

By letter dated March 14, 1952, the Comptroller refused to amend the assessment, assigning no reasons for such refusal at that time, and informing the Company that it was entitled to appeal to the Board of Review. By letter dated 20th March, 1952, and addressed by the Company to the Clerk to the Board of Review, the Company appealed against the assessment pursuant to Section 75 of the Income Tax Ordinance, 1947.

In response to the Company's request to assign reasons for his decision, the Comptroller later stated (27th June, 1952) that in his view the Company's chargeable income for the Year of Assessment 1951 was the income accruing to the Company in that year, notwithstanding the fact that its quantum might be measured by profits of some other period. In these circumstances, the Comptroller said, dividends paid by the Company in 1950 could not be regarded as paid out of the Company's chargeable income for 1951.

By letter dated 31st July, 1952, and addressed by the Comptroller to the Clerk to the Board of Review, the Comptroller gave notice that he proposed to submit as a preliminary point at the hearing of the appeal that no appeal lay under Section 75 of the Income Tax Ordinance, 1947, because the application of the proviso to Section 39 of the Ordinance was entirely within the discretion of the Comptroller and was not subject to appeal to the Board of Review. The Comptroller intimated that the Clerk to the Board should inform the Company accordingly.

The Company's appeal to the Board of Review was heard on the 12th and 26th August, 1952.

At the hearing of the Appeal before the Board of Review, the Comptroller contended as a preliminary point that Section 39 of the Ordinance conferred a discretion on the Comptroller and that that Section did not contain any provision for an appeal to the Board of Review, and consequently if the Comptroller had exercised his discretion arbitrarily the remedy should be by writ of *certiorari* or *mandamus* and not by appeal to the Board.

In reply to the preliminary point it was contended on behalf of the Company that in the letter by the Comptroller refusing to amend the assessment he had said that if the Company were aggrieved by his decision it was entitled to appeal to the Board, and that an appeal to the Board can lie against an assessment in respect of quantum as well as rate of tax.

The Board decided that, pursuant to Regulation 9 of the Board of Review (Procedure in hearing appeals) Regulations, 1949, the Comptroller was entitled to take the preliminary point. The Board further decided following James, L.J., in *Ex parte Sidebotham* (1880) 14 Ch. D. at p. 465; *Re Read Bowen & Co.*; *Ex parte Official Receiver* (1887) 19 Q.B.D. 174 10 at p. 177; *R. v. Surrey (Mid-Eastern Area) Assessment Committee* [1948] All E.R. p. 856; and *R. v. Surrey Quarter Sessions Appeal Committee* [1951] All E.R. p. 659, that the Respondent Company was a person aggrieved within the meaning of Section 75 (1) of the Ordinance by an assessment made by the Comptroller and could appeal to the Board.

The issues were then agreed between the parties as follows:—

p. 7, l. 40.

(1) Whether the dividends paid in 1950 were paid out of the chargeable income for the year of assessment 1951.

p. 7, l. 42.

(2) Whether the Comptroller was wrong in determining not to charge any part of the chargeable income of the Respondent 20 Company for the year of assessment 1951 at 20 per cent. instead of 30 per cent.

p. 18, l. 10.

The Board held on the first issue that the dividends paid in 1950 were paid out of the chargeable income for the year of assessment 1951, on the ground that chargeable income in the proviso to Section 39 had the same meaning as chargeable income in Section 34, and that the combined effect of Sections 31 (1), 33, 34 and 39 is that generally the chargeable income of any person for any year of assessment is the statutory income for the year preceding the year of assessment after the deductions allowed under Sections 33 and 34. 30

p. 18, l. 21.

The Board held on the second issue that the Comptroller was wrong in determining not to charge any part of the chargeable income of the Respondent Company for the year of assessment 1951 at 20 per cent. instead of 30 per cent., on the ground that the proviso to Section 39 did not give him any discretion but made it a duty on his part to exercise the power to determine to charge at a lower rate or at no rate, and the Board ordered that the assessments be so adjusted as to charge at 20 per cent. an amount equal to the amount of the dividends paid in 1950.

pp. 31-33.

8. The present Appellant appealed to the High Court against the whole of the decision of the Board of Review. The appeal was heard 40 by Mr. Justice Wilson on the 21st November, 1952, and on the 11th February, 1953, he gave Judgment dismissing the appeal.

p. 31, l. 22.

The learned Judge dealt first with the preliminary [point that Section 39 confers a discretion on the Comptroller and that there is no provision in that Section for an appeal to the Board. He considered the words "may be charged" in the proviso to Section 39 of the Income Tax Ordinance, 1947, as amended, and pointed out that these words

clearly gave the Comptroller some discretion, but there was nothing in the proviso to guide him as to how to fix the rate if he decided to charge at a lower rate. If he had to exercise his discretion he could therefore evade the intention of the Legislature by charging at a rate of 29½ per cent.

He then considered *Julius v. The Lord Bishop of Oxford* and in particular the words of Lord Blackburn at p. 244 where the Noble Lord said "The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right." The learned judge then expressed his conclusion that the proviso to Section 39 conferred a legal right on the Respondent Company, and that if the Comptroller were arbitrarily to fix a lower rate there would be a right of appeal under Section 75 of the Ordinance to the Board of Review. p. 32, l. 16.

The learned Judge then considered the second point, whether the dividend paid in 1950 was paid out of the chargeable income for 1951. He agreed with the Board that the words "chargeable income" in the proviso to Section 39 had the same meaning as the words in Section 34, and that in view of the definitions of "assessable income" and "statutory income" the chargeable income of the Respondent Company for the year of assessment 1951 was the statutory income of the trading year 1950, and consequently that the dividend paid in 1950 was paid out of the chargeable income for the year of assessment 1951. p. 32, l. 33.

He finally held that the Respondent Company being aggrieved and having appealed to the Board, it was entitled to order that the assessment be adjusted to as to charge at twenty per cent. an amount equal to the amount of the dividend paid in 1950. p. 33, l. 17.

9. The Appellant appealed to the Supreme Court against the judgment of Mr. Justice Wilson. The appeal was heard by the Supreme Court (Mathew, C.J., Murray-Aynsley, C.J. and Bellamy, J.) on 8th June 1953. The Supreme Court gave judgment on the same day unanimously dismissing the Appeal. pp. 41-45.

As a result of concessions made in the course of the hearing by Counsel for the Appellant the Court was left to determine three questions :—

(1) Does the proviso to Section 39 of the Ordinance, as amended, vest in the Comptroller an absolute and uncontrolled discretion to reduce or remit the rate of tax or to leave the rate of tax unaltered ?

(2) Is there any right of appeal to the Board of Review if the Comptroller refuses to act under the said proviso ?

(3) Has the Board of Review power to exercise on appeal the discretion (if any) vested in the Comptroller under the said proviso ?

Before formulating these questions and proceeding to answer them the Court expressed approval of the view expressed by Wilson, J., that the dividends paid in 1950 were paid out of the chargeable income of the Company for the year of assessment 1951, and of his reasons for that view, and the Court then said that inasmuch as no argument to the contrary was presented to it it need not consider the point further. In fact no argument was presented to the Court because the Court had intimated that it was fully satisfied on that point and that no argument would move it.

On the first question the Court considered *Julius v. Lord Bishop of Oxford* where the words "it shall be lawful" were construed as being permissive and enabling only, but it refused to accept the contention that the decision in that case applied in the present case. It remarked that there is a long line of cases construing similar words as permissive and an equally long line construing them as obligatory, and referred to the speech of Lord Cairns in *Julius v. Lord Bishop of Oxford* at p. 225, and also the speech of Lord Melbourne at p. 235 : and particularly to Lord Blackburn's statement of the law at p. 244, where he said "the enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right." In the Court's opinion, the words of the proviso were not difficult to construe, and in particular it was important to bear in mind in construing the words "may be charged at a lower rate or not charged with any tax as the Comptroller shall determine" that the Legislature had used the words "may" and "shall" in the same short phrase. The Court also observed that the only person under the Ordinance empowered to determine the rate of tax, and in certain instances, as in Section 33, directed to do so, is the Comptroller. The Court considered it "crystal clear" that whether a company be charged at a lower rate or not charged with any tax was discretionary, for the Legislature had used the word "may". But that once the Comptroller had exercised that discretion he must give effect to it, and therefore the word "shall" was used. The Court considered that the primary object of the proviso to Section 39 was that a Company should have a reduction of tax in the circumstances of the present case, and that the Legislature could not have intended that the Company should be deprived of this benefit by the act of the Comptroller for whose benefit the proviso was not inserted. Its answer to the first question was that the Comptroller was bound to exercise his discretion.

The Court then decided the second question in the affirmative. *Prima facie*, it said, a company which has been assessed to tax at a figure greater than the law allows and has applied to the Comptroller to review and to revise the assessment, when the Comptroller refuses to do so, is "a person aggrieved." The Court then referred to the definition given by James, L.J., in *Ex parte Sidebotham*, 14 Ch. D. 458, at p. 465, and decided that the Company in the present case came within that definition, and clearly had a right of appeal under Section 75 (1). The Court then decided the last question in the affirmative, on the ground, as the Court said, that no argument had been addressed to it on this point.

10. The decision of the Supreme Court was, as will be seen, based primarily upon three findings :—

(A) That the Comptroller had a duty to exercise the power given to him by the proviso to Section 39 in one of the two ways stated in the proviso, and

(B) That the Respondent is "a person aggrieved" by an assessment made on it within the terms of Section 75, and

(C) That the dividend in question was paid out of the Respondent's chargeable income for the year 1951.

The Appellant submits that the Supreme Court was wrong on each of these findings and that the Orders appealed from should be reversed for the following amongst other

REASONS

- (1) BECAUSE it has not been proved to the satisfaction of the Comptroller of Income Tax that the dividends paid by the Respondent Company in November, 1950, were paid "out of" the Company's chargeable income for the year 1951.
- 10 (2) BECAUSE, although the statutory income for a Year of Assessment is calculated on the income of the year preceding the Year of Assessment, it is not income for that year; and dividends paid in the year preceding the Year of Assessment are not "paid out of" the income of the Year of Assessment.
- 20 (3) BECAUSE the conception of a payment out of a notional fund is well recognised in income tax law and an illustration of the acceptance of this conception in the House of Lords can be found in the speech of Lord Simon, L.C., in *Allechin v. Coulthard* [1943] A.C., at pages 619 to 621.
- (4) BECAUSE in these circumstances the proviso to Section 39 gives to the Comptroller an unfettered discretion whether to charge tax at the full rate or at a reduced rate, or to remit tax altogether.
- 30 (5) BECAUSE the use of the word "may" in the proviso indicates that the Comptroller has an unfettered discretion, and the word "shall" in the last line of the proviso is used in the future tense and not in the imperative tense.
- (6) BECAUSE the view of the Court of Appeal involves the substitution of the word "must" for the word "may" in the proviso.
- (7) BECAUSE the view of the Court of Appeal involves the anomaly that less prosperous companies which are unable to pay a dividend would pay at the full rate on their profits; whereas companies which do pay dividends would be entitled to a reduced rate on the amount of these dividends.
- 40 (8) BECAUSE the view of the Court of Appeal would result in the further anomaly that no Company would pay tax at the full rate on its distributed profits.
- (9) BECAUSE if the Court of Appeal is correct, and the Comptroller is under an obligation to exercise his discretion, he is given no guidance as to how he should exercise it, and in particular as to the amount by which

tax should be reduced in years when there is no alteration in the rate of tax.

- (10) BECAUSE the proviso applies also to trusts, and the Court of Appeal view involves the reduction of tax of a beneficiary's share of trust income, even though the beneficiary might be liable to pay tax at more than the current standard rate.
- (11) BECAUSE if the construction placed on the proviso by the Court of Appeal is a possible construction, then the proviso is ambiguous, and the object and intent of the 10 Section must be looked at.

The purpose of the proviso was not to grant relief, but to simplify the collection of tax from shareholders and beneficiaries.

- (12) BECAUSE the history of Section 39 negatives the view that it was intended for relief, at least in years where the rate of tax was charged.
- (13) BECAUSE the principle stated in *Julius v. Lord Bishop of Oxford* that the exercise of a discretion may be obligatory requires that the object of the power should 20 be to effectuate a legal right. The Respondent in this case had no legal right entitling it to call for the exercise of the discretion, and clearly no legal right was intended.
- (14) BECAUSE the Respondent Company is not "a person aggrieved" by an assessment since the assessment is perfectly proper and correct, and this seems clear from the passage from James L.J.'s judgment in *Ex parte Sidebotham* quoted by the Supreme Court in its judgment, for the Respondent has not suffered a legal grievance, 30 it is merely disappointed of a benefit which it might have received.
- (15) BECAUSE where the Board of Review is intended to review the Comptroller's discretion, the Ordinance so provides, and there is no such provision in relation to the present case.

- (16) BECAUSE the plea of hardship is irrelevant; there is no reference in Section 39 to hardship and relief for poverty is explicitly provided in Section 88 of the Ordinance. 40

Moreover no hardship is caused to shareholders, who, whatever tax is deducted, receive corresponding credit for it in respect of their dividends.

- (17) BECAUSE the reasoning of the Judgment of the Supreme Court upon the Appeal is not well founded.

F. N. BUCHER.

In the Privy Council.

ON APPEAL

*from the Court of Appeal of the Supreme
Court of the Federation of Malaya.*

BETWEEN

COMPTROLLER OF INCOME

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Case for the Appellant.

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