Privy Council Appeal No. 16 *of* 1961

The Government of the Federation of Malaya – – – *Appellant*

v.

Rimau Omnibus Company Limited of Ipoh – – – – *Respondent*

FROM

THE SUPREME COURT OF THE FEDERATION OF MALAYA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH NOVEMBER, 1962

Present at the Hearing:

LORD JENKINS.

LORD GUEST.

LORD PEARCE.

[*Delivered by* LORD PEARCE]

The Government of the Federation of Malaya claims from the respondent company 7793 dollars as a debt due to it by virtue of section 40 subsection (4) of The Income Tax Ordinance of 1947. Smith, J. gave judgment for the amount claimed. The Court of Appeal of the Supreme Court of the Federation of Malaya by a majority reversed that judgment.

During the year of assessment 1956, the company purported to deduct from dividends paid to its shareholders income tax which exceeded by 7793 dollars the tax payable by the company in respect of that year of assessment. If such tax was in fact deducted, any excess is admittedly a debt recoverable as such by the Government unless there is a balance of tax paid or payable by the Company in respect of previous years which falls to be taken into account. The Court of Appeal, however, held that there was in fact no deduction of tax and, on the true construction of section 40, no excess creating any debt.

Section 10 of the Ordinance imposes a charge of income tax on income from dividends. Section 26 provides that the income from dividends where tax has been deducted shall be the gross amount before making such deduction; where no such deduction has been made the income arising shall be the amount of the dividend increased by an amount on account of tax corresponding to the extent to which the proceeds out of which the said dividend has been paid, have been charged with tax. By section 31 the statutory income for the year of assessment is the actual income for the year preceding the year of assessment. Section 40 provides—

> (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 30% of every dollar of such dividend.
>
> (2) Every 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 company shall render to the Controller a statement in such form as the Controller may direct showing the total amount of the tax which has been deducted from all dividends paid to the shareholder during such year of assessment and the Controller 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 subsection (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 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 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 rate of payment would be equal to the net amount paid and a sum equal to the difference as between such gross amount and the net amount paid shall be deemed to have been deducted from such dividend or part thereof as tax.

Subsections (3), (4) and (5) above were added by an Ordinance of 1956 and were deemed to have come into force on the 1st January 1956.

The respondent company is a holding company whose sole source of income is dividends received from the General Omnibus Company (Perak) Ltd. Both companies and their shareholders are resident in the Federation of Malaya and all are separately liable on their respective incomes. For several years preceding 1956 substantial dividends had been received by the company. The company had then paid to their own shareholders dividends approximately equal to the net amount of such dividends as they received from the General Omnibus Company (Perak) Ltd. but slightly diminished by amounts expended in administration. Once or twice in every year since 1949 the directors of the company passed resolutions declaring dividends at a certain rate less tax at a certain rate. On the 21st January 1956, for instance, there is a minute showing that it was resolved that a first interim dividend of 300% for the year ended 31st December 1956 less 30% income tax be declared and payable forthwith. The dividend certificate repeats those figures. The practical result of these distributions by the company has been to pay cash annually to its shareholders in amounts approximately equal to the amounts of cash received each year in net dividends from the General Omnibus Company.

In spite of the references to deduction of tax in the Minutes and the certificates, it is argued on the Company's behalf that it did not in fact deduct tax. It is further contended that subsection (6) has no application to the machinery provided in subsections (3), (4) and (5) and that for the purposes of those subsections, the company is not deemed to have made deductions: therefore, it is said, there can be no sum recoverable by the Government under section 40. And even if the company must be deemed to have made a deduction in 1956 by virtue of subsection (6), it is argued that the subsection is not retrospective with the result that there was no deemed deduction in previous years. If that be so, the tax payable by the company in previous years (which can be brought into account) admittedly exceeds the amount deducted in 1956 and, therefore, there is no sum due

to the Government. If, however, the Company either deducted or must be deemed to have deducted tax both in 1956 and previous years, then it is admitted that the company is liable to pay the amount claimed.

Undoubtedly some support for the contention that the Company did not in fact deduct tax is to be derived from the case of *Neumann v. Commissioners of Inland Revenue* 18 Tax Cases 332. Without deciding that matter their Lordships are prepared to deal with this case (as the learned Chief Justice did) on the assumption that tax was not deducted. In that event, however, subsection (6) has effect. Their Lordships cannot accept the contention that subsection (6) does not affect or enter into the machinery provided by sub-sections (3), (4) and (5). The initial words of subsection (6) " For the purposes of this section " show that it is intended to apply throughout the whole section. Moreover if it did not do so, it would seem to serve no purpose.

The whole section, therefore, must in their Lordships' opinion be read as containing machinery applicable alike to cases where there has been deduction of tax and cases where although there has been no deduction of tax, the dividend is deemed to be a dividend of a gross amount which after deduction of tax would be equal to the net amount paid.

Thus section 40 provides a sensible and intelligible scheme. The company can by deduction (or deemed deduction) of tax from the dividends paid to shareholders recoup itself for any tax payable by it. A running account is allowed whereby the company can carry forward any amounts for which it has hitherto failed to recoup itself in respect of tax payable by it in previous years. As soon however as it collects from its shareholders more tax than it has had to pay, the excess becomes due to the Government. There is, however, no provision by which it can retain the excess and carry it over against its future indebtedness for tax. It cannot recoup itself in advance. Nor is this surprising. No general hardship is created by this scheme. A particular hardship may arise in a case like the present where the holding company chose to pay out an increased dividend (with the consequent increased deduction of tax) in the same year as it received an increase from the General Omnibus Company with the result that the tax deducted by the company from its shareholders has to be taken into account in 1956 whereas the tax which the company will have to pay in respect of the increased dividend so received from the General Omnibus Company will not be payable or fall to be taken into account until the following year. And by that time the Government have already become entitled to any excess created by the increased deduction of tax in 1956. Such a situation would not arise in the case of an ordinary trading company which does not distribute its profits during the year in which they are earned but in the following year which is the year of assessment in respect of those profits.

Mr. Bucher's ingenious contention that the words of subsection (6) which came into effect on 1st January 1956 are only applicable to dividends issued after that date necessitates reading the words " has been paid " as if they were " shall after the commencement of this Act have been paid ". Their Lordships do not feel able so to read them. The calculation under subsection (3) is a calculation to be made after the Ordinance comes into force but in making that calculation it is deemed that dividends which have in the past been paid without deduction of tax were gross dividends producing the net figure actually paid.

In their Lordships' opinion the view taken by the learned Chief Justice was correct. They will accordingly report to the Head of the Federation of Malaya as their opinion that the appeal ought to be allowed and the judgment of the Court of Appeal set aside and the judgment of Smith J. restored, and that the respondents ought to pay the appellant's costs of the appeal to the Court of Appeal and the costs of this appeal.

(86642) Wt. 8004/82 90 12/62 Hw.

In the Privy Council

THE GOVERNMENT OF THE FEDERATION OF MALAYA

v.

RIMAU OMNIBUS COMPANY LIMITED OF IPOH

DELIVERED BY
LORD PEARCE

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