

14/81

ON APPEAL
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 ^{RESPONDENT} ~~APPELLANTS~~

Record

- 10 1. This is an appeal from the judgment of the Court of Appeal of Trinidad and Tobago (Phillips, J.A. Rees, J.A., and Scott, J.A) dated the 18th November 1977, which allowed the Respondent's appeal from the judgment of the High Court (Braithwaite J) dated the 19th April, 1974 whereby it was adjudged that the Board of Inland Revenue pay to the Appellant \$ 16,376.00 and interest from the 20th April, 1967, and costs. p.37-52 p.19-33 p. 33
- 20 2. The facts giving rise to the dispute between the Appellant and the Board of the Inland Revenue were (and are) not in dispute. The Appellant was at all material times a company incorporated in Trinidad and Tobago which held shares in certain other companies including in particular:
- (1) 2000 "B" preference shares of \$ 50.00 each in Caribbean Development Company Limited, of 69, Independence Square, Trinidad;
 - (2) 5000 "B" preference shares of \$ 10.00 each in Bermudez Biscuit Company Limited, of 6, Maloney Street, Mount Lambert, Trinidad.
 - (3) 3,492 ordinary shares of \$ 100 each in Gordon Grant and Co. (Tobago) Limited of Scarborough, Tobago.
- 30 3. Dividends were declared by each of the said companies for their accounting year ending in 1961 as follows:

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- p. 60 (1) By Caribbean Development Company Limited in or about November 1961, for the year ending 30th June 1961 5% on each share;
- p.61 (2) By Bermundéz Biscuit Co. Ltd. on the 3rd October, 1961, for the year ending 31st August 1961 2% on each preference share;
- p.65 (3) By Gordon Grant and Co. (Tobago) Ltd. in or about December 1961 for the year ended 30th September, 1961 10% on each ordinary share. 10

The total sum of the said dividends so declared on shares held by the Appellant amounted to \$ 40,920 and each of the companies deducted Income Tax at 40% to a total of \$ 16,368.

p.63 In addition to the Appellant's shares in Gordon Grant and
p.64 Co. (Tobago) Limited, one J.F. Merry and one Major G.C. Howden held one share each upon which \$ 10 were paid to each and from which a total deduction of \$ 8 Income Tax was made. That sum added to \$ 16,368 constituted the Appellant's claim in the action.

p.54-55 4. In 1963 a new basis for the imposition and collection of tax in Trinidad and Tobago was introduced by the provisions of the Income Tax (Amendment) Act 1963. The provisions of that Act material to this appeal are set out in Appendix B to this Case. By Section 76A of the Act the Appellant was entitled to be discharged of income tax on its chargeable income arising in 1962. The said dividends paid to the Appellant arose in 1962. As a result of an exchange of letters between the Appellant's Chartered Accountants (Fitzpatrick, Graham and Co.) and the Commissioner of Inland Revenue the Appellants were advised in June 1966 that "tax on the income of 1962 had been discharged". The issue in this appeal is whether or not in the light of such statutory discharge the tax deducted by the companies before payment of the dividends falls to be refunded to the Appellant by the Board of the Inland Revenue. 20

5. A company's entitlement to make deductions of tax from a dividend were governed by Section 23 of the Income Tax Ordinance (CAP. 33 No. 1). The said section and other sections of the Ordinance material to this appeal are set out in full Appendix A to this Case. Section 23 and Section 24 were amended by the 1963 Act. 30

6. Section 23(1) provided in essence that "every company ... shall be entitled to deduct from the amount of any dividend paid to any shareholder tax at the rate paid or payable by the company ... on the income out of which such dividend is paid", subject to the provision that "where the tax is not paid or payable by the company on the 40

whole income out of which the dividend is paid the deduction shall be restricted to that portion of the dividend which is paid out of income on which tax is paid or payable by the Company."

10 7. A shareholder's rights in relation to any deduction made or entitled to be made were contained in Section 24 of the Ordinance and after 1963. also in Section 24A. Section 24 in essence provided that "any tax which a compny has deducted ... shall, when such dividend ... is included in the chargeable income of such shareholder ... be set off for the purposes of collection against the tax charged on that chargeable income". Section 24A provided that "where a dividend is paid to a shareholder ... out of income of a company ... that has been discharged of tax by section 76A, such shareholder ... is not entitled when such dividend or share is included in the chargeable income of such shareholder ... to set off for the purposes of collection against the tax charged on that chargeable income or to be refunded by the Commissioner, any tax which the company has deducted or is entitled to deduct under section 23 from such dividend ..."

20 8. The Appellant in fact claimed to be entitled to a refund by virtue of Section 46(1) of the Ordinance which provides that: "If it be proved to the satisfaction of the Commissioner that any person for any year of income has paid tax, by deduction or otherwise, in excess of the amount with which he is properly chargeable such person shall be entitled to have the amount as paid in excess refunded ..."

30 9. The learned trial Judge held that by deduction at source the Appellant had paid to the Commissioner of Inland Revenue p.30 1.18
§ 16,376.00, and that since in the year of income 1962 all income tax on income was discharged this amount had to be treated as in excess of what was properly chargeable, and was therefore to be redunded unless Section 24A applied. The learned Judge held Section 24A did not apply for he found on the material before him that the paying companies had not been discharged of tax by Section 76A, such discharge being an express requirement of Section 24A. He concluded that there had been no discharge because none had been asserted before the
40 proceedings and none had been pleaded.

10. Phillips J.A. who delivered the Judgment of the Court of Appeal allowed the appeal substantially upon the ground p.37 - 52
that Section 24A of the Ordinance did apply. The learned p.50 1.40
Judge held that since the paying companies were in existence in 1962 they were discharged of liability to be taxed and thus the bar to the operation of S.24A was removed. However in the course of reasoning Phillips J.A. came to two further conclusions, which it is submitted are germane to this appeal. He held:

50 (1) that the paying companies were not discharged of tax

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p.48 1.25

under section 76A only in as far as it purports to be applicable to the sum of \$ 16,376.00 claimed ..."

p.48 1.38

(2) that on the assumption that the sum of \$ 16,376 was paid to the Revenue it represented the tax liability of the paying companies in respect of their profits.

11. The Respondent respectfully submits that the Appellant did not pay tax in the sum claimed "by deduction or otherwise" (S.46(1)), because the Appellant did not pay the sums deducted at all. When a company exercises its entitlement under s.23 to deduct tax it does not thereby incur any liability to pay that amount deducted over to the Revenue. The paying company's liability to pay tax is based upon "the income out of which such dividend is paid". By section 23 the paying company is enabled to recoup the tax paid (or payable) from the shareholder. It is submitted that s.23 is not a tax charging section. The tax to be charged on dividends is provided for by Sections 5 and 6 (see Appendix A). Further it is submitted that section 23 expressly states that the tax deducted is the "tax at the rate paid or payable by the company". It is submitted that as a result it cannot be viewed as tax paid by the shareholder.

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12. It is submitted that upon a proper construction of all the relevant provisions that the sums deducted cannot be treated as tax paid by the Appellant. If they are "tax" at all it is submitted they represent tax paid by the paying companies. That such is the case is borne out by section 24. The shareholder is only concerned with the deduction so far as it may provide him with a wirhg of set off, but it is respectfully submitted that close regard must be paid to the fact that the set off is a "set off for the purposes of collection against the tax charged on that chargeable income". The shareholder's chargeable income will include the amount of the gross dividend declared by the paying company. The tax properly chargeable will be the amount chargeable against the gross figure and the right to set off only arises "for the purposes of collection ". The shareholder is taxable separately from a company in respect of a dividend.

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13. The Respondent submits that upon a proper construction of s.46(1) that even if contrary to the foregoing the Appellant is to be treated as having paid tax, then the amount with which he is properly chargeable is not affected by the right of set off, which is for the purposes of collection only. Thus it cannot be said that any amount has been paid in excess of the amount with which the Appellant was properly chargeable.

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14. Further, it is submitted that if the said reference to "tax" in Sections 23 to 24 are not references to tax charged on the company but rather to tax paid by deduction by the share-

holder, the tax so deducted is not "income tax on all the income that would have been chargeable to tax ..." which was discharged by Section 76A. This is so because the shareholder is not charged to tax under Sections 5 and 6 of the Ordinance in respect of his dividends as a separate items but only in respect of his chargeable income as defined; and the set off provided for by Section 24 of the Ordinance is not allowed against tax that might be said to have been "paid by deduction" on the dividends only, or in computing his chargeable income. The set off is allowed for the purposes of collection only, of the tax payable by him on his chargeable income, as defined. Thus Section 76A(1) cannot, therefore, refer to such tax paid by deduction as the discharge is the full amount of income tax assessed in accordance with the Ordinance and not tax deducted by the company under Section 23(1)

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15. Further, it is respectfully submitted that the Court of Appeal were correct in holding that section 24A prevented the Appellant obtaining a refund of tax deducted at source under section 23. The income out of which the dividends were paid was 1961 income and thus within the meaning of s.24A was not income that could be discharged of tax under s.76A, but nevertheless the companies had been discharged of tax under s.76A.

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16. The Respondent accordingly submits that this appeal should be dismissed for the following (among other)

REASONS

1. BECAUSE the Appellant did not pay tax on the dividends.
2. BECAUSE the amounts deducted represented the paying companies' tax.
3. BECAUSE Section 24 of the Income Tax Ordinance grants a shareholder a right of set off for the purposes of collection only.
4. BECAUSE if the amounts deducted by the paying companies are treated as tax paid by the tax payer the sums deducted not being assessed for tax were not discharged of tax by s.76A.
5. BECAUSE Section 23 of the Income Tax Ordinance is not a charging section.
6. BECAUSE the Court of Appeal were correct,

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MERVYN HEALD Q.C.

GEORGE NEWMAN

APPENDIX 'A'

INCOME TAX ORDINANCE

CHAPTER 33 No. 1

Section 2

2. ... "chargeable income" means the aggregate amount of the income of any person from the sources specified in section 5 remaining after allowing the appropriate deductions and exemptions under this Ordinance; ...

... "tax" means the income tax imposed by this Ordinance; ...

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Section 6

6. Tax shall be charged, levied, and collected for each year of assessment upon the chargeable income of any person for the year immediately preceding the year of assessment.

Section 23

23.(1) Every company which is registered in the Colony shall be entitled to deduct from the amount of any dividend paid to any shareholder tax at the rate paid or payable by the Company (double taxation relief being left out of account) on the income out of which such dividend is paid:

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Provided that where tax is not paid or payable by the company on the whole income out of which the dividend is paid the deduction shall be restricted to that portion of the dividend which is paid out of income on which tax is paid or payable by the company.

(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; and also, where the tax paid or payable by the company is affected by double taxation relief, the rate (hereinafter in this Ordinance referred to as "the net Colonial rate") of the tax paid or payable by the company after taking double taxation relief into account.

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(3) In this section the expression "double taxation relief" means any credit for foreign income tax which is allowable against income tax chargeable under this Ordinance by virtue of arrangements having effect under section 50 of this Ordinance, and any relief allowable under section 47 or section 48 of this Ordinance, including any credit or relief which has been taken into account in determining the net Colonial rate applicable

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to any dividends received by the company.

Section 24

24. Any tax which a company has deducted or is entitled to deduct under the last preceding section from a dividend paid to a shareholder, and any tax applicable to the share to which any person is entitled in the income of a body of persons assessed under this Ordinance, shall, when such dividend or share is included in the chargeable income of such shareholder or person, be set off for the purposes of collection against the tax charged on that chargeable income.

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Section 46

46.(1) If it be proved to the satisfaction of the Commissioner that any person for any year of assessment has paid tax, by deduction or otherwise, in excess of the amount with which he is properly chargeable, such person shall be entitled to have the amount so paid in excess refunded. Every claim for repayment under this section shall be made within two years from the end of the year of assessment to which the claim relates. The Commissioner shall give a certificate of the amount to be repaid and upon the receipt of the certificate the Accountant General, shall cause repayment to be made in conformity therewith.

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APPENDIX 'B'

INCOME TAX (AMENDMENT) ACT 1963

Section 18

18. The Ordinance is amended by inserting immediately after section 23 the following new sections numbered 23A and 23B respectively:

"23A. A dividend paid by a company shall be deemed, for all the purposes of this Ordinance, to represent income of such an amount as would, after such deduction of tax as is authorised by subsection (1) of section 23, be equal to the net amount received. 10

"23B.(1) Where any dividend from which deduction of tax is authorised by subsection (1) of section 23 is paid without deduction of tax, the amount received in respect thereof shall, for the purposes of this Ordinance, be deemed to be a net amount received in respect of a dividend from the gross amount of which such deduction as is authorised by the said subsection (1) has been made, and the provisions of section 23A shall apply accordingly. 20

(2) The provisions of this section shall apply where, though a deduction is made from a dividend, that deduction is less than the full amount authorised as it applies where no deduction is made".

Section 19

19. The Ordinance is amended by inserting immediately after section 24, the following new section 24A:

"24A.(1) Notwithstanding section 24,
(a) where a dividend is paid to a shareholder, and 30
(b) where a share to which a person is entitled to the income of a body of persons assessed under this Ordinance is paid to that person,

out of the income of a company or other body of persons that has been discharged of tax by section 76A, such shareholder or person is not entitled when such dividend or share is included in the chargeable income of such shareholder or person to set off for the purposes of collection against the tax charged on that chargeable income or to be refunded by the Commissioner, any tax which the company had deducted or is entitled to deduct under section 23 from such dividend and any 40

tax applicable to the share to which such person is entitled as aforesaid.

10 (2) When a company had paid a dividend to any shareholder before the commencement of the Income Tax (Amendment) Act, 1963, out of income that is discharged of tax by section 76A, a refund of any amount of that shareholder in respect of tax that the company had deducted under section 23 from a dividend out of the income discharged as aforesaid shall be deemed to be a payment of a dividend, or where a company instead of making a refund pays the said amount as a dividend or part thereof in any year of income to that shareholder, then the provisions of subsection (1) shall apply accordingly."

Section 44

44. The Ordinance is amended by inserting immediately after section 76 the following section:

20 "76A.(1) Notwithstanding anything contained in this Ordinance, other than the provisions of section 76, but subject to this section, income tax on all income (other than income tax on all emoluments within the meaning of section 53C), that would have been chargeable to tax for what would have been the year of assessment, 1963, had the Income Tax (Amendment) Act, 1963 not been passed, is hereby discharged.

30 (2) Where the tax payable by any person for the year of income 1963 is less than the tax that would have been payable for what would have been the year of assessment 1963 had the Income Tax (Amendment) Act, 1963 not been passed, the amount of tax to be discharged shall not exceed the amount of tax assessed and paid for the year of income 1963, it

- (a) such person was in receipt of income for part only of the year of income 1963; or
- (b) such person was in receipt of income for part or the whole of the year of income 1963, but the income
 - 40 (i) did not include income from such of sources from which the total income for what would have been the year of assessment 1963, had the said Act not been passed, was derived, as the Commissioner may in any case determine; or
 - (ii) was income arising, accruing in, derived

from or received in Trinidad and Tobago in respect of a business, trade, profession or vocation that, in the opinion of the Commissioner, had been voluntarily curtailed or reduced by such person.

(3) For the purpose of determining the amount of income tax to be discharged where the total income of an individual includes emoluments within the meaning of Section 53C, the tax to be discharged shall be an amount that bears to the full amount of income tax assessed in accordance with this Ordinance the same proportion that the income from sources other than emoluments bears to the total income without any deductions allowable under sections 14, 15 or 16D but allowing deductions under section 10 other than an allowance in respect of an annual payment under paragraph (f) of section 10. 10

(4) Notwithstanding the provisions of this Ordinance, no loss that may have been allowed to be set off in computing the chargeable income of any person (who carried on any trade, business, profession or vocation either solely or in partnership) for what would have been the year of assessment 1963 had the Income Tax (Amendment) Act, 1963 not been passed, may be set off in computing the chargeable income of that person for any year of income. 20

(5) Nothing in subsection (4) shall prevent any loss incurred during a former year of assessment that is permitted under this Ordinance to be set off in a subsequent year from being so set off in a year of income in computing the chargeable income of such person for that year of income. 30

76B.(1) Notwithstanding the provisions of this Ordinance assessments on all emoluments as defined in section 53C for the former years of assessment 1959 to 1962 inclusive shall be deemed to have been assessments for the former years of assessment 1958 to 1961 respectively, and tax paid or payable in respect to the former years of assessment 1959 to 1962 inclusive shall be deemed to have been paid or to be payable in respect of those years at the then prevailing rates. 40

(2) Amounts deducted in the year 1962 from emoluments, as defined in section 53C earned in that year on account of tax which would have been assessable on such emoluments in what would have been the year of assessment, 1963 had the Income Tax (Amendment) Act, 1963, not been passed, shall be deemed to have been deducted on account of tax for the former year of assessment, 1962 at the rates then prevailing.

(3) Nothing in subsections(1) and (2) shall be construed as permitting adjustments to be made that would not otherwise have fallen to have been made if this section had not been enacted.

76C. Notwithstanding that any assessment has been made upon any person before the Income Tax (Amendment) Act, 1963 was passed in respect of his chargeable income for what would have been the year of assessment 1963, had that Act not been passed, the provisions of this Ordinance shall have effect in relation to that income and the Commissioner may refund the amount paid, if any, in respect of the tax discharged by this Ordinance, or instead of making a refund, may, where the person is liable or about to become liable to make a payment under this Ordinance for the year of income 1963 apply any part of that amount to that other liability and refund any balance to such person and notify such person of that action."

No. 34 of 1979

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL
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 RESPONDENT

Lodged this day of 1980

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Ref: R/JA/10391

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