29/1962

IN THE PRIVY COUNCIL No. 16 of 1961

ON APPEAL FROM THE SUPREME COURT
OF THE FEDERATION OF MALAYA

B E T W E E N :

THE GOVERNMENT OF THE FEDERATION OF MALAYA (Plaintiff) Appellant

- and -

RIMAU OMNIBUS COMPANY LIMITED OF IPOH (Defendants) Respondents

CASE FOR THE RESPONDENTS

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1. This is an Appeal from an Order of the Court of Appeal of the Supreme Court of the Federation of Malaya (Thompson C.J. Hill J.A. and Ong J.) given on 12th December 1960 allowing an appeal by the Respondents from an Order of the High Court of the Supreme Court of the Federation of Malaya (Smith J.) dated 21st May 1960 in an action commenced by the Appellant by a specially indorsed writ of summons dated 28th March 1959 to recover from the Reapondents the sum of $7,793/- as a debt due to the Appellant by virtue of Section 40 of the Income Tax Ordinance. p.43 p.20 p. 1 No.48 of 1947

2. In its statement of claim the Appellant alleged that the Respondents had deducted by way of tax from the dividends paid by them during the period 1st January to 31st December 1956 the sum of $22,515/- and claimed that the difference between this sum and the sum of $14,722/- the tax assessed on the Respondents for the year of assessment 1956, namely the said sum of $7,793/-, was due and owing to it by the Respondents. The Respondents in their defence denied that they had deducted the sum of $22,515/- from the dividends paid by them during the said period and denied that any debt was due to the Appellant under the said Section. p. 3

3. Section 40 of the Income Tax Ordinance 1947 which was amended by the Income Tax(Amendment) Ordinances of 1948, 1950, 1951 and 1956 provided with effect from 1st January 1956 as follows:- No.48 of 1947 No.11 of 1948 No. 2 of 1950 No. 6 of 1951 No. 4 of 1956

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"40. (1) Every company which is resident in the "Federation shall be entitled to deduct from "the amount of any dividend paid to any share- "holder 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, "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 there- "from 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 "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.

"(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:

"Provided that at the end of the year of

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"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.

"(6) For the purposes of this section, "where any dividend has been paid without deduc- "tion 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 differ- "ence between such gross amount and the net "amount paid shall be deemed to have been deduc- "ted from such dividend or part thereof as tax. "(Sub-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).

4. The material facts as appearing in the agreed statement of facts and the documents therein referred to are as follows:- pp.8 to 10 pp.49 to 63

(i) The only assets of the Respondents were at all material times certain shares in the General Omnibus Co. (Perak) Ltd. and its only income was from dividends declared and paid by that Company.

(ii) As a result the Respondents received from the General Omnibus Co. (Perak) Ltd. in the year 1955 a net dividend of $34,935.04 which represented a gross dividend of $49,907.20 from which tax had been deducted by the General Omnibus Company to the extent of $14,972.16. The total income of the Respondents for the year 1955 was therefore this dividend and the chargeable income of the Respondents for the year of assessment 1956 was found by the Comptroller of taxes to be $49,073/- being the amount of this dividend less the expenses incurred by the Respondents. On this chargeable income of $49,073/- the tax payable was $14,721.90 which tax was paid by set-off by virtue of the provisions of Section 42 of the Income Tax Ordinance 1947 as amended.

(iii) During the year 1956 the Respondents received by way of dividend from the General Omnibus Company gross dividends amounting in total to $77,980/- from which tax amounting

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to $23,394/- was deducted leaving a net dividend of $54,586/-.

(iv) During the year 1956 the directors of the Respondents declared two interim dividends in total of 500 per cent less 30 per cent income tax and in consequence the Respondents paid the sum of $52,535/- to its members and on 9th September 1959 the Respondents issued dividend certificates pursuant to Section 40(2) of the Ordinance showing the gross amount of the dividend paid to each member and the amount of income tax in respect thereof. The total amount of income tax shown in respect of these dividends is the sum of $22,515 referred to in the Statement of Claim.

App. p.10. 5. In his judgment Mr. Justice Smith said that the principal argument of the Respondents was that they had in fact deducted no tax at all and were not caught by the provisions of subsections (3), (4) and (5) of Section 40 of the Ordinance. He examined the history of that Section so as to see what the amendments of 1956 were trying to do and what in fact they had done. It appeared to him that the principal object of the amendments was not to make things easier for the taxpayer but to ensure that the Revenue did not suffer; in his view these provisions attempted to incorporate in the Federal Law provisions which had been found necessary in the United Kingdom as a result of Neumann v. Commissioners of Inland Revenue and Commissioners of Inland Revenue v. Cull. The main difference in his view between the facts of Neumann's case and the facts of this case was that in Neumann's case the dividend was finally expressed to be a dividend of 5 per cent actual whereas in the present case all the dividends purport to be dividends in respect of which a deduction of tax has been made. An important part of the Appellant's argument was that if the Company issues dividend warrants stating that it has in fact made a deduction of tax then it is useless for it to say that in fact no deduction has been made at all. The main argument of the Respondents was that to impose a charge to tax the words must be plain and unambiguous and that the word deducted in subsection (3) must mean tax in fact deducted, nowhere in the Section is there any reference to any sums being deemed to be deducted except in subsection (6). It was clear the Respondents said that from the facts of the case they made no deduction of any kind, they performed the purely ministerial function of distributing a dividend received from the General

(1934) 18 Tax Cas.332
(1939) 22 Tax Cas 603

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Omnibus Company.

In the learned Judge's view if a company declares a dividend of a certain size and proceeds to distribute that dividend after deduction of tax he could not see that it was entitled at a later stage to turn round and deny that it had in fact done so, if it wished to do this it must do, as was done in Neumann's case, namely issue corrected dividend warrants.

6. On 8th June 1960 the Respondents appealed to the Court of Appeal against the decision of the High Court on the grounds that the learned judge was wrong in holding that by reason of the form of the dividend certificates issued to its shareholders they were estopped from denying that they had in fact deducted tax before payment of dividends to their shareholders. App.p.21 App.p.22

7. The said Appeal came on for hearing before the Court of Appeal (Thompson C.J. Hill J.A. and Ong J.) and on the 12th December 1960 the Court of Appeal by a majority gave judgment in favour of the Respondents allowing the Appeal and setting aside the judgment of Mr. Justice Smith. App.p.43/4.

8. The first judgment of the Court of Appeal was the dissenting judgment of Chief Justice Thompson. In his judgment he said that he was unable to accept the reasoning of Mr. Justice Smith. Under Section 40(1) a company is entitled to deduct from any dividend "tax" at the rate of 30 per cent of such dividend and the amount of the deduction has no relation to the amount of tax paid or payable by the company in any particular year. To his mind what the Respondents did fell fairly and squarely within the provisions of the Section. The Section deals with dividends paid not with dividends declared. In 1956 the Company paid in dividends the sum of $52,535 but by reason of subsection (6) the amount paid and received was to be deemed to be $75,050 and a sum of $22,515 was to be deemed to have been deducted. As a result the provisions of subsection (4) were attracted. pp.25-33

9. Mr. Justice Hill gave the first of the majority judgments. In his view it was all too clear that the Company made no tax deductions and the question to be decided was whether subsection (6) of Section 40 should apply. It seemed to him that for any part of Section 40 to apply the following conditions must be present, namely (i) the Company must be resident in the Federation and (ii) the Company itself must have paid tax or

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be liable to pay tax at the fixed rate so as to be entitled to deduct tax in respect of dividends. In the present case the income received and distributed by the Respondents was not chargeable or assessable income as tax deductions in full had already been made by the General Omnibus Company and in his view no further deductions could legally be made therefrom and the Respondents were not therefore entitled to make any. In his view the whole of Section 40 dealt with income from which tax was deductible and he was of opinion that it did not apply to this case.

In his view the fact that the Company unnecessarily, in his opinion, and incidentally incorrectly attempted to comply with subsection (2) in issuing certificates to shareholders could not and did not render them liable for a debt to Government.

10. Mr. Justice Ong said that his views could be set out within a small compass. First by subsection (1) the Company had the option to deduct. In his opinion the wording of subsections (3), (4) and (5) where the words "has been deducted" have been followed repeatedly by the words "so deducted" was a compelling reason why he should hold that, where no deduction had in fact been made, subsection (4) did not apply and no debt arose by operation of law.

It was said by the Appellant that if the Respondents so chose to arrange their affairs that by a statutory fiction a debt was created they only had themselves to blame. It seemed to him that between this argument and the ground upon which Smith J. based his decision there was no perceptible dividing line. The question was whether the true facts must perforce be shut out by the deeming provisions of subsection (6), in his opinion it did not have this effect. Subsections (3), (4) and (5) cover cases of actual deductions, where no deductions are in fact made the provisions of subsection (6) come into play for the purpose of calculating the gross amount of dividend cum tax. Provisions made to apply where no deduction was made could not, in his opinion, be construed to modify provisions which create a debt to the Government only when an actual deduction had been made.

In his view, following the dicta of Sir Wilfred Greene M.R. (as he then was) in Commissioners of Inland Revenue v. Cull, subsection (6) only provides, in effect, that for the purposes of ascertaining a taxpayer's taxable income the dividends in his hands must be grossed up.

(1938) 2 K.B. 109, 120.

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11. The Appellant on 7th February 1961 obtained conditional leave to appeal to His Majesty the Yang di-Pertuan Agong from the judgment of the Court of Appeal and Final Leave was granted on 1st May 1961. App. p.45 App. p.47

12. The Respondents humbly submit that the decision of the majority in the Court of Appeal was right and should be upheld for the following among other

10. REASONS

(1) Because subsection (4) of Section 40 of the Ordinance is a section imposing a liability and is not therefore open to a wide construction.

(2) Because the Respondent Company did not in fact deduct tax in paying the dividends in question and the words "tax so deducted" in subsection (4) of Section 40 of the Ordinance refer to tax which has in fact been deducted and cannot be construed to include an amount deemed to have been deducted as tax within the meaning of sub-section (6).

(3) Because there is no provision in Section 42 or elsewhere in the Ordinance which treats the gross amount referred to in subsection (6) of Section 40 as the income of the shareholder or entitles him to set off the amount of tax deemed to have been deducted against the tax charged on his chargeable income and the inclusion of tax so deemed to have been deducted in the computation in subsection (4) of the Section would result in the Company paying a sum to the Government by way of debt unrelated to its own tax or to the tax of the share-holders. Subsection (4) could not therefore be given the wide meaning imputed to it by the Appellant.

(4) Because the form of the certificate given under subsection (2) of the Section after the present proceedings had been instituted cannot determine the Company's liability in those proceedings.

(5) Because for the purposes of the proviso to subsection (5) of the Ordinance the amount of tax deducted from dividends paid to share-holders in years of assessment prior to the

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year of assessment 1956 could only include tax in fact deducted from such dividends and no tax having been deducted from dividends declared by the Company during that period the amount carried forward for the purposes of Section 40 at the commencement of the year of assessment 1956 was the whole of the tax paid or payable by the Company in respect of periods prior thereto.

(6) Because the reasoning of the judgment of Mr. Justice Smith was not well founded and his decision was wrong. 10

(7) Because the reasoning of the judgment of Chief Justice Thompson is not well founded and the decision of the Court of Appeal was right.

F. N. BUCHER

R. BUCHANAN-DUNLOP

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