

~~C.M.F. 22~~ 9, 1956

# In the Privy Council.

No. 27 of 1954.

## ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF THE FEDERATION OF MALAYA

UNIVERSITY OF LONDON  
W.C.1.  
19 FEB 1957  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

BETWEEN

COMPTROLLER OF INCOME TAX ... .. *Appellant*

AND

HARRISONS & CROSFIELD (MALAYA) LIMITED ... *Respondent.*

45983

### CASE FOR THE RESPONDENT

1.—This is an Appeal from a judgment of the Court of Appeal at Kuala Lumpur in the Federation of Malaya (Charles Mathew, C.J., Charles Murray-Aynsley, C.J., and Bellamy, J.), dated 8th June, 1953, upon an appeal by the Comptroller of Income Tax (Malaya) from a judgment of the High Court, Kuala Lumpur (Wilson, J.), dismissing an appeal by the Comptroller of Income Tax from a decision of the Income Tax Board of Review, Kuala Lumpur. By the judgment of the Court of Appeal, Kuala Lumpur, the judgment of the High Court and the decision of the Board of Review were affirmed.

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10 2.—The matter arises upon an assessment to Income Tax made upon the Respondent Company by the Comptroller of Income Tax (Malaya) for the year of assessment 1951 under the Income Tax Ordinance 1947 of Malaya as amended by subsequent Ordinances. The point in question in the appeal relates to the rate of Income Tax which ought to be charged in respect of a part of the income of the Respondent Company amounting to 533,333 dollars that was distributed by way of dividend to its shareholders. The contention on behalf of the Respondent Company which has prevailed in the Tribunals below, shortly stated, is that the rate of tax to be charged in respect of that part of the income of the Company was 20 per cent. only, being the rate of tax deducted by the Company from the dividend in question in accordance with the terms of the Income Tax Ordinance then

Exh. A (1),  
pp. 49-50

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 p. 49, l. 37 in force which currently imposed Income Tax at a rate of 20 per cent. By a later Ordinance the rate of tax upon the profits, part of which had already been distributed as aforesaid and been the subject of deduction of tax at the rate of 20 per cent. only, was raised to 30 per cent., and the Respondent Company claimed and does claim that in the circumstances it is entitled to the relief provided by Section 39 of the Income Tax Ordinance 1947 as amended by the Income Tax (Amendment) Ordinance 1951, and that the relief to be given ought to be by way of the reduction of the rate of tax from 30 per cent. to 20 per cent. in respect of the part of the Company's profits which had already been distributed as dividend. The contention for the Comptroller is that the Respondent Company is not entitled to the relief claimed and that the whole of its income for the year in question should bear tax at 30 per cent. 10

3.—The material provisions of the said Section 39 as so amended are—

“ 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 . . .

“ Provided that where any company proves to the satisfaction 20  
 “ of the Comptroller that any dividends have been paid out  
 “ of such income . . . an amount equal to such dividends in  
 “ the case of a company . . . may be charged at a lower  
 “ rate or not charged with any tax as the Comptroller shall  
 “ determine.”

4.—The specific questions of law raised in the Appeal shortly stated are—

- (1) Whether the proviso to Section 39 (b) of the Income Tax Ordinance (Federation of Malaya) 1947 as amended by the Income Tax (Amendment) Ordinance 1951 vests in the Comptroller of Income 30 Tax an absolute and uncontrolled discretion to reduce or remit the rate of tax or to leave the rate of tax unaltered.
- (2) Whether there is any right of appeal to the Board of Review if the Comptroller refuses to act under the said proviso.
- (3) Whether the Board of Review has power to review on appeal the discretion (if any) vested in the Comptroller under the said proviso and to adjust the rate of tax in accordance with the Board's view of the proper adjustment.

p. 7, l. 29  
 p. 8, l. 30  
 p. 27, l. 27 5.—It was originally contended before the Board of Review and before the High Court on behalf of the Comptroller that the proviso to 40 Section 39 (b) of the Ordinance did not apply to the facts of the case because the dividend could not be treated as paid out of the chargeable income for the year of assessment 1951 and that a condition precedent in Section 39 of the Ordinance had therefore not been fulfilled. But this contention,

having been over-ruled by the Board of Review and by the High Court, was abandoned before the Court of Appeal. It was not therefore in dispute in the latter Court that the dividend was paid out of the chargeable profits of the Respondent Company for the year of assessment 1951, and that the condition precedent in Section 39 had therefore been fulfilled.

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p. 33, l. 8

6.—The facts of the Case are set out in detail in the Record and are summarised as follows :—

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- 10 (i) The Respondent Company is a company incorporated in Singapore and has a place of business in Kuala Lumpur in the Federation of Malaya.
- (ii) The rate of Malayan Income Tax on the chargeable income of the Company for the year of assessment 1950 was 20 per cent.
- (iii) In November, 1950, the Company declared and paid out of its income for the year ended the 30th June, 1950, a gross dividend of 533,333 Malayan dollars from which it deducted income tax at the rate of 20 per cent. in accordance with the provisions of Section 40 of the Income Tax Ordinance 1947, the Company not being permitted by the terms of the said Ordinance to deduct tax at any higher rate.
- 20 (iv) Section 2 of the Income Tax (Amendment) Ordinance of 1951 increased the rate of tax on the chargeable income of companies for the year of assessment 1951 from 20 per cent. to 30 per cent.
- (v) The chargeable income of the Company for the year of assessment 1951 was, as provided by Sections 31, 33, and 34 of the Ordinance, its income for the previous year which was taken to be its income for the Company's trading year ended 30th June, 1950. The result was that although the rate of income tax deducted by the Company from its said dividend when paid was 20 per cent., this dividend was paid out of profits which later suffered tax at 30 per cent. by virtue of an assessment for the year 1951 made by the Comptroller of Income Tax on 9th February, 1952.
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p. 49, l. 23

p. 49, l. 25

(As above stated it was not in dispute before the Court of Appeal that the dividend was paid out of the chargeable income of the Company for the year of assessment 1951 or that the tax deducted from the dividend was at the rate of 20 per cent. or that the profits out of which it was paid had suffered tax at 30 per cent.).

7.—Extracts from other relevant provisions of the Income Tax Ordinance 1947 (as amended) are as follows :—

40 Section 26. "The income of a person from a dividend paid by a  
" company liable to tax under this Ordinance . . . shall, where  
" any such tax has been deducted therefrom, be the gross amount  
" before making such deduction."

Section 40 (1). "Every company which is resident in the Federation  
" shall be entitled to deduct from the amount of any dividend

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“ paid to any shareholder tax at the rate paid or payable by the  
“ Company . . . ”

Section 74 (1). “ For the purpose of hearing appeals in the manner  
“ hereinafter provided there shall be a Board of Review, hereafter  
“ in this Part referred to as ‘ The Board,’ consisting of not more  
“ than thirty members who shall be appointed from time to time  
“ by the High Commissioner . . . ”

“ (3) All the powers, functions and duties of the Board may  
“ be exercised, discharged and performed by any Committee of the  
“ Board consisting of not less than three members of the Board. 10  
“ Any act, finding or decision of any such Committee shall be  
“ deemed to be the act, finding or decision of the Board . . . ”

Section 75 (1). “ Any person who, being aggrieved by an assessment  
“ made upon him, has failed to agree with the Comptroller in the  
“ manner provided in subsection (4) of Section 72 of this Ordinance  
“ may appeal to the Board by—

“ (a) lodging with the Clerk, within seven days from the date  
“ of the refusal of the Comptroller to amend the assessment  
“ as desired, a written notice of appeal in duplicate ; and

“ (b) lodging with the Clerk, within thirty days of the date on 20  
“ which such notice of appeal was lodged, a petition of appeal  
“ in quadruplicate containing a statement of the grounds of  
“ appeal.”

Section 76 of the Ordinance deals with the hearing of an appeal by the  
Board of Review. Subsection (10) of Section 76 is as follows :—

“ (10) The Board may, after hearing an appeal, confirm, reduce,  
“ increase or annul the assessment or make such order thereon  
“ as to it may seem fit.”

Section 77 of the Ordinance provides that the decision of the Board  
of Review shall be final, subject to a right of appeal to the High 30  
Court upon any question of law or of mixed law and fact.

p. 1 8.—The Company on 18th April, 1952, appealed to the Board of  
Review under Section 75 of the Ordinance of 1947 on the ground that the  
Comptroller of Income Tax had wrongfully refused to reassess for income  
tax at the rate of 20 per cent. that part of the Company’s chargeable income  
for the year of assessment 1951 which had been distributed in the said  
dividend of 533,333 dollars in accordance with the powers given to him in  
that behalf by Section 39 of the Ordinance of 1947.

p. 22, l. 27 9.—The Board of Review decided, upon a preliminary point raised by  
the Comptroller, that the Company was a person “ aggrieved ” within the 40  
meaning of subsection (1) of Section 75 of the Ordinance of 1947 by an  
assessment made by the Comptroller and could thus appeal to the Board,

p. 18, l. 10 and further decided that the dividend paid by the Company in 1950 was

paid out of the chargeable income of the company for the year of assessment 1951, and that the Comptroller was wrong in determining not to charge any part of the chargeable income of the Company for the year of assessment at 20 per cent. instead of at 30 per cent., and the Board ordered that the assessment be adjusted so as to charge at 20 per cent. an amount equal to the amount of the dividend paid by the Company in 1950.

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p. 24, l. 18

10 10.—The Comptroller on 30th August, 1952, appealed to the High Court against the decision of the Board on the grounds (i) that the decision was wrong in law and (ii) that he (the Comptroller) had under the said Section 39 full discretion as to whether the rate of charge should be reduced or left unaltered and (iii) that the Board had acted without jurisdiction in purporting to perform the duty of the Comptroller and in purporting to determine a lower rate of charge, and (iv) that the dividend in question paid by the Company was not paid out of the chargeable income of the company for the year of assessment 1951.

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20 11.—The High Court (Malaya) (Wilson, J.) on 11th February, 1953, dismissed the appeal of the Comptroller and held that the dividend of the Company paid in 1950 was paid out of the chargeable income of the Company for the year of assessment 1951 and that the Company, being aggrieved and having appealed to the Board, the Board was entitled to order that the assessment be adjusted so as to charge tax at 20 per cent. (in place of 30 per cent.) upon an amount of the profits of the company equal to the dividend paid in 1950. Mr. Justice Wilson said that clearly the Comptroller had some discretion under Section 39 and might charge either at a lower rate or at no rate at all, but, citing the case of *Julius v. The Bishop of Oxford* (5 Appeal Cases, p. 214) was of opinion that the Legislature must have intended in the proviso to the said Section 39 to confer a legal right, and if the Comptroller were arbitrarily to fix a rate of tax there would be a right of appeal to the Board of Review.

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p. 32, l. 6

p. 32, l. 29

30 12.—On the 23rd February, 1953, the Comptroller appealed to the Court of Appeal against the decision of the High Court on the grounds that the learned Judge was wrong in law—(i) in holding that the said proviso to Section 39 conferred a legal right upon the Company and imposed a duty on the Comptroller to reduce the rate of tax payable by the company, and (ii) in not holding that under the said proviso the Comptroller had an unfettered discretion whether to reduce or remit the rate of tax or to leave the rate of tax unaltered, and (iii) in holding that the Board of Review was entitled to exercise on appeal the discretion vested in the Comptroller under the said Section 39, and that the learned Judge was wrong in fact in holding that if the Comptroller was under any duty at all there were any circumstances affecting the Company which entitled it to the exercise of the discretion of the Comptroller in its favour, and upon other grounds not now material to this Case.

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- 13.—On the 8th June, 1953, the Court of Appeal dismissed the appeal of the Comptroller and ordered that the Judgment of Wilson, J. be affirmed. It was held that the learned Judge was right in his decision that the dividend of the Company paid in 1950 was paid out of the chargeable income of the Company for the year of assessment 1951, this point being conceded by Counsel for the Comptroller and no argument to the contrary being presented to the Court of Appeal.
- The Court referred to the cases upon the question as to whether a statutory power is permissive or mandatory set out in the speech of Lord Cairns, L.C., in *Julius v. The Bishop of Oxford* (supra), at page 223 *et. seq.* of 5 A.C., and, following the statements of law in that case, the Court was of opinion that once a company proves to the satisfaction of the Comptroller that any dividends have been paid out of its chargeable income, such a company has a legal right to be assessed on the amount equal to such dividend either at a lower rate of tax or at no rate at all, and as to the right of appeal of a person aggrieved the Court thought that the Company was a “ person aggrieved ” within the meaning of the definition in that case.
- p. 44, l. 32
- p. 45, l. 18
- p. 47
- 14.—The Comptroller of Income Tax applied to the Court of Appeal for leave to appeal to Her Majesty in Council and in due course an Order granting final leave so to appeal was made by the Court.

15.—The Respondent Company humbly submits that the decision of the Court of Appeal is right and should be affirmed and that this Appeal should be dismissed with costs for the following, amongst other

### REASONS

1. BECAUSE the Respondent Company is entitled to relief in pursuance of the proviso to Section 39 of the Income Tax Ordinance 1947, as amended by the Income Tax (Amendment) Ordinance 1951, in respect of the rate of income-tax charged upon the part of its income distributed to its shareholders as dividend in November 1950.
2. BECAUSE the relief to which the Respondent Company is so entitled is such as will reduce the rate of income tax charged upon the part of its income so distributed to 20 per cent. in substitution for the rate of 30 per cent. at which the whole income of the Company has in fact been charged in the assessment for the year 1951.
3. BECAUSE, as is not disputed, it has been proved to the satisfaction of the Comptroller of Income Tax within the meaning and for the purpose of the proviso to Section 39 of

the Income Tax Ordinance (as so amended) that the dividend paid by the Company in November 1950 was paid out of the chargeable income of the Company for the year of assessment 1951.

4. BECAUSE at the time of paying the dividend in November 1950 the Company was then entitled to deduct from the payment income tax at a rate not exceeding 20 per cent., and did in fact deduct tax therefrom at that rate.
- 10 5. BECAUSE the rate of income tax for the year of assessment 1951 having been raised from 20 per cent. to 30 per cent. subsequent to the payment of the dividend it became just and equitable and required by the proviso to Section 39 of the Income Tax Ordinance (as so amended) that the assessment upon the Company's chargeable income for 1951 should be adjusted so that the part paid out of it as dividend in November 1950 should bear income tax at a rate not exceeding 20 per cent.
- 20 6. BECAUSE the Respondent Company had only been able to recoup itself for the income tax upon the income paid as dividend to the shareholders at a rate of 20 per cent. and it will have borne income tax upon the whole of its said chargeable income at a rate of 30 per cent. unless relief in respect of the assessment for 1951 under appeal is allowed as the tribunals below have decided should be allowed.
- 30 7. BECAUSE in the circumstances the Comptroller of Income Tax was under an obligation in pursuance of the said proviso to Section 39 of the Ordinance (as amended) either to reduce the rate of tax to 20 per cent. or to charge no income tax upon the part of the said income paid as dividend to the shareholders.
- 40 8. BECAUSE, whatever be the discretion given to the Comptroller of Income Tax under the proviso to Section 39 of the Ordinance as regards adjusting the rate of income tax, his exercise of the discretion was open to review by the Board of Review under the Board's powers contained in Section 76 (10) of the Ordinance on the appeal by the Respondent Company to the Board against the assessment under Section 75 (1) thereof.
9. BECAUSE the Respondent Company was a person aggrieved by an assessment within the meaning of Section 75 (1) of the Ordinance and its appeal to the Board of Review was competent.

10. BECAUSE the Board of Review rightly decided that the assessment for 1951 under appeal was to be reduced upon the basis that the income tax upon the income of the Company applied in 1950 in paying the dividend to its shareholders should be charged at a rate of 20 per cent. instead of the rate of 30 per cent. adopted by the Comptroller for the purpose of the assessment.
11. BECAUSE the decision of the Board of Review was rightly affirmed by the judgment of the High Court.
12. FOR the reasons given in the judgment of the Court of 10 Appeal.

ROY BORNEMAN.  
REGINALD HILLS.



In the Privy Council.

No. 27 of 1954.

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

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BETWEEN  
COMPTROLLER OF INCOME  
TAX ... .. *Appellant*  
AND  
HARRISONS & CROSFIELD  
(MALAYA) LIMITED ... *Respondent.*

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CASE FOR THE RESPONDENT

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STEPHENSON HARWOOD & TATHAM,  
16 Old Broad Street, E.C.2.