

29/1962

IN THE PRIVY COUNCIL

No.16 of 1961

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

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
20 MAR 1963
25 RUSSELL SQUARE
LONDON, W.C.1.

68256

B E T W E E N :

THE GOVERNMENT OF THE
FEDERATION OF MALAYA Appellant

- and -

RIMAU OMNIBUS COMPANY
LIMITED OF IPOH Respondent

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CASE FOR THE APPELLANT

RECORD

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1. This is an appeal with leave from a judgment and order of the Court of Appeal in the Supreme Court of the Federation of Malaya (Thomson C.J., Hill J.A. and Ong J.) dated the 12th day of December 1960 allowing an appeal by the Respondent Company and reversing a judgment of the High Court in the Supreme Court of the Federation of Malaya (Smith J.) dated the 21st day of May 1960 which ordered that the Appellant should recover against the Respondent Company the sum of \$7,793.

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2. The matter arises upon a Statement of Claim by the Appellant dated the 26th day of March 1959 and a Statement of Defence and Counter-claim by the Respondent Company dated the 16th day of May 1959 and an amended Reply and Defence to the Counter-claim dated the 19th day of April 1960. By the Statement of Claim the Appellant claimed the sum of \$7,793 as a debt due to it by the Respondent Company under Section 40(4) of the Income Tax Ordinance 1947 of the Federation of Malaya, as amended by Section 6 of the Income Tax (Amendment) Ordinance 1956, (hereinafter called the Ordinance).

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pp.4,5
& 6

pp.6,7

Malayan
Union
Ord.No.4
of 1956.

Malayan
Union
Ord.No.48
of 1947.

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The substantial issue in this appeal is what was the amount of tax deducted, within the meaning of the said Section 40, by the Respondent Company from the dividends paid by it to its shareholders during the year of assessment 1956. The contention of the Appellant is that the amount of tax so deducted from those dividends by the Respondent Company was \$22,515, because the Respondent Company actually made that deduction in pursuance of its powers under Section 40(1) of the Ordinance or alternatively because it was deemed to have deducted that sum by Section 40(6) of the Ordinance. The contention of the Respondent Company is that the amount of tax so deducted from those dividends is nil because it in fact deducted no tax from those dividends and cannot be deemed to have done so within the meaning of Section 40(4) by the provisions of Section 40(6). The Respondent Company by its Counter-claim claimed that during all the years of assessment 1948-1956 inclusive it had similarly paid dividends without deduction of tax and was therefore entitled to the benefit of the carry forward provisions of Section 40(5) of the Ordinance.

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Malayan
Union
Ord.No.48
of 1947

3. The relevant statutory provisions are contained in the Income Tax Ordinance 1947 of the Federation of Malaya as amended.

(i) The charge to tax on dividends is imposed by Section 10(1)(d).

"10(1) Income tax shall, subject to the provisions of this Ordinance be payable at the rate or rates specified hereinafter for each year of assessment upon the income of any person accruing in or derived from the Federation or received in the Federation from outside the Federation in respect of -

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"(d) dividends, interest or discounts."

(ii) The basis for computing statutory income is laid down in Section 31(1).

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"31(1) 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 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."

10 (iii) Section 31(7A) specifically governs the inclusion of dividends in the statutory income of any person.

"(7A) The statutory income of any person for any year of assessment in respect of dividends shall be the full amount of the income therefrom for the year preceding the year of assessment notwithstanding that the source of such income is not possessed by him during the year of assessment (Sub-section added by 4 of 20 "1956, s.5)."

(iv) Section 40 provides for and regulates the deduction of tax from dividends by the paying company.

"40(1) Every company which is resident in the Federation shall be entitled to deduct from the amount of any dividend paid to any shareholder tax at a rate not exceeding thirty per centum on every dollar of such dividend. (Amended by 11 of 1948, s.2 by 54 of 1950, 30 "s.20 by 6 of 1951, s.3 and substituted by 4 "of 1956, s.6).

"(2) Every such company shall upon payment of a dividend, whether tax is deducted therefrom or not furnish each shareholder with a certificate setting forth the amount of the dividend paid to that shareholder and the amount of tax which the company has deducted or is entitled to deduct in respect of that dividend.

"(3) At the end of each year of assessment every such company shall render to the 40 "Comptroller a statement in such form as the "Comptroller may direct, showing the total amount "of the tax which has been deducted from all "dividends paid to shareholders during such year

"of assessment, and the Comptroller shall compare
"the amount of tax so deducted with the aggregate
"of the following amounts, namely, the amount of
"the tax payable by the company in respect of
"such year of assessment in accordance with the
"provisions of this Ordinance and the amount of
"the balance (if any) carried forward from any
"previous year of assessment in accordance with
"the provisions of sub-section (5) of this
"section.

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"(4) Notwithstanding any other provisions of
"this Ordinance, where the amount of tax so
"deducted exceeds the aggregate of the said
"amounts, a sum equal to the amount of such
"excess shall be a debt due from the Company to
"the Government and shall be recoverable as such.

"(5) Where the aggregate of the said amounts
"exceeds the amount of tax so deducted, a sum
"equal to the amount of the excess shall be
"carried forward as a balance to the immediately
"ensuing year of assessment, and such balance
"shall be available to be set off against the
"amount of tax deducted from dividends in such
"ensuing year of assessment in accordance with
"the provisions of this section:

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"Provided that at the end of the year of
"assessment 1956 the amount of the balance to be
"carried forward shall be the amount (if any) by
"which the tax paid or payable by the company in
"the said year of assessment and in all previous
"years of assessment under this Ordinance
"exceeds the amount of tax deducted by the
"company from all dividends paid to shareholders
"in all such years of assessment.

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"(6) For the purposes of this section, where
"any dividend has been paid without deduction of
"tax, such dividend or part thereof from which
"there was a title to deduct tax shall be deemed
"to be a dividend of such a gross amount as after
"deduction of tax at the rate deductible at the
"date of payment would be equal to the net amount
"paid; and a sum equal to the difference between
"such gross amount and the net amount paid shall
"be deemed to have been deducted from such
"dividend or part thereof as tax. (Sub-

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"sections 3, 4, 5 and 6 added by 4 of 1956, s.6)
 "(Deemed to have come into force on 1st day of
 "January, 1956)."

(v) Section 42 regulates allowances to the shareholder for the tax deducted by the company against the tax charged on him when the dividend is included in his chargeable income.

"42. Any tax -

10 "(a) which a person has deducted or is
 "entitled to deduct from any dividend
 "under the provisions of section 40
 "of this Ordinance or has deducted
 "from any mortgage, debenture or loan
 "interest under the provisions of
 "section 41 of this Ordinance;

 "(b) applicable to the share to which any
 "person is entitled in the income of
 "a body of persons or trust;

20 "shall, when such dividend, mortgage interest,
 "debenture interest, loan interest or share is
 "included in the chargeable income of any
 "person, be set off for the purposes of
 "collection against the tax charged on that
 "chargeable income. (Amended by 11 of 1948, s.21
 "and by 73 of 1953, s.8)."

4. The facts of the case are set out in detail in the Record and are summarised as follows:-

30 The Respondent is a limited liability company
 known as the Rimau Omnibus Company Limited. At all
 material times the only assets of the Respondent
 Company were certain shares in the General Omnibus
 Company (Perak) Limited, (hereinafter referred to as
 General Company) and the only income of the
 Respondent Company was the dividends received on
 those shares. In the year of assessment 1956, which
 was the year ended the 31st day of December 1956, the
 tax liability of the Respondent Company was \$14,722
 that sum being calculated on its actual profits for
 the year ended the 31st day of December 1955 which
 consisted of gross dividends amounting to \$49,907.20
 paid to it by General Company in 1955. During the
 year of assessment 1956 General Company paid to the
 Respondent Company dividends amounting to \$77,980

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gross from which General Company deducted tax at source amounting to \$23,394 pursuant to Section 40(1) with the result that the Respondent Company received a net dividend of \$54,586. General Company issued a dividend certificate pursuant to Section 40(2) stating the amount of the dividend and the amount of tax it had deducted. The tax so deducted was by Section 42 available for the credit of the Respondent Company in respect of its tax liability for the year of assessment 1957 being the year of assessment in which these dividends were included in the chargeable income of the Respondent Company. 10

p.53 By resolutions dated the 21st day of January and the 28th day of June 1956 the Directors of the Respondent Company resolved that dividends amounting to 500 per cent for the year ended the 31st day of December 1956, less 30 per cent Income Tax should be declared and paid. This was recorded in the appropriation account of the profit and loss account of the Respondent Company for the year ended the 31st day of December 1956 as follows - 20

p.58

"To Dividend Paid	\$75,050	
Less Income Tax	\$22,515	\$52,535."

pp.54, 56 The amount actually paid out to shareholders was \$52,535. These dividends were accompanied by dividend certificates pursuant to Section 40(2) which stated the total gross amount of the dividend, the amount of Income Tax on this at 30 per cent, and the amount actually paid to the shareholder which was the gross amount less the 30 per cent Income Tax. 30

p.9 In each of the years 1949-1955 the Respondent Company had similarly declared gross dividends less tax at the appropriate rate and had issued dividend warrants setting out the gross dividend, the tax deductible and the actual amount paid.

p.10 The individual shareholders obtained credit under Section 42 of the Ordinance for the Income Tax deductions from the dividends in respect of tax assessed on them for each of the succeeding years, being the years of assessment in which the dividends were included in their chargeable income. 40

5. The case came on for hearing in the High Court of Ipoh before Smith J. on the 26th and 27th

10 April 1960. It was contended by the Appellant that the Respondent Company had in fact deducted tax amounting to \$22,515 from the dividends paid by it during the year of assessment 1956, that the tax payable by the Respondent Company for that year of assessment was \$14,722, that there was no carry forward credit to the Respondent Company under Section 40(5), and that therefore \$7,793, being the difference between the tax deducted and the tax

20 payable by the Respondent Company, was a debt due to it under Section 40(4). Alternatively the Appellant contended that if the Respondent Company had not deducted tax then it was deemed to have done so by Section 40(6) with the same result. The Respondent Company contended that it had deducted no tax at all, and that Section 40(6) did not affect Section 40(4). On 21st May 1960 the learned Judge gave judgment for the Appellant in the sum of \$7,793, the amount claimed in the Statement of

30 Claim, as a debt due under Section 40(4) on the grounds that the Respondent Company was estopped from denying that it had deducted tax although it had in fact not done so. Accordingly he also dismissed the Counter-claim. In the course of his judgment the learned Judge found that it was clear from the facts that the Respondent Company had made no deduction of any kind whatsoever but had performed the purely ministerial function of distributing the dividend received from General Company. The dividends paid by the Respondent Company all purported to be dividends in respect of which a deduction of tax had been made. He considered it vital that corrective dividend warrants had not been issued as in Neumann v. Commissioners of Inland Revenue [1934] A.C. 215. He considered that the Respondent Company was estopped from denying that it had deducted tax because by its conduct it had permitted the Comptroller to believe that it had made a

40 deduction of tax.

The learned Judge agreed with the Appellant that the Respondent Company must be deemed to have deducted tax but Subsections (1) to (5) in Section 40 had no reference to any tax being deemed to be deducted.

6. By Notice of Appeal dated the 8th day of June 1960 the Respondent Company appealed against the judgment of the High Court to the Court of Appeal. p.21

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7. The Court of Appeal on the 12th day of December 1960 allowed the appeal by a majority (Hill J.A. and Ong J., Thomson C.J. dissenting) and by an Order dated the 12th day of December 1960 set aside the judgment entered for the Appellant in the High Court and dismissed the Counter-claim by the Respondent Company. Thomson C.J. delivered the first judgment. In the course of reviewing the facts he said that the Respondent Company, General Company and the shareholders of both companies were all liable to be assessed separately to Income Tax. He stated that he could not accept the reasons of the decision of Smith J. relating to estoppel because there was no question of the Government being caused or permitted to believe anything other than the true state of affairs. Nevertheless he came to the same conclusion for different reasons. He observed that the Government was not suing for Income Tax as such but for a debt under Section 40 of the Ordinance and he also observed that although the Respondent Company was compelled by Section 40 to issue the dividend certificates in the form in which it did the amount of the dividend on which the amount of the tax deduction depended was in the control of the Directors. In 1956 the Respondent Company had paid dividends of \$52,535 and that amount was actually received by the shareholders, but by reason of Section 40(6) the amount paid and received was deemed to have been \$75,050 and a sum of \$22,515 was deemed to have been deducted from that \$75,050. These figures therefore had to be shown in the dividend certificates and Section 40(4) applied so that the difference between \$22,515, the amount of tax deemed to have been deducted and \$14,722, the amount of tax payable by the Respondent Company in respect of the year 1956 became a debt due to the Government. He would have dismissed the appeal.

Hill, J.A. delivered the second judgment. He agreed that no estoppel arose. It was, he said, clear that the Respondent Company had made no tax deductions and the question was therefore whether Section 40(6) of the Ordinance applied. In his view the whole of Section 40 referred solely to income from which tax was deductible and did not apply in the present case because the income received and distributed by the Respondent Company was not chargeable or assessable income since tax deductions in full had already been made by General Company and no further deductions could legally be

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made. It was significant that the basis of the Appellant's claim was that the Respondent Company had in fact deducted tax from the dividends. The fact that the Respondent Company unnecessarily and incorrectly attempted to comply with Section 40(2) in issuing certificates did not render it liable for a debt to the Government. He would therefore have allowed the appeal from the judgment and he would have dismissed the Respondent Company's Counter-claim as being just as fictitious as the Appellant's claim.

Ong, J. delivered the third judgment. He said that it was not in dispute that the Respondent Company had made no deductions whatsoever under Section 40(1) before proceeding to distribute to their own shareholders the dividends paid by General Company from which General Company had made the appropriate deductions at source. [The Appellant respectfully submits that the learned Judge was in error in stating that it was not in dispute that tax had not been deducted by the Respondent Company, since the Appellant has at all times contended that the Respondent Company had in fact deducted tax in paying the said dividends]. He held that Section 40(4) only applied where a deduction had in fact been made. Section 40(6) applied only where no deduction had been made and could not be construed so as to modify Subsections (3), (4) and (5) which created a debt to the Government only where an actual deduction had been made.

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Ong, J. also thought that there was no debt due under Section 40(4) because under Section 40(3) the amount of tax deducted from dividends during any year of assessment should be compared with the tax payable by the Company in respect of the same year. The tax payable by the Company in 1956 was \$14,722 and the tax paid by the Company for the year of assessment 1956 was \$14,722 and there was therefore no debt due under Section 40(4).

He agreed with the judgment and reasons of Hill J.A.

8. The Appellant applied to the Court of Appeal for leave to appeal to His Majesty The Yang di-Pertuan Agong and an Order granting conditional leave to appeal was made on the 7th day of February 1961 upon the terms set out therein.

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9. An Order granting Final leave to appeal to His Majesty The Yang di-Pertuan Agong was made on the 1st day of May 1961.

10. The Appellant humbly submits that the decision of the Court of Appeal is wrong and should be reversed and that this appeal should be allowed with costs both here and below for the following amongst other

R E A S O N S

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|-----|---|----|
| (1) | BECAUSE on the true construction of the Income Tax Ordinance 1947 as amended there is a debt due from the Respondent Company to the Appellant under Section 40(4) of the Ordinance. | 10 |
| (2) | BECAUSE the Respondent Company in pursuance of its powers under Section 40(1) of the Ordinance in fact deducted the sum of \$22,515 from the dividends paid by it during the year of assessment 1956. | |
| (3) | BECAUSE, in the alternative if the Respondent did not in fact deduct tax from the said dividends, the Respondent Company is by Section 40(6) of the Ordinance deemed to have deducted the sum of \$22,515 from the dividends paid by it during the year of assessment 1956. | 20 |
| (4) | BECAUSE the Respondent Company is not entitled to claim any relief under the provisions of Section 40(5) of the Ordinance. | |
| (5) | BECAUSE the reasoning in the judgment of Thomson, C.J. is well founded. | 30 |
| (6) | BECAUSE the reasoning of the judgments of Hill, J.A. and Ong, J. is wrong. | |

PHILIP SHELBORNE

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ON APPEAL FROM THE COURT OF
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B E T W E E N :

THE GOVERNMENT OF THE
FEDERATION OF MALAYA

Appellant

- and -

RIMAU OMNIBUS COMPANY
LIMITED OF IPOH

Respondent

CASE FOR THE APPELLANT

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