Privy Council Appeal No. 34 of 1979

Gordon Grant and Company (1965) Limited – – – *Appellant*

v.

The Attorney General of Trinidad and Tobago – – *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD MARCH 1981

Present at the Hearing:

LORD DIPLOCK
LORD RUSSELL OF KILLOWEN
LORD KEITH OF KINKEL
LORD BRIDGE OF HARWICH
SIR JOHN MEGAW

[*Delivered by* LORD BRIDGE OF HARWICH]

In 1961 three companies in which the appellant held shares declared dividends of which the gross amount attributable to the appellant's shares was $40,940. The companies, as they were entitled to do, deducted $16,376, representing tax at 40 per cent from the gross sum, and paid the appellant the balance of $24,564.

The fiscal year in Trinidad and Tobago corresponds to the calendar year. The dividends in question were paid out of the income of the paying companies for the year 1961. However, owing to the manner in which the accounts of the appellant company were kept, it is common ground that the dividends are to be treated as forming part of the appellant's income for the year 1962.

In 1968 the appellant commenced these proceedings in the High Court of Trinidad and Tobago claiming under the Income Tax Ordinance (" the Ordinance ") as amended from time to time, and, in particular, as amended by the Income Tax (Amendment) Act, 1963 (" the Act of 1963 ") to recover from the Board of Inland Revenue $16,376, being the amount of tax deducted at source by the paying companies from the appellant's 1962 income.

On 19th April 1974 Braithwaite J. gave judgment in favour of the appellant for the amount claimed with interest at 6 per cent. from 20th April 1967. On 18th November 1977 the Court of Appeal of

Trinidad and Tobago set the judgment aside. The appellant appeals to their Lordships' Board against that decision pursuant to final leave granted by the Court of Appeal on 23rd May 1978.

The dispute arises as a consequence of the change in the basis of taxing income (other than emolument income, which was already taxed on a PAYE system), which was introduced by the Act of 1963. Until amended in 1963 the Ordinance provided by section 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."

The Act of 1963, enacted on 25th June, 1963 but taking effect retrospectively from 1st January 1963, repealed and replaced this provision as follows:—

> "Tax shall be charged for each year of income upon the chargeable income of any person for that year."

Thus, tax for 1962 was based on income for 1961, tax for 1963 was based on income for 1963; what was to be the position in relation to tax liability of income for 1962? The principal transitional provision which the Act of 1963 makes to deal with this question is to introduce into the Ordinance a new section 76A(1) as follows:—

> "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."

This is the corner-stone of the appellant's case. The gross dividend of $40,940, being part of the appellant's 1962 income, was "income . . . . . 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". The income tax on that income is therefore discharged. This must mean that the income was not liable to bear any tax. But the appellant has borne tax on this part of its income, such tax having been deducted by the companies paying the dividends. Unless, therefore, the appellant can recover the tax deducted from the Board of Inland Revenue it is deprived of the immunity which section 76A(1) is designed to confer. So far the argument appears to their Lordships irrefutable. The whole question on which the appeal turns is whether the statute provides any available machinery by which such recovery can be effected.

It will be convenient here to set out the main provisions of the Ordinance on which this question depends. They are as follows:—

> "23. (1) Every company which is registered in Trinidad and Tobago 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 . . . .
>
> "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, ... 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.

"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."

Before considering the effect of these provisions, it is necessary to refer to the section on which the Court of Appeal based its decision. This is section 24A(1) of the Ordinance, introduced by amendment by the Act of 1963, which provides, so far as material:—

"Notwithstanding section 24,

(*a*) where a dividend is paid to a shareholder, . . .

out of the income of a company . . . . that has been discharged of tax by section 76A, such shareholder . . . . is not entitled when such dividend . . . . 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 . . . ."

The Court of Appeal held that this provision applied to the circumstances of the instant case so as to bar the refund of tax claimed by the appellant. They held it to be sufficient to bring section 24A(1) into operation that the company paying the dividend in respect of which deducted tax is claimed to be set off or refunded was in existence in 1962 (so as to be discharged of liability to tax on its income for that year), even though, as here, the dividend in question was paid out of the company's income for a previous year. This construction of section 76A(1) and section 24A(1) is one which counsel for the respondent before their Lordships' Board did not feel able to support and which their Lordships, with respect, are quite unable to accept. It is plain that the only income discharged of tax by section 76A(1) is income for the year 1962 and that it is only to dividends paid out of that income that section 24A(1) has any application.

The argument for the appellant on the application of the main sections is simple. Tax was properly deducted by the paying companies from the dividend paid to the appellant under section 23(1). It is common ground that the income of the appellant from these dividends was not the net amount received but the "grossed up" amount including the tax deducted. The appellant having, by virtue of section 76A(1), no chargeable income for 1962, there was no charge to tax against which the tax deducted could be set off under section 24. But under section 46(1) the appellant claims to be a person who "has paid tax, by deduction or otherwise, in excess of the amount with which he is properly chargeable" and thus to be entitled to a refund of the amount so paid.

The respondent's main argument against this contention is that tax deducted from dividends under section 23(1) is in no sense "paid" by the shareholder. The only payment of tax has been by the company, which is a payment in discharge of the company's liability alone and not a payment for or on behalf of the shareholder. Accordingly, so it is argued, there can never be any right under section 46(1) to recover tax deducted under section 23(1). In support of this argument a number of Australian and English cases were relied on, but their Lordships derive no assistance from these, which, in so far as they were concerned with provisions similar to section 23(1) of the Ordinance, nevertheless turned upon questions arising in a totally different context from that in which the present issue has to be resolved.

Their Lordships are impelled to reject the respondent's main argument by three considerations. First, bearing in mind that the shareholder's gross income includes the amount of any tax deducted from dividends paid to him, it is surely no misuse of language to say that the shareholder has " paid " that amount of tax out of his income " by deduction ". Secondly, if the respondent is right, whereas the large tax-payer is entitled to set off tax deducted from dividends against his tax liability, the person whose income is too small to attract any liability to tax but is received entirely in the form of dividends from which tax at the company rate has been deducted, is denied any right of recovery. Fully alert to the iniquity of this contrast, counsel for the respondent accepted that the tax deducted from dividends received by a person whose total allowances equalled or exceeded his total income would always be refunded, but suggested that this was not a matter of statutory right but merely an administrative concession. Their Lordships find this suggestion wholly unacceptable. Thirdly, if the issue were otherwise left in any doubt, that doubt is conclusively resolved by section 52(1) of the Ordinance, which provides:

> " Where the tax paid or payable by a company is affected by double taxation relief the amount to be set off under section 24 of this Ordinance, or to be repaid under section 46 of this Ordinance, in respect of the tax deductible from any dividend paid by the company shall be reduced as follows . . . . . "

There could be no clearer express recognition of the principle that tax deductible from a dividend under section 23 is in an appropriate case repayable under section 46.

An alternative submission was advanced for the respondent to defeat the appellant's claim under section 46(1). Such a claim, it was said, applied only to tax paid " for any year of assessment " and by virtue of the amendment of the Ordinance by the Act of 1963, the year 1962 was no longer a year of assessment. The premise on which this submission rests is mistaken. Section 6 of the Ordinance, before its amendment by the Act of 1963, the text of which is set out earlier in this judgment, shows that the year of assessment was the year for which tax was charged based on the chargeable income of the preceding year. Thus, 1962 was the year of assessment for which tax was charged based on the chargeable income of 1961. The Act of 1963 introduces a new definition of " former year of assessment ". It is unnecessary to set it out *in extenso*. It is apt to include the year 1962. All this is confirmed by an amendment made by the Act of 1963 to section 46 which (*a*) extends the time for making a claim under section 46(1) from two to six years and (*b*) adds a new subsection (1*a*) as follows:—

> " The extension of the time within which such claim for repayment shall be made has effect for the former years of assessment 1961 and 1962, and subsequent years of income."

A subtle refinement of the argument for the respondent suggests that, though 1962 was a year of assessment under the Ordinance before amendment and remains a former year of assessment after amendment, the tax paid by deduction which the appellant claims to recover, being no part of the tax charged on the appellant for the year 1962 based on its chargeable income for the year 1961, was not paid " for the year of assessment " 1962. In their Lordships' view, to adopt such a refinement would be to apply an altogether too restrictive interpretation to the language of the statute. On the construction which their Lordships have applied to section 23(1) and section 46(1), the dividend in question was part of the appellant's income for 1962 out of which the tax in question

was paid by deduction. 1962 was a year of assessment and it is a perfectly natural use of language to say that the tax was paid for that year; it is only by straining language that this conclusion can be avoided.

The appeal will, therefore, be allowed and the judgment of Braithwaite J. restored. The respondent must pay the appellant's costs before the Board and the Court of Appeal.

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THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

DELIVERED BY

LORD BRIDGE OF HARWICH

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