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O N A P P E A L

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

B E T W E E N :

GORDON GRANT AND COMPANY (1965) LIMITED Appellant

- and -

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO Respondent

CASE FOR THE APPELLANT

THE NATURE OF THE APPEAL

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10 1. This is an appeal from a Judgment and Order of the Court of Appeal of Trinidad and Tobago (Phillips J.A., Rees J.S., and Scott J.A.), dated the 18th day of November 1977, allowing an appeal by the Respondent from the Judgment and Order of Braithwaite J., dated the 19th day of April 1974. By his said Judgment the learned Judge had held that the Appellant was entitled, under section 46 of the Income Tax Ordinance, chapter 33, No. 1 ("the Ordinance), to recover from the Board of Inland Revenue income tax deducted by three companies in which it held shares, from certain dividends received by the Appellant in the year 1962. The hearings in the High Court and the Court of Appeal occupied three days and two days respectively.

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20 2. On 23rd May 1978, the Court of Appeal of Trinidad and Tobago (Phillips J.A., Kelswick J.A., and Scott J.A.) granted the Appellant final leave to appeal to Your Lordships' Committee.

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THE FACTS AND THE POINT OF ISSUE

30 3. At all material times the Appellant held shares in three companies ("the Paying Companies"), liable to income tax under the Ordinance. In 1962 the Appellant's chargeable income included gross dividends totalling \$40,940, paid to it out of the 1961 income of the Paying Companies, from which they had deducted tax totalling \$16,376, under section 23 of the Ordinance.

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4. The chargeable income of the Appellant for 1962 was discharged from tax by section 76A of the Ordinance. The Appellant claimed from the Commissioner of Inland Revenue

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repayment of the said sum of \$16,376.

5. The substantial question arising on this Appeal is whether the Appellant is entitled to a refund by the Board of Inland Revenue of the said tax deduction of \$16,376.

THE RELEVANT STATUTORY PROVISIONS

6. The statutory provisions relevant to the questions raised in this Appeal were contained in the Ordinance, although certain relevant amendments were made in 1963.

(i) The Ordinance Prior to 1963

Sections 2, 5 and 6

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Income tax was charged on, inter alia, gains, profits and dividends of any person for each calendar year on his chargeable income in the preceding year.

Section 23

Entitles a company to deduct from any dividend paid to any shareholder out of income on which the company is liable to tax a proportionate amount of that tax.

Section 24

"24. Any tax which a company has deducted or is entitled to deduct under (section 23) from a dividend paid to a shareholder, ... shall, when such dividend ... is included in the chargeable income of (the) ... shareholder ... be set off for the purpose of collection against the tax charged on that chargeable income."

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Section 46

Entitles a person who has "paid tax, by deduction or otherwise" in excess of his liability to be refunded the excess

(ii) The Amendments made by the Income Tax (Amendment) Act 1963

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This Act ('the 1963 Act') by sections 3 and 6 altered the basis of taxing income, for 1963 and thereafter, from the preceding year basis to an actual year basis.

Section 44

This section introduced a new section 76A of the Ordinance which discharged from tax the income of 1962 which would otherwise have fallen to be taxed in 1963 on the preceding year basis under the Ordinance in addition to the 1963 income being taxable on the new actual year basis (such a "drop-out" is an essential part of a change from preceding year basis to an actual year basis)

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By a new Section 76C the repayment machinery is provided to avoid double taxation.

Section 19

A new section 24A was introduced in the Ordinance, disentitling any shareholder who had received a dividend "out of the income of a company that has been discharged of tax by section 76A", from reclaiming the tax deductible from the dividends.

THE JUDGMENT OF BRAITHWAITE J

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10 7. Braithwaite J. held that the \$16,376 tax deducted by the Paying Companies from the dividends received by the Appellant in 1962, was repayable to it by the Board of Inland Revenue, with interest, together with the costs of the action. He made an order in those terms. In the course of his judgment the learned Judge correctly observed that section 24A(1) of the Ordinance "clearly contemplates ... a set-off against tax and a refund by the Commissioner if excess tax may exist, that is to say, the circumstances explicitly expressed by sections 24 and 46(1) of the Ordinance." he also correctly held that section 24A of the Ordinance "is inapplicable to the instant case."

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20 The Appellant will seek to uphold the conclusions of the learned Judge, but not necessarily by the same reasoning.

8. By Notice of Appeal, dated 24th May 1974, the Respondents appealed to the Court of Appeal of Trinidad and Tobago. The Appeal came on before Phillips, Rees and Scott JJ.A, on the 9th April 1977.

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THE JUDGMENT OF THE COURT OF APPEAL

30 9. Phillips J.A., delivered the judgment of the Court of Appeal on 18th November, 1977, allowing the Respondent's appeal, holding that it was immaterial to the issue whether or not the dividends paid to the Appellant in 1962 were derived from pre-1962 profits of the paying companies. For section 24A of the Ordinance to apply it was sufficient that the Paying Companies were in existence in 1962.

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40 Although the Court of Appeal were correct in holding that the object of section 76A of the Ordinance "is to exempt from liability to tax all non-emolument income made during the year 1962", and that "all companies that were in existence in 1962 were discharged of liability to be taxed on their income for that year", the Appellant will seek to argue that it does not follow that the only criterion for section 24A of the Ordinance to apply is that the company was in existence in 1962, irrespective of the income out of which the dividend was paid.

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THE APPELLANT'S CONTENTIONS

10. The issues in the present case turn on the proper construction to be placed upon the provisions of sections 24, 24A, 46, 76A and 76C of the Ordinance, which is a question of law for determination by the Court.

The issues can conveniently be put into three questions

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as follows:

(i) Apart from sections 24A and 76C of the Ordinance, is the income tax deducted by the Paying Companies from dividends paid to the Appellant in a year in which the income of the Appellant is discharged from tax by section 76A of the Ordinance, refundable to the Appellant by the Commissioner of Inland Revenue, under section 46 of the Ordinance.

(ii) If the answer to (i) is in the affirmative, does section 24A of the Ordinance apply to the present case so as to disentitle the Appellant to a refund of the tax deducted. 10

(iii) If the answer to (i) above is in the negative or to (ii) above is in the affirmative, does section 76C of the Ordinance nonetheless apply so as to entitle the Appellant to the refund claimed.

11. The Respondent's case, and the Court of Appeal's decision, that the tax deducted from the dividends is not refundable, result in double taxation of dividends in 1963, once on the 1962 dividends and once on the 1963 dividends. Furthermore, the Respondent's argument that tax was not "paid" by the Appellant and so was not refundable under section 46 of the Ordinance, would affect the tax liability of shareholders irrespective of the 1963 amendments; so that a shareholder whose liability to tax in respect of the dividends was less than the tax deducted, either because of allowances to which he is entitled or because the dividends fall to be taxed in his hands at a lower rate than the rate applicable to the Paying Company, would bear more tax than the tax for which he is liable. In this way dividends would be taxed differently from the other income, for which there is no authority in the Ordinance. 20 30

The Appellant's contentions seek to give effect to the presumed intention of the legislature to avoid double taxation of dividends in 1963. They also ensure that dividends are not taxed differently from other income, in keeping with the provisions of the Ordinance.

Of the following contentions the Appellant will seek leave to put those marked with an asterisk for the first time before your Lordships. 40

The Appellant contends as follows:

(i) Is Tax Deducted by Paying Companies Refundable to the Appellant?

(a) Income Tax on the Appellant's income from 1962, including the dividends, was discharged from tax by section 76A(1) of the Ordinance.

(b) But for the discharge under (a) above the Appellant

could, under section 24 of the Ordinance, set off the \$16,376 against its liability to income tax, as a credit against the Revenue.

(c) The set-off under section 24 of the Ordinance in effect deems a payment of tax to have been made by a shareholder, creating a credit in his favour against the Revenue, not against the Paying Company. The words "paid tax by deduction or otherwise" in section 46(1) of the Ordinance extend to such credit.

10 *(d) The contention in (c) above is supported by the deletion of the word "by deduction or otherwise" under section 31 of Finance Act 1966, which by section 20 makes alternative provisions for repayment of excess tax deducted from dividends.

*(e) The words "or to be refunded by the Commissioner" in section 24A(1) of the Ordinance show that any surplus set off under section 24 of the Ordinance is refundable.

20 *(f) The words "or to be repaid under section 46 of this Ordinance" in section 52(1) of the Ordinance, (which deals with double taxation relief applicable to dividends), support the contention in (e) above.

*(g) In section 23 of the Ordinance "amount of any dividend paid" clearly refers to a credit rather than actual payment since the shareholder is neither paid nor entitled to demand a sum greater than the declared dividend less tax. Similarly, "paid" in section 46(1) of the Ordinance refers to a credit rather than actual payment.

30 *(h) The effect of section 24 of the Ordinance is to render payment of tax by the company a good proportionate discharge of the shareholder's liability, and the same as payment by shareholder for the purposes of the Ordinance.

40 *(i) From sections 5, 6 and 22 of, and the Schedule to the Ordinance, it is clear that the legislature intends to tax chargeable income, including dividends, at progressive rates. The net effect of sections 5, 23, 24 and 46 of the Ordinance must be to tax dividends at the same rates as other income. However, if section 46 of the Ordinance did not give a right of refund in respect of the set off under section 24 of the Ordinance, a shareholder whose liability to tax on his other chargeable income is less than so much of the set off as is not absorbed by his tax liability on the dividend, (excess set off), will effectively pay tax at a higher rate the lower his other chargeable income.

*(j) The deduction under section 23 of the Ordinance is characterised as "tax". At least where a deduction under section 23 of the Ordinance has actually been made the shareholder has "paid tax" in the terminology of the Ordinance.

(ii) Does Section 24A of the Ordinance disentitle the Appellant to the Refund Claimed?

(k) The Respondent does not dispute that the income out of

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which each of the Paying Companies paid dividends was not discharged from income tax by section 76A of the Ordinance. Therefore, section 24A of the Ordinance does not apply to disentitle the Appellant to the sum claimed.

*(l) Section 76A of the Ordinance discharges income tax on given income, without reference to the person whose income is so discharged of tax. This is consistent with sections 5 and 6 of the Ordinance which impose a charge to income tax on income and not on the person.

*(m) From (l) above it follows that in section 24A(1) of the Ordinance "discharged of tax by section 76A" refers to the income that has been so discharged and not the company.

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*(n) Section 24A in using the words "out of the income of" instead of "by" can only apply by reference to the income out of which the dividend is paid.

(iii) Does Section 76C of the Ordinance entitle the Appellant to a Refund

(p) Section 76C of the Ordinance is not confined to cases where there has been an assessment prior to the passing of the 1963 Act, but applied "notwithstanding" such an assessment.

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*(q) There is no requirement under Section 76C of the Ordinance that the amount paid in respect of tax shall have been paid by the person entitled to a refund. Payments of tax by the Paying Companies which by section 24 of the Ordinance are in respect of the shareholder's tax are sufficient to give rise to a right of refund under Section 76C of the Ordinance.

SUBMISSIONS

12. The Appellant humbly submits that this Appeal should be allowed with costs and that the Order of the Court of Appeal of Trinidad and Tobago ought to be reversed and the Order of the High Court of Trinidad and Tobago restored for the following among other

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R E A S O N S

1. BECAUSE on the true construction of section 46 of the Ordinance any surplus set off permitted by section 24 of the Ordinance is refundable to the taxpayer by the Commissioner of Inland Revenue.

2. BECAUSE when a deduction is made under section 23 of the Ordinance, tax has been paid within the meaning of section 46 of the Ordinance.

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3. BECAUSE section 76A of the Ordinance discharged of income tax the Appellant's income in 1962, giving rise to a surplus set off under section 24 of the Ordinance, or an excess payment of tax within the meaning of section 46 of the Ordinance.

4. BECAUSE section 24A of the Ordinance does not apply to the present case so as to deprive the Appellant of the right to a refund.

5. BECAUSE alternatively, section 76C of the Ordinance gives the Appellant a right to a refund to the sum claimed.

6. BECAUSE the construction of the Ordinance contended for by the Appellant accords with the intention of the Ordinance and provides a coherent scheme of taxation.

7. BECAUSE the decision of the Court of Appeal was wrong in law.

SAID MOSTESHAR-GHARAI

No. 34 of 1979

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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Respondent

CASE FOR THE APPELLANT

PHILLIP CONWAY THOMAS & CO.
61 Catherine Place,
London, SW1E 6HB.

Solicitors for the Appellant