Privy Council Appeal No. 26 of 1969

Guiana Industrial and Commercial Investments Limited *Appellant*

v.

The Commissioner of Inland Revenue - - - - *Respondent*

FROM

THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE, GUYANA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD MAY 1971

Present at the Hearing:
LORD MORRIS OF BORTH-Y-GEST
LORD GUEST
LORD DONOVAN

[*Delivered by* LORD DONOVAN]

The problem in this case is whether income tax in Guyana, before it became assessable upon the appellant company, was nevertheless a debt owed by it within the meaning of section 3 of the Property Tax and Gift Tax Ordinance 1962. The Board of Review held that it was not. In the Supreme Court the Chief Justice took the same view; and his decision was upheld by a majority of the Court of Appeal. The question affects the liability of the appellant company to property tax for the year of assessment being the calendar year 1962.

Under the said Ordinance property tax has been levied in Guyana from and including the calendar year 1962 "in respect of the net property, on the corresponding valuation date, of every person". (Section 7.) Such property is to be valued on the last day of the year preceding the year of assessment. Ordinarily therefore the valuation date for the year of assessment 1962 would be 31st December 1961. Where, however, a person has been permitted by the respondent Commissioner to compute his trading profits upon the income of a year ending on some date other than 31st December for the purposes of income tax, then the Commissioner may permit that other date to be the valuation date in respect of property held for the purpose of the trade or business (section 8).

This provision was operated in the case of the appellant company, which made up its accounts to 30th November 1961, so far as concerns property tax for the year of assessment 1962.

The "net property" to be subjected to the property tax is

> "the amount by which the aggregate value, computed in accordance with the provisions of this Ordinance, of the property of any person on the valuation date is in excess of the aggregate value of all the debts owed by him on that date other than . . ." Then follow certain exceptions not presently material (section 3).

On 30th November 1961 the appellant company knew that it would be liable to income tax in Guyana in respect of its profits for 1961, although they would be assessed to income tax in 1962 and not before. In Guyana the position is not that the profits of the year of assessment are simply measured by the profits of the preceding year. These latter profits are the actual subject matter of next year's assessment. But on the valuation date, *i.e.* 30th November 1961, no income tax assessment had been made upon the appellant company in respect of its profits as shown in its accounts up to that date. Nor, under the Income Tax Ordinance, could any such assessment be made until the year 1962 had arrived. And when the assessment to income tax *was* made, the tax would be payable within 30 days after the date of assessment (section 67 Income Tax Ordinance).

In these circumstances the respondent Commissioner denied that the income tax payable in and for the year of assessment 1962 (computed in that year in the sum of $1,861) was a " debt owed " by the appellant company on 30th November 1961 so as to qualify as a deduction in computing " net property " for the purposes of property tax. He therefore disallowed any deduction in respect of it. Property tax being at the rate of ½%, the amount of such tax involved is the sum of $9 odd. Their Lordships were informed however that a principle is at stake.

The main contentions of the appellant company before their Lordships were these:

(1) Since its profits of 1961 were liable to income tax in 1962, it could properly be said that such liability existed on 30th November 1961.

(2) Such liability was a debt owed on that date notwithstanding that it would not become actually payable until 1962 after an assessment to income tax had been made by the respondent Commissioner. It was a case of *debitum in praesenti solvendum in futuro.*

(3) Alternatively, if the said income tax was not a debt owed on 30th November 1961, nevertheless a deduction in respect of it ought, in principle, to be allowed.

The second of the above contentions led to support for the appellant company's case being sought elsewhere than in the provisions of the Income Tax Ordinance, under which it is (*prima facie* at least) extremely difficult to argue that income tax for 1962 is a debt owed in 1961. Reliance was therefore placed on judicial decisions in other fields of law where the existence of a " debt " was in issue, and also whether it was " owing ". Cases dealing with garnishee proceedings were accordingly cited and examined. Among these were *O'Driscoll* v. *Manchester Insurance Committee* [1915] 3 K.B. 499. The facts which gave rise to that case were that O'Driscoll's executors were judgment creditors of a Doctor Sweeny, a medical man practising as a panel doctor in the Manchester Area. The Manchester Insurance Committee, acting under the current National Insurance Acts, by agreement with the local panel doctors, including Dr. Sweeny, collected all the fees due to them from the National Insurance Commissioners. From this pool sums were distributed to the doctors in accordance with an agreed scale. O'Driscoll's executors found that Dr. Sweeny had done work and was entitled under the agreement to receive a sum from the Manchester Insurance Committee who had received the necessary funds from the National Insurance Commissioners. The Manchester Committee had not however made up the necessary distribution account and so Dr. Sweeny had not yet received his share. O'Driscoll's executors brought garnishee proceedings to attach this share, claiming that it represented a debt

owing or accruing to Dr. Sweeny. The Manchester Insurance Committee denied that any debt was owed by them to Dr. Sweeny on the ground (inter alia) that until the necessary accounts were made up it was not known to what sum Dr. Sweeny would be entitled.

This defence failed, it being held that a debt to Dr. Sweeny did exist and could be attached notwithstanding that at the moment its precise amount was not ascertained. *Phillimore, L.J.* said at page 515 of the report:

> " . . . Therefore both under the Regulations which have statutory force and under a contract incorporating the Regulations there was a debt due from the committee to Dr. Sweeny. No doubt these debts were not presently payable, and the amounts were not, on April 9, 1914, ascertained in the sense that no one could say what the result of the calculations would be, but it was certain on that date that a payment would become due from the committee to the doctors out of the balance of the moneys in the hands of the committee for 1913, and that there was a provisional payment due to the doctors for the first quarter of 1914. Therefore for each of those periods there was a debt owing or accruing from the Insurance Committee to Dr. Sweeny, and it is well established that a debt so payable, though *solvendum in futuro,* is attachable under Order XLV, r.l. It is not like the case of unliquidated damages which are not a debt until judgment. . . . "

And Bankes, L.J. at page 516, added:

> " It is well established that ' debts owing or accruing ' include debts *debita in praesenti solvenda in futuro.* The matter is well put in the Annual Practice, 1915, p. 808: ' But the distinction must be borne in mind between the case where there is an existing debt, payment whereof is deferred, and the case where both the debt and its payment rest in the future. In the former case there is an attachable debt, in the latter case there is not.' If, for instance, a sum of money is payable on the happening of a contingency, there is no debt owing or accruing. But the mere fact that the amount is not ascertained does not show that there is no debt."

It is clear that similar reasoning cannot apply to a case like the present. There was no situation here as between the appellant company and the respondent Commissioner on 30th November 1961 corresponding to the position between the Manchester Insurance Committee and Dr. Sweeny. The point will be elaborated later.

In *Commissioner of Income Tax* v. *Barcellos* [1957] B. G. L. R. page 105, the question arose whether income tax assessed in what was then British Guiana, upon a person after the date when a Receiving Order was made against him, but referable to income earned before that date, was provable as a debt in insolvency. Stoby, J. (as he then was) held that it could: and in the course of his judgment allowing the proof said:

> " As soon as income is derived in the Colony over and above a certain sum the obligation to pay income tax arises. The taxpayer's liability does not depend on the arithmetical calculations of a Goverment Official: it is the extent of his liability which is dependent on the ascertainment of his chargeable income. A clear distinction must be drawn between the liability to pay on the one hand and the amount required to be paid as a result of the liability on the other hand."
>
> And again " . . . in the present case the obligation to pay tax arose as soon as the income was earned ".

Not unnaturally, the appellant company relied heavily on these observations: but in their Lordships' opinion they refer to a completely different state of affairs. They do not assist the appellant company's case if the true sense in which the words " obligation " and " liability " were being used by *Stoby J.* is considered. What he is clearly meaning is that by virtue of the charge to income tax imposed by the Income Tax Ordinance, the moment that a taxpayer receives taxable income he incurs a prospective obligation or liability to pay income tax thereon in due course and subject to the provisions of the Income Tax Ordinance. He acquires, it may be said, a status of taxability. *Stoby J.* could not have meant that the moment chargeable income accrues to a taxpayer a debt for tax thereon at once becomes owing. For during the rest of the year many things could happen which might expunge the prospective liability altogether, for example the suffering of losses in excess of the income. And it is not to be supposed that *Stoby J.* intended to give the go-by to all those provisions of the Income Tax Ordinance which have to be obeyed before a taxpayer is required to pay a penny.

The same comment may be made upon the appellant company's use of a passage from Lord Dunedin's speech in *Whitney* v. *C.I.R.* [1926] A.C. 37 at page 52:

> " Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend upon assessment. That, *ex hypothesi,* has already been fixed. But assessment particularizes the exact sum which a person has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntariiy pay."

These observations were made in the course of repelling an argument by Mr. Whitney to the effect that there was no machinery for assessing him to super tax in the United Kingdom on his English income, he being a resident in the United States; and that it was a proper conclusion from this that he was not liable. But the Income Tax Act expressly charged income tax upon the income of non-residents arising in the United Kingdom, and super tax was simply an additional income tax. It was this charge in the statute to which Lord Dunedin was referring when he spoke of " liability " and the " declaration " of it in the Statute. It is only by construing the word " liability " in this passage as referring to the perfection of an individual liability upon Mr. Whitney, attained through the operation of the statutory machinery, including an assessment, that the quotation can be used in support of the appellant company's case. In their Lordships' opinion such a construction is clearly wrong.

Although a number of other decisions given in different contexts were cited in argument, their Lordships do not think it either necessary or helpful to canvass them. For in the end the question comes back to the true construction of the words " debts owed by him on that date " in section 3 of the Property Tax and The Gift Tax Ordinance: and in order to ascertain whether they cover the next year's Income Tax one must examine the Income Tax Ordinance in order to determine when such tax becomes a debt owed. In the present case it is true that in the year of assessment 1962 it is the profits of the year to 30th November 1961 that are assessed to income tax. But before the respondent Commissioner could make the appellant company pay anything he must wait for the year 1962 to come: he must then examine the income tax return and decide whether he will accept it: he must, in an appropriate case, decide what allowances he will make for such things as alleged bad debts, wear and tear of machinery, and so on; and though these last two

problems may not arise in the appellant company's particular case, this is irrelevant to the general issue. Then the Commissioner must make an assessment and serve notice of it. No tax is actually payable till 30 days have elapsed without an appeal being lodged. If an appeal *is* lodged, payment of the disputed tax is not due until the appeal is disposed of.

In these circumstances it seems to their Lordships impossible accurately to assert that on 30th November 1961 the appellant company owed a debt for income tax for the year of assessment 1962. It matters not that the profits to be taxed were all earned by 30th November 1961 so that one can speak loosely of a " liability " then existing which was certain to crystallise into a debt at some later date. This does not justify treating the debt as owing on some prior date any more than the fact that a life tenant is assuredly liable to die at some future date justifies treating the prospective liability to Estate Duty on that event as a present debt.

Their Lordships did not call upon Counsel for the respondent Commissioner to reply to the appellant company's alternative contention. A provision in the Property Tax and The Gift Tax Ordinance permitting a reduction for future debts for which provision ought in ordinary prudence to be made on the valuation date, would no doubt be an equitable arrangement, but it is not there.

Finally at the close of his reply Counsel for the appellant company suggested that if the argument of the respondent Commissioner were right, then a taxpayer who owned a house on the valuation date would have to pay property tax on the full value thereof even though he had a mortgage thereon, and would be entitled to no deduction for instalments of the mortgage debt falling due for payment after the valuation date. Their Lordships do not accept that this is correct. Such a case would obviously be one of *debitum in praesenti solvendum in futuro*. In any event (assuming that the property and not the mere equity of redemption had to be taxed) it would seem implicit in the definition of " net property " in section 3 of the Ordinance that such outstanding instalments would be deductible. (See the opening paragraph of the definition read together with sub-paragraph (*d*).)

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant company must pay the costs.

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In the Privy Council

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v.

THE COMMISSIONER OF INLAND REVENUE

DELIVERED BY
LORD DONOVAN

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