

23/85

No.45 of 1983

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF MAURITIUS

B E T W E E N :

ALUMINIUM ENTERPRISES LIMITED	<u>First Appellant</u>
LIM KWET CHOW LAM PO TANG	<u>Second Appellant</u>
GARY LAM PO TANG	<u>Third Appellant</u>
LIMBERG LAM PO TANG	<u>Fourth Appellant</u>
- and -	
THE COMMISSIONER FOR INCOME TAX	<u>Respondent</u>

(Consolidated Appeals)

CASE FOR THE APPELLANTS

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Respondent

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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B E T W E E N :

ALUMINIUM ENTERPRISES LIMITED First Appellant

LIM KWET CHOW LAM PO TANG Second Appellant

GARY LAM PO TANG Third Appellant

LIMBERG LAM PO TANG Fourth Appellant

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- and -

THE COMMISSIONER FOR  
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Respondent

(Consolidated Appeals)

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CASE FOR THE APPELLANTS

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RECORD

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1. This is a consolidated Appeal from two Judgments of the Supreme Court of Mauritius (V.J.P.Glover, acting Chief Justice, and A.M.G. Ahmed, Judge) (a) the first one being an Interlocutory Judgment, pronounced on the 2nd December 1982, rejecting the Appellants' contention that they were, as a Development Company, (First Appellant) and as shareholders thereof (Second, Third and Fourth Appellants), exempt from the anti-avoidance provisions for non-distribution of Companies' profits, under Income Tax Law, and upholding the Respondent's determination, under the said provisions, quoad the First Appellant, and his consequential assessments to tax of Second, Third and Fourth Appellants respectively and (b) the second one being a final Judgment, pronounced on the 10th of July 1983 (i) confirming the quantum of the said assessments and finally dismissing the Appellants' Appeals from the aforesaid determination and assessments and (ii) holding

pp.18-31

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pp.32-35

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that, in any case, the First Appellant had no right of appeal under the Income Tax Act, 1974.

2. The Income Tax Law on the subject of (a) Development Companies and (b) Tax avoidance by non-distribution of Companies profits, is briefly as follows :

A

(a) Development Companies

Under the Income Tax Ordinance, 1950, as subsequently amended, (hereinafter referred to as "the Ordinance") it is enacted that a "Development Company" as defined in Section 2, after qualifying as such under the procedures and conditions prescribed by Sections 36A - 36G, shall be entitled to income tax relief for a period of five years from the date of its production day (Section 36H(1) and that the amount of its income, as stated by the Commissioner, under Section 36N(2), for each accounting period during the said five-year period, shall be exempt from Tax under the Ordinance (Section 36N and 36 O(1)(a)).

p.25 Ll.17-22

p.25 Ll.11-46

It is further enacted (Section 36H(2)) that when any Development Company elects not to claim the initial allowance for capital expenditure to which it would otherwise be entitled under Sections 16 and 22 and in accordance with Section 36L, its tax relief period shall be extended by three years.

So far as dividends distributed by the said Development Company are concerned, it is enacted by Section 36 O(b)(i) that any amount of dividend out of its profits, for the duration of its five-year tax relief period, shall not form part of the assessable income, total income or chargeable income of the shareholders for any year of assessment and shall be exempt from tax under the Ordinance, provided that such exemption shall not apply to any dividend distributed during the three-year extension of the tax relief period, if any, under Section 36H(2) Supra.

Finally, Section 36P enacts that, subject to certain reservations, the anti-

avoidance provisions of Section 55 of the Ordinance, for non-distribution of Companies' profits, shall have no effect in relation to any amount of income of a Development Company exempted under Section 36 O Supra.

(b) Anti-avoidance provisions for non-distribution of Companies' profits

10 Section 55(1) of the Ordinance provides that, with a view to preventing the avoidance of the payment of tax through the withholding from distribution of income of a company which would otherwise be distributed, the Commissioner may, when it appears to him that such company has not distributed to its shareholders as dividend a reasonable part of its income, by written notice to the Company, direct  
 20 that such undistributed income shall be deemed to have been distributed as dividend amongst shareholders and the shareholders concerned shall be assessable accordingly.

p.25 Ll. 47-52  
p.26 Ll.1-20

The remaining subsections of Section 55 deal with specific points related to the implementation of the above principle and direction.

30 Under Subsection (8) any company aggrieved by a decision of the Commissioner under Section 55 may appeal to the Supreme Court against such decision within fourteen days of the date when the decision was duly notified to the Company.

As pointed out above, Section 36P expressly provides that Section 55 shall not apply to Development Companies.

B

40 In 1974, the Ordinance was repealed in toto and replaced by the Income Tax Act, 1974 (hereinafter referred to as "the Act").

The Act was promulgated on the 25th of July 1974 and took effect, so far as is relevant to this Appeal, from the 1st of July of the Year of Assessment 1974-75.

A comparison of the Act with the Ordinance shows that

(a) Development Companies

(i) Section 2 of the Act defines "Development Companies" as having the same meaning as in the Development Incentives Act. This latter Act, promulgated on the 26th of July, 1974 governs the legal status of Development Companies, (which is, broadly speaking, the same as under the Ordinance), and lays down their Tax relief period, viz: a period not exceeding five years from the date of their production day (Section 5(3)(b)). 10

p.26 Ll.42-49  
p.27 Ll. 1-5

(ii) So far as is relevant to the present appeal, Section 33(4)(a) of the Act re-enacts the exemption from tax of the Development Company's profits during its tax relief period. 20

(iii) Section 33(8) likewise provides for the three-year extension of the Development Company's tax relief period in case of its election not to claim its initial allowance on capital expenditure under Section 28(1) or 29(1).

(iv) Shareholders are exempted from any tax on dividends received out of any income exempt from income tax during the Company's tax relief period (Section 33(4)(b)(i), but such exemption, following Section 36H (2) of the Ordinance, does not cover any dividend received during the three-year extension of such tax relief period (Section 33(4)(b)(ii)). 30

(v) Finally, Section 36P of the Ordinance expressly excluding the application to Development Companies of the anti-avoidance provisions of Section 55 is not re-enacted by the Act. 40

(b) Anti-avoidance provisions for non-distribution of Companies' profits

p.27 Ll.9-44  
p.28 Ll.1-10

Section 40 of the Act re-enacts, in more elaborate form, the anti-avoidance provisions of the Ordinance in relation

to excessive undistributed profits of Companies and more especially, Section 40(8) defines the term "distributable income" as follows:

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p.27. L1.  
36-43  
p.28 L1.1-10

"For the purposes of this Section "distributable income" means the "difference between

"(a) the sum of

10 " (i) the chargeable income derived  
" by the Company in the income  
" year and  
" (ii) any dividends deductible by the  
" Company under Section 55 in  
" that income year  
"and

"(b) the amount of income tax in  
"respect of the chargeable income  
"derived by the Company in that  
"income year. "

20 3. Interpretation and General Clauses Act, 1974

In relation to the repeal in 1974 of the Ordinance by the Act, it is relevant to this Appeal to refer to the Interpretation and General Clauses Act, 1974, Section 17(3) whereof enacts as follows:

p.23 L1.13-22

"Effect of Repeal"

30 ".....The repeal of an enactment shall  
"not.....; (b) affect the previous  
"operation of the repealed enactment or  
"anything duly done or suffered under the  
"repealed enactment; (c) affect any right,  
"privilege, obligation or liability  
"acquired, accrued or incurred under the  
"repealed enactment, (d) affect any  
"investigation, proceeding or remedy in  
"respect of a right, privilege, obligation,  
"liability, penalty, forfeiture or punish-  
"ment and any investigation, proceeding or  
40 "remedy may be instituted, continued or  
"enforced, and any penalty, forfeiture or  
"punishment may be inflicted, as if the  
"enactment had not been repealed."

p.28 L1.17-22

50 4. As an introduction and background to this Appeal, it is relevant to refer shortly to the general policy of industrial development which was initiated by the Government of Mauritius in 1961 and was persistently pursued throughout the years ever since.

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Mauritius, as a developing country, being vitally interested in industrialisation and diversification of its economy, adopted an active policy of industrial development which was followed by its successive Governments with a view to promoting and protecting "any industry not being carried on in the Colony on a scale suitable to the economic requirements of the Colony or at all" (Section 36A(1) of the Ordinance). 10

The essential characteristic of that policy consisted in providing incentives to "Development Companies" in the shape of tax relief periods or tax holidays under the provisions of amending Ordinance No. 49 of 1961 as incorporated in Section 36A to 36P of the Ordinance. This policy was pursued after the accession of Mauritius to independence in 1968 and throughout the succeeding years and more especially in 1974 when the Development Incentives Act, enacted "to provide incentives to development", and Section 33 of the Act perpetuated and consolidated the specific promotion and protection of "development companies" and preserved to such companies the tax advantages granted to them by the Ordinance. 20

5. The Appeal raises the following questions : 30

(a) In limine litis, whether the First Appellant was entitled to appeal, under Sections 93 and 96 of the Act, from the Respondent's direction under Section 40 thereof and from his consequential Assessments to Tax of the Second, Third and Fourth Appellants.

(b) On the merits of the Appeal

(i) Whether the Appellants, as a Development Company (First Appellant), incorporated in 1969 and operating as from 1971, and as Shareholders thereof (Second, Third and Fourth Appellants) were governed by the Ordinance during the whole of the said Company's Tax relief period, i.e. 1971 to 1979, or by the Act, as from the date of the promulgation thereof in July 1974 40 50

(ii) If governed by the Ordinance, whether the Appellants were, by the effect of Section 36P thereof, immune from the operation of the anti-avoidance provision of Section 55 thereof

10 (iii) If governed by the Act, whether, on the proper construction of Section 40 thereof, the Appellants, as a Development Company (First Appellant) and as Shareholders thereof (Second, Third and Fourth Appellants) fell within the scope and ambit of the anti-avoidance provisions of the said Section.

6. The material facts giving rise to this Appeal are as follows -

20 (a) On the 10th of September 1969, the First Appellant was incorporated as a Limited liability Company under the name of "Aluminium Enterprises Limited", with three Shareholders, viz: the Second, Third and Fourth Appellants respectively p.41 L1.13-14

30 (b) Seven months earlier, on the 10th of January 1969, the Second Appellant had been informed by the Principal Assistant Secretary, Ministry of Commerce and Industry, that in answer to his application for a Development Certificate in respect of the manufacture of aluminium ware and stainless steelware, the grant of a Development Certificate to his proposed Company had been approved, under the provisions of Section 36A(7) of the Ordinance, and that a Development Certificate would be issued after the registration of the proposed Company (Letter 10th January 1969 Document A1) p.39 L1.12-14

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(c) On the 9th of October 1969, a Development Certificate was issued by the aforesaid Ministry declaring the First Appellant to be a Development Company, in terms of the Ordinance, for a period of five years from a date to be determined by the Respondent p.41 L1.20-22

50 (Letter of 9th October 1969-Documents A2 and A3) pp.40-41



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- p.43 Ll.33-37  
pp.43-45
- (d) On the 7th of December 1971, the Respondent certified, under Section 36D (4) of the Ordinance, that the Company's date of Production Day should be the 1st of April 1971 and the amount of qualifying capital expenditure incurred by the Company, prior to Production Day, to be Rs 280,753 (Letter of 7th December 1971 - Documents A6 and A7)
- p.45 Ll.30-33  
p.45
- (e) On the 13th of December 1971, the Fourth Appellant, being the Manager of the First Appellant, notified the Respondent that the First Appellant elected not to claim its initial allowance and applied for an extension of its Tax relief period by another three years, under Section 36H (2) of the Ordinance (Letter of 17th January 1972 - Document A8) 10
- p.46 Ll.23-26  
p.46
- (f) On the 17th of January 1972, the Respondent informed the First Appellant that its Tax-relief period had been as a consequence of its aforementioned election not to claim its initial allowance, extended by three years and would expire on the 31st of March 1979 (Letter of 17th January 1972 - Document A9) 20
- (g) Between the years of Assessment 1972-73 and 1976-77, the Net Profits made by the First Appellant were as follows :

	<u>Year of Assessment</u>	<u>Net Profit as per a/c</u>	30
p.82 1.46	1972-73	Rs 90,183	
p.83 1.3	1973-74	Rs 375,074	
p.83 1.4	1974-75	Rs 798,536	
p.83 1.5	1975-76	Rs 831,755	
p.83 1.6	1976-77	Rs 1,285,334	

During each of the above years, dividends were paid by the First Appellant to its shareholders, the Second, Third and Fourth Appellants, as follows :

p.82 1.46	1972-73	Rs 60,000	40
p.83 1.3	1973-74	Rs 360,000	
p.83 1.4	1974-75	Rs 800,000	
p.83 1.5	1975-76	Rs 800,000	
p.83 1.6	1976-77	Rs 960,000	

In relation to each of the above years of Assessment, the First Appellant was exempt from any Tax on the above Net Profits and the Second, Third and Fourth

Appellants were likewise exempt from any Tax on the above dividends

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- (h) For the years of Assessment 1977-78 and 1978-79, the Net Profits made by the First Appellant amounted to Rs 1,501,556 and Rs 1,501,615 respectively. p.50

10 The First Appellant was exempt from any Tax on such Net Profits. No dividends were declared by the First Appellant from the aforesaid Net Profits in relation to the aforesaid years of Assessment. p.66

- (i) On the 9th of March 1979, the Respondent, by a letter written to the Fourth Appellant, Manager of the First Appellant, informed the latter that, having noted that, in spite of substantial profits in the years of Account 1976-77 and 1977-78 (Years of Assessment 1977-78 and 1978-79), the First Appellant had not distributed to its shareholders (Second, Third and Fourth Appellants) by way of dividend, any part of its distributable income during those years, in spite of its high liquidity rate, he determined by virtue of the powers conferred upon him under Section 40 of the Act, that the following amounts should be deemed to have been distributed amongst the Shareholders (Second, Third and Fourth Appellants) and that they should be assessable accordingly : p.77 Ll.27-33

<u>Year of account to</u>	<u>Year of Assessment</u>	<u>Amount deemed to have been distributed at dividend</u>	p.78 Ll.1-6
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40 30.6.77	1977-78	Rs 898.921	
30.6.78	1978-79	Rs 899.331	

(Letter of the 9th March 1979 - Document A34) pp.77-78

- (j) Between the 21st of March 1979 and the 1st of April 1980, there followed a correspondence between Mr. Seeyave, of the firm De Chazal Du Mée & Co., Chartered Accountants on behalf of the Appellants, and Mr. Sam Fat, on behalf of the Respondent, regarding. pp.80-108

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the latter's determination under Section 40 of the Act quoad the First Appellant and regarding his announced intention of future assessments quoad the Second, Third and Fourth Appellants. Mr. Seeyave, throughout such correspondence contended that (1°) the proper construction of the wording of Section 40 of the Act showed that such Section did not apply to Development Companies and that the Respondent had therefore no power to make any such determination and assessments and (2°) in the alternative, the Appellants' case was to be governed by the Ordinance under which the First Appellant had been incorporated and had operated, and the repeal thereof could not affect the Appellant's acquired rights, by virtue of the Interpretation and General Clauses Act, 1974. 10 20

On his part, Mr. Sam Fat, analysing the various relevant Sections of the Ordinance and of the Act, maintained that the Respondent was fully empowered to take action under Section 40 of the Act and fully justified in his determination quoad the First Appellant and in his intention to assess the Second, Third and Fourth Appellants in due course. 30

p.102 In his letter to Mr. Seeyave of the 13th of March 1980, Mr. Sam Fat, for the Respondent, finally concluded as follows:

p.102 L1.28- 36 "In view of the explanation which, I regret, has been so lengthy, I have to let you know that I have determined that the Rs 898.921 and Rs 899.331 should have been distributed as dividends for the two years of assessment 1977-78 and 1978-79 respectively - assessment notices will be issued to the shareholders of the Company as soon as possible. " (Letter of 13th March 1980 - Document A41) 40

pp.1-3 (k) On the 22nd of April 1980, the First Appellant appealed to the Supreme Court against the Respondent's determination and the Appeal case was started before the Supreme Court on the 24th of February 1982.

(1) On the 1st of June 1982, the Respondent served additional assessments on the 50

Second, Third and Fourth Appellants, in respect of the years of assessment 1977-78 and 1978-79, relating to the dividends deemed to have been distributed to them for the said years.

RECORD  
pp.109-114

- 10 (m) On the 7th and 10th of June 1982, the Second, Third and Fourth Appellants appealed to the Supreme Court from the Respondent's assessments. pp.4-17
- (n) On the 14th of September 1982, on the resumption before the Supreme Court of the First Appellant's appeal case, on a joint motion from Counsel, for both sides all the above appeals were consolidated and heard together. p.36 Ll.24-25
- 20 7. At the hearing of the Appeals, it was argued on behalf of the Appellants that :
- (a) Appellants had acquired the following rights under the provisions of the Ordinance:
- 30 (i) exemption of the First Appellant from any Tax on its income during the whole of its five-year Tax relief period from 1972 to 1976, as well as during its extended three-year period from 1977 to 1979;
- (ii) exemption of the Second, Third and Fourth Appellants from any tax on any dividend received by them out of the first Appellant's exempt income during the aforesaid five-year Tax relief period, though not during the aforesaid extended three-year period;
- 40 (iii) immunity of all the Appellants during the whole of both of the aforesaid Tax relief periods, viz: from 1972 to 1979, from the anti-avoidance provisions of Section 55, by virtue of Section 36P;
- (b) The Appellants could not be deprived of any such acquired rights by the repeal of the Ordinance and its

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replacement by the Act in 1974. This resulted from the general principle of non-retrospectivity of any new law unless expressly enacted to the contrary as well as and, more specifically from Section 17(3)(c) of the Interpretation and General Clauses Act, 1974;

- (c) The Appellants were therefore governed by the Ordinance and not by the Act 10
- (d) The Respondent, in disregard of the facts of the case and of the effect of Section 17(3)(c) of the Interpretation and General Clauses Act on the maintenance of Appellants' rights under the Ordinance, had wrongly applied the Act to the present case and had made a wrong determination quoad the First Appellant and wrong assessments quoad the Second, Third and Fourth Appellants; under Section 40 thereof 20
- (e) In the alternative, should the Act be held to apply to the present case, the Respondent misconstrued Section 40 of the Act as applying to Development Companies
- (f) The Respondent was wrong in assimilating in toto Section 40 of the Act to Section 55 of the Ordinance and in holding that the disappearance from the Act of any equivalent to Section 36P of the Ordinance was a clear indication of the legislator's intention to "unshield" Development Companies and their Shareholders from the effect of Section 40 30
- (g) The new wording of Section 40 and, especially, subsection (8) thereof, regarding the definition of "distributable income" was entirely inappropriate to Development Companies and could not apply thereto. Such Companies remained outside the scope of Section 40 and it was therefore unnecessary to provide specifically for their exclusion and to re-enact an equivalent to Section 36P of the Ordinance 40
- (h) The cases of Compagnie d'Investissement 50

& de Developpement Ltée v C I T  
M R 1975 239, Maingard Holding Co.Ltd.  
v C I T 1977, 189, at page 193  
Esperance Co.Ltd. v C I T 1982 -  
S C J No.22 were cited by Counsel for  
Appellants in support of their  
submissions

- 10 (i) The Respondent's determination quoad  
the First Appellant and his assess-  
ments of the Second, Third and Fourth  
Appellants were therefore wrong and  
should be quashed
8. At the hearing of the Appeals, it was  
argued on behalf of the Respondent that:
- 20 (a) No acquired rights ever accrued to  
the Appellants from the Development  
Certificate issued to the First  
Appellant in 1969, nor from the  
extension of the Tax relief period  
granted under Section 36H of the  
Ordinance in 1971
- 30 (b) The Act did not, in any way, impugn  
any acquired rights which had accrued  
to the Appellants under the Ordinance,  
either from the point of view of the  
Tax-relief period enjoyed by the  
Appellants or from that of their  
previous immunity from the anti-  
avoidance provisions of Section 55.  
Such Tax relief or immunity as the  
Appellants enjoyed under the Ordinance  
did not constitute any acquired rights
- (c) Section 17(3) of the Interpretation  
and General Clauses Act, 1974 could not  
therefore be invoked by the Appellants  
and it was exclusively under the 1974  
Act that the Appeals fell to be  
decided
- 40 (d) Section 40 of the Act is a mere  
re-enactment of Section 55 of the  
Ordinance and there has been no  
substantial change of language in  
Section 40, so as to change the nature  
of the Section as compared with Section  
55 of the Ordinance
- (e) Sections 40 and 33(4) of the Act should  
not be read together to construe  
Section 40. So far as subsection (8)  
of Section 40 is concerned, it defines

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the concept of "distributable income" and is a new feature of the anti-avoidance Section intended to arrive with greater precision to a final computation but it should not deprive the Respondent of the powers which he already had. The "distributable income" of Section 40 is merely the net income available for distribution

(f) It is significant that Section 36P of the Ordinance, which excluded the application of the anti-avoidance provisions of Section 55 to Development Companies, has not been re-enacted in the Act and the new wording of Section 40 makes it clear that the situation prevailing under the Ordinance should not prevail under the Act 10

(g) The Respondent has therefore properly and rightly exercised his powers under the Act. He is in no way bound by the Ordinance, which ceased to apply. Far from having misconstrued Section 40 of the Act, he has made a proper application thereof and his determination and assessments should therefore be maintained by the Court and the Appeals dismissed 20

pp.18-31

9. The Supreme Court delivered an Interlocutory Judgment on the 2nd of December 1982, rejecting the Appellants' contentions and upholding the Respondent's determination, under Section 40 of the Act, quoad the First Appellant and his consequent assessments to Tax of the Second, Third and Fourth Appellants. 30

10. In the said Judgment the Court held that:

1° the Ordinance having been repealed and replaced by the Act in 1974, the Appellants were exclusively governed by the provisions of the said Act so far as the years of Assessment 1977-78 and 1978-79 were concerned and, more especially by the anti-avoidance provisions of Section 40 thereof 40

p.22 Ll.31-34

2° the Act had no retrospective effect and Article 2 of the Code Napoleon was irrelevant and need not be considered.

p.22 Ll.34-37

The situation was entirely different from that in I R C v Ross and Coulten 1948 I A E R 616, where it was specially provided that "the enactments relative 50

to E P T shall be deemed always to have had effect as amended and extended by the foregoing provisions of this Section".

- 3° the Act entitled the Respondent to issue a direction under Section 40, in relation to income years beginning with the year 1973-74 p.22 L1.50-53
- 10 4° the Appellants acquired no right which could not be affected by a change in the law. There was no such acquired right, more especially in fiscal matters - Section 17(3)(c) of the Interpretation and General Clauses Act therefore did not apply to the present case and did not protect the Appellants from the change in the anti-avoidance provisions brought about by the Act p.23 L1.24-25
- 20 5° the Legislator is always free and entitled to plug loop-holes in the Tax laws. There cannot be any "accrued right" to be protected therefrom - more especially, Development Companies have always carried an element of non-entitlement to accrued rights, both under the Ordinance and under the Act. The following cases may be referred to to show that in fiscal matters the legislator may intervene retrospectively to render taxable revenue which was previously exempt: p.23 L1.24-30
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- Jamieson v IRC 1964 AC 1445 p.23 1.51
- Cory & Son Ltd. v IRC 1965 AC, 1088 p.23 1.52
- Greenberg v IRC 1972 AC, 109 p.24 1.1
- Esperance Co.Ltd. v CIT 1982, SCJ 153 p.24 1.8
- 40 6° Parliament is always authorised to review the situation and to determine that shareholders are not paying the public revenue their rightful shares and to prescribe measures to ensure that they do. The only pre-requirement for an interference with rights is that the language of Parliament should be unambiguous and nothing can be clearer than the omission in the Act of any counterpart to Section 36P of the p.24 L1.3-6 p.25 L1.1-3





the Supreme Court was informed that the Appellants had decided not to press the point. Whereupon, the Court, delivering its final Judgment on the 15th of July 1983, held that the Respondent had rightly determined the First Appellant's liability under Section 40 of the Act and had rightly assessed the Second, Third and Fourth Appellants accordingly.

pp.32-35  
p.33 Ll.16-19

10 The Court further held that the First Appellant had, from the first, no right of objection to, and no right of appeal from the Respondent's determination under Section 40 and was therefore not entitled to question such determination under Sections 93 and 96 of the Act.

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12. All appeals were finally dismissed with costs.

p.34 Ll.45-47

20 13. With reference to the findings of the Court in its Interlocutory Judgment of the 2nd of December 1982, as summarised in sub-paragraphs 8(1°) to (8°) supra, the Appellants respectfully submit that:

pp.18-31

30 (a) the Court was wrong in holding that the question raised by the Appeals was not one of retrospectivity but rather whether, pursuant to Section 17(3)(c) of the Interpretation and General Clauses Act, the Appellants had acquired a right under the Ordinance which could not be affected by a repeal thereof

40 (b) the Court was wrong in holding that no right of exemption from the anti-avoidance provisions of Section 55 had accrued to the Appellants under the Ordinance and that no such right could accrue, more especially in fiscal matters where the legislator can always intervene to plug loopholes with immediate (retrospective) effect

(c) the Court wrongly analysed the position of Development Companies under the Ordinance and under the Act and was wrong in finding that such companies carried an element of non-entitlement to accrued rights

(d) the Court was wrong in holding that the four cases cited in support of its

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finding applied to the present case

- (e) the Court was wrong in holding that provided the language of parliament was unambiguous, rights could be interfered with retrospectively, by mere implication
- (f) the Court was wrong in finding that the omission from the Act of any provision corresponding to the old Section 36P was sufficient to have such an effect 10
- (g) so far as the construction of Section 40 of the Act is concerned, the Court wrongly construed the said Section
- (h) the Court was wrong in its analysis of Section 40 of the Act as compared with Section 55 of the Ordinance and failed to give effect to the changed wording of Section 40
- (i) the Court was wrong in finding that Development Companies fell within the scope of Section 40 and that the Respondent was therefore entitled to make a determination, under its provisions, quoad the First Appellant and to assess the Second, Third and Fourth Appellants accordingly. 20

14. With reference to the final judgment of the Court of the 10th of July 1983, the Appellants respectfully submit that the Court wrongly interpreted Sections 93 and 96 of the Act in holding that the First Appellant had no right of objection to nor right of appeal from the Respondent's determination under Section 40. 30

15. The Appellants therefore respectfully submit that these Appeals should be allowed and that the Judgments of the Supreme Court of Mauritius should be set aside and that it be declared that the Respondent's determination quoad the First Appellant, under Section 40 of the Act and his subsequent assessments to Tax of the Second, Third and Fourth Appellants, are ultra vires and null and void to all intents and purposes and that the Respondent should be ordered to pay to the Appellants the costs of these Appeals and in the Supreme Court of Mauritius, for the following among other 40

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- (1) BECAUSE in limine litis, the First Appellant was entitled to object to the Respondent's determination under Section 40 of the Act and to appeal therefrom under Sections 93 and 96 therefor
- 10 (2) BECAUSE the Appellants acquired, under the Income Tax Ordinance 1950, as subsequently amended, statutory rights to a tax relief period of eight years as from the 1st of April 1971 and under Section 36P, to complete immunity, during the said period, from the anti-avoidance provisions of Section 55 of the said Ordinance
- 20 (3) BECAUSE the repeal in 1974 of the aforesaid Ordinance and its replacement by the Income Tax Act, 1974, could not by virtue of Section 17(3)(c) of the Interpretation and General Clauses Act, 1974 affect the said statutory rights
- 30 (4) BECAUSE in the alternative, Section 40 of the Income Tax Act, 1974, did not include Development Companies in its ambit and the First Appellant, being such a Development Company, did not fall within such ambit and the Second, Third and Fourth Appellants, as shareholders of such a Company, could not be assessed to Tax under the provisions of the said Section 40.

A. RAFFRAY Q.C.

H. MOLLAN Q.C.