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UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
IN THE PRIVY COUNCIL  
- 9 MAR 1960  
25 RUSSELL SQUARE  
LONDON, W.C.1.

No. 27 of 1958

O N A P P E A L  
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

55494

B E T W E E N

GEORGE N. HOURY Q.C. ... Appellant  
and  
THE COMMISSIONER OF INCOME TAX Respondent

C A S E FOR THE APPELLANT

RECORD

pp.83-93

10 1. This is an appeal from a judgment, dated  
the 2nd April 1958, of the Court of Appeal for  
Eastern Africa (O'Connor, P. Forbes, J.A. and  
Macduff, J.), dismissing an appeal from a judgment,  
dated the 12th November 1956 of the High Court of  
Tanganyika (Lowe, J.), dismissing an appeal against  
two assessments to income tax made by the Respondent  
upon the Appellant, being Additional Assessment T.1234  
in the sum of Shs. 104,304/0 for the year of income  
1951 and Additional Assessment 3718 in the sum of  
20 Shs. 72,900/0 for the year of income 1952.

2. The issue raised by this Appeal is whether  
in Section 24 of the East African Income Tax  
(Management) Act 1952 (hereinafter called "the  
Act") the income deemed to be that of a settlor of a  
settlement includes income deemed to have been  
distributed under the provisions of Section 22 of the  
Act to shareholders of a company within the scope  
of that section, who are infant beneficiaries of the  
settlement.

30 3. The relevant sections of the Act are:-

22(1) Where the Commissioner is satisfied that, in  
respect of any period for which the accounts  
of a company resident in the Territories have  
been made up, the amounts distributed as  
dividends by that company up to the end of

RECORD

twelve months after the date to which such accounts have been made up are less than sixty per cent of the total income of the company ascertained in accordance with the provisions of this Act for that period, he may ..... 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 end of the sixth month after the date to which such accounts have been made up and thereon the proportionate share thereof of each shareholders shall be included in the total income of such shareholder for the purposes of this Act: .....

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(4) Where the proportionate share of any shareholder of a company in the undistributed profits of a company has been included in his total income for any year under the provisions of sub-section (1) the tax payable in respect of such proportionate share may .....be recovered from the company.....

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(6) When a company is a shareholder deemed under sub-section (1) to have received a dividend, the amount of the dividend thus deemed to have been paid to it shall be deemed to be part of its total income for the purposes also of the application of that sub-section to distributions of profits by that company, and the provisions of this section shall apply accordingly.

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24.(1). Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of income, the income shall be treated for all the purposes of this Act as the income of the settlor for that year and not as the income of any other person.

(2) Subject as hereafter provided, for the purposes of this section:-

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(a) Income which, by virtue or in consequence of a settlement to which this section applies, is so dealt with that it, or assets representing it, will or may become payable or applicable to or for the benefit of a child of the settlor in the future (whether on the fulfilment of a condition, or the happening of a contingency,

or as the result of the exercise of a power or discretion, or otherwise) shall be deemed to be paid to or for the benefit of that child:

- (4) Where by virtue of subsection (1) any tax becomes chargeable on and is paid by the person by whom the settlement was made, that person shall be entitled to recover from any trustee or other person to whom the income is payable by virtue or in consequence of the settlement the amount of the tax so paid.

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4. The agreed facts were that the Appellant, an advocate practising in Tanganyika, was a shareholder in a private company called "Coastal Freights & Co. Ltd." (hereinafter called "the Company"), the paid up share capital of which was Shs. 500,000/- divided into 500 shares of Shs. 1,000/- each. At all material times the Appellant held 251 shares, his wife 49 and each of his infant sons, 100 each. It was agreed that the shares held by both sons were transferred to them by the Appellant without valuable consideration, which transfer constituted a settlement for the purposes of Section 24 of the Act, and that both sons were "children" within the meaning of section 24(9) of the Act, by directions dated the 17th November 1954 the Respondent pursuant to section 22 of the Act ordered that 60% of the company's income for the periods ending the 31st December 1950 and 31st December 1951 be deemed to have been distributed among the Company's shareholders as at the 30th September 1951 and the 30th June 1952 respectively. The result of such a direction was that each child was deemed to have received Shs.44.162/- gross on the first date and Shs.33.568/- gross on the second date aforementioned. The amounts so deemed to have been distributed by way of gross dividend were thereupon treated by the Respondent as the Appellant's taxable income purportedly under section 24 of the Act. Together with the dividends deemed to have been paid on his own shareholding the Appellant received Additional Assessments in the sum of Shs. 104.304/- for the year of income 1951 and in the sum of Shs. 72.900/- for the year of income 1952.

pp.6-10

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5. The Appellant applied to the Respondent to have such assessments amended on the ground that the dividends deemed to have been distributed to the two children should not have been included in his income, but the Respondent refused to make such amendments, whereupon the Appellant appealed to the High Court of Tanganyika. The appeals against both Additional Assessments were consolidated, and the same questions arise in relation to each.

pp.2-3

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RECORD

6. The relief sought by the Appellant was that the assessments should be amended so as to exclude the dividends directed and ordered in terms of section 22 of the Act, in respect of the shareholding of the two children in the Company. One of the grounds of appeal to the High Court of Tanganyika was that section 24 of the Act could not act retrospectively in respect of accounting periods ending before the 1st January 1951 but that ground was not pursued before the Court of Appeal for Eastern Africa and is not now raised.

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pp.46-61

p.59  
CC.39-48

7. On 12th November 1956 the High Court of Tanganyika (Lowe J.) dismissed the appeal. Lowe J. based his decision upon sub-section (2) of section 24 of the Act and said that that sub-section provided that any income of the company, being monies or assets which might become payable or applicable for the benefit of the children, should be deemed to be the income of the Appellant and was accordingly assessable to tax upon the Appellant. He also found that the income arose to the children in consequence of the settlement. He accordingly held that the income deemed to have been distributed under the provisions of Section 22 of the Act was income arising by virtue or in consequence of a settlement within the meaning of section 24 of the Act. He further concluded that the income deemed to have been distributed was income which had been so dealt with that it would or might become payable or applicable to the benefit of the children of the Appellant and so had been correctly treated as the Appellant's income.

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p.90  
CC.11-39

8. The basis of this decision had not been raised by the Respondent in argument and was not put forward by him in the Court of Appeal for Eastern Africa. In giving the decision of that Court, Forbes J.A. said: "With great respect to the learned Judge, I think his argument shows some confusion of thought between sub-section (1) and sub-section (2) of section 24.....In my opinion, therefore, the assessment cannot be supported on the basis of paragraph (a) of sub-section (2) of section 24 and in fact Counsel for the respondent did not seek to rely on that paragraph, either on the appeal before the High Court or on this appeal." At the end of his judgment discussing the costs, he said: "I do in fact hold the view that that reasoning (i.e. of Lowe J.) was unsound....."

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9. On the 2nd April, 1958 the Court of Appeal

RECORD

pp.87-97

for Eastern Africa dismissed the Appellant's appeal from the High Court of Tanganyika. Forbes J.A. delivered the only reasoned judgment. After relating the history of the case, he rejected the decision of Lowe J. in the passage cited in paragraph 8 hereof, and then referred to the Respondent's contention that the assessments could be justified by reading sub-section (1) of section 24 in conjunction with sub-section (1) of section 22 of the Act. He then considered the Appellant's contentions that "paid" in section 24 (1) meant physically paid and that express provision was necessary to include dividends "deemed to have been paid" under the provisions of section 22, and that where the statute imposes two fictions it should be clearly expressed that one fiction is to be super-imposed upon another. He rejected the Appellant's contention that assistance as to the interpretation of the Act could be gained by looking at the parallel provisions of the Income Tax Act 1952 of the United Kingdom upon which the Act is based.

p.90  
CC.40-43

pp.91C.14-  
92C.5

Forbes J.A. accepted the argument for the Appellant that special provision was needed to extend the meaning of "paid" in section 24 beyond physically paid, but held, contrary to the Appellant's contention, that such special provision was to be found in section 22 (1) of the Act. He thought that the plain meaning of that sub-section was that notional income arising in consequence of an order made under that section was to be treated for all the purposes of the Act as income actually paid to the shareholder, and that, therefore, for the purposes of section 24 such notional income must be treated as income actually paid. A settlor would not suffer injustice under this interpretation for he would be able to recover the tax from the company via the children by a combination of the provisions of section 24 (4) and section 22 (4) of the Act. The learned judge then referred to Case No. 7 1E.A.T.C.43, where the President of the Court had said: "When the legislature enacts that something shall be deemed to have been done, which in fact and in truth has not been done, and plainly indicates between what persons that statutory fiction is to be resorted to, the Court is bound to treat the thing which "shall be deemed" to have been done as having been done and cannot go behind the plain language of the enactment." The learned Judge also quoted a passage from Case No. 21 2 E.A.T.C.1. (Commissioner of Income Tax v. Bjordal (1955) A.C.309). Although neither case was

p.91 CC.  
36-39

p.93 CC.  
7-12

p.94 C.47-  
p.95 C.8

p.95  
CC 17-38

RECORD

p.95 CC.  
40-p.96  
C.20.

dealing with the point at issue, he found the dicta quoted of assistance in deciding the case. It was not a question in this case whether the word "paid" ordinarily includes "deemed to have been paid" but whether income deemed to have been paid by virtue of the provisions of the Act was to be treated for the purposes of the Act as actually paid. The cases cited in Stroud's Judicial Dictionary (3rd Ed.) and Burrows' Words and Phrases were in favour rather than against the views taken by the learned Judge, and in particular the interpretation was in accordance with the intention of the legislature which was to prevent certain forms of avoidance of tax.

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p.96  
CC.21-39

It was conceded by the Appellant that if an actual dividend had been declared, that income would have arisen to the Appellant's children "by virtue or in consequence of" the settlement, and the learned Judge found that similarly income notionally arising as a result of a direction by the Respondent arose by virtue or in consequence of the settlement. The notional dividend accrued to each child by virtue of his holding shares settled on him under the settlement.

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O'Connor P. and MacDuff J. agreed with the judgment of Forbes J.A. and the appeal was accordingly dismissed.

10. By an order dated the 19th June 1958 the Court of Appeal for Eastern Africa granted conditional leave to the Appellant to appeal to Her Majesty in Council from the Judgment and Order of that Court and by further Order dated the 27th August 1958 granted final leave to appeal.

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11. The Appellant respectfully submits that the Court of Appeal wrongly construed and wrongly applied sections 22 and 24 of the Act. Only tax which is clearly imposed should be exacted under the terms of the Act. Tax is only imposed on "deemed" income when such tax is clearly charged by the words of the relevant enactment. There is no such charge in the Act on a parent in respect of income deemed to arise in respect of shares held by his child, even though such shares were given by the parent to that child. Further there is no justification in the words of the statute for holding that where a notional dividend has been directed and ordered under section 22, there was thereby "income paid" to or for the benefit of a child for the purposes of section 24 of the Act.

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The Appellant also submits that within the meaning

of section 24 no income arose by virtue or in consequence of any settlement. It was the Respondent by his direction and order under section 22 who caused income of the company to be deemed to be distributed.

12. The Appellant humbly submits that the decision of the Court of Appeal for Eastern Africa was wrong and should be reversed and that this appeal should be allowed with costs both here and below for the following (amongst other)

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R E A S O N S

1. BECAUSE the notional income deemed to have been distributed pursuant to an order under section 22 should not be included in the income paid to or for the benefit of a child within the meaning of section 24 of the Act.

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2. BECAUSE income of a company deemed to have been distributed pursuant to an order under section 22 is not income paid to or for the benefit of a child within the meaning of section 24 of the Act.

3. BECAUSE the word "paid" in section 24 does not include dividends deemed to have been distributed pursuant to an order under section 22 of the Act.

4. BECAUSE a notional dividend deemed to have been distributed pursuant to an order under section 22 is not money paid by virtue or in consequence of a settlement within the meaning of section 24 of the Act.

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5. BECAUSE the judgment and decision of the Court of Appeal for Eastern Africa was wrong and ought to be reversed.

ROY BORNEMAN

P.J. BRENNAN

No. 27 of 1958

IN THE PRIVY COUNCIL

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B E T W E E N

GEORGE N. HOURY Q.C.                      Appellant

- and -

THE COMMISSIONER OF  
INCOME TAX                      ...                      Respondent

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C A S E    F O R    T H E    A P P E L L A N T

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