Privy Council Appeal No. 46 of 1989

Alim Khan Juman *Appellant*

v.

The Board of Inland Revenue *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JULY 1991

Present at the hearing:-

LORD TEMPLEMAN
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY
SIR MICHAEL KERR
SIR CHRISTOPHER SLADE

*[Delivered by **Lord Oliver of Aylmerton**]*

Section 39 of the Income Tax Ordinance of Trinidad and Tobago (now re-enacted as section 83 of the Income Tax Act) provides for the making of assessments to tax to the best of the judgment of the Board of Inland Revenue in cases where a taxpayer either makes a return of income which is not accepted or fails to make a return. It also (by sub-section (4)) empowers the Board to charge additional tax, not exceeding the amount of tax chargeable on the excess where the taxpayer has been assessed to a sum in excess of the chargeable income disclosed in his return, if the taxpayer fails to prove that the omission or incorrectness of the return did not amount to fraud, covin, art or contrivance or gross or wilful neglect.

Under sections 53 and 68A of the Ordinance (sections 97 and 117 of the Act) the Board is empowered, for the purpose of carrying out its duties, to seek information from any person (other than one in a confidential relationship) and to inspect a taxpayer's records relating to his income. Section 45(1) of the Ordinance (now section 89 of the Act) provides that where it appears to the Board that any person liable to tax has not been assessed, or has been assessed at a less amount than that which ought to have been charged, the Board may, within the year of income or

within six years after the expiration thereof, assess such person at such amount or additional amount as according to its judgment ought to have been charged. Finally, section 43E(2) of the Ordinance (now section 8(2) of the Tax Appeal Board Act) provides that in appeals against assessments the onus of proving that the assessment or other decision complained of is excessive or wrong lies upon the taxpayer.

The appellant is the director of a number of limited companies including Juman's Garment Factory Limited ("the company"). For the tax year 1971 he submitted an income tax return disclosing a chargeable income of only $5007. That return was accepted and he was assessed to tax in a sum of $711.75. It appears that during the ensuing years the respondent had or thought that it had reason to doubt whether the returns made by the appellant fully disclosed his chargeable income and on 14th April 1977 he was told that a tax audit of his income for the years 1971 to 1975 was to be undertaken, for which purpose he was requested to produce the relevant accounting books and records. That audit made little progress for a number of reasons, in particular because it was said that a fire at the company's premises in April 1975 had destroyed virtually all the accounting books and records of the appellant, the company and the other companies in which the appellant was interested and because the appellant was abroad for long periods during the audit.

Finally, in November 1977 the respondent required the appellant's accountant to provide a statement of the appellant's net worth as at 1st January 1971 and 31st December of each year from 1971 to 1976 inclusive. These were never supplied and the respondent proceeded to compute the appellant's chargeable income as best it could by the method known as "source and application of funds". As their Lordships understand it, this involves the computation on the one hand of all the funds received by the taxpayer during the year and on the other of his expenditure during the same period. If this computation demonstrates an excess of expenditure (application) over receipts (source), the taxpayer, who alone knows the true facts, can properly be called upon to explain the source of the excess and, if he either cannot or will not do so, the inference is virtually irresistible that the balance represents undisclosed income chargeable to tax. In the result the appellant's chargeable income for the year 1971 was adjusted by the respondent from the return figure of $5007 to a sum of $590,655 in respect of which it was proposed to assess additional tax of some $294,615.75. Further correspondence ensued and on 20th December 1977 notices of additional assessments to income tax, unemployment levy and additional tax under section 39(4) were issued. The adjusted chargeable income for the year computed by the respondent was $256,484 on which there was assessed income tax of

$128,242, unemployment levy of $12,324.20 and additional tax under section 39(4) of $127,530.25.

The respondent having refused to amend this assessment on objection from the appellant's accountants, the appellant appealed to the Tax Appeal Board on 15th January 1979. The respondent's case was that an examination of the appellant's bank accounts and such other records as had been produced disclosed that the appellant's expenditure for the year 1971 exceeded his total funds by a sum of $250,848 which, in default of credible information from the appellant, the respondent accordingly treated as unreported income.

The Tax Appeal Board conducted a careful investigation of the figures contended for by the accountant who conducted the audit and by the appellant's accountant and concluded that there was properly attributable to the appellant as "sources of funds" during the year a sum of $492,846.67 (which included a sum of $60,000 described as a loan from the company). Under the heading "application of funds", however, the appellant's expenditure amounted to $547,409.55 so that there was an excess of $54,562.88 in the appellant's expenditure over the amount of his receipts which, unless satisfactorily explained (as to which the burden lay on the appellant), was properly to be treated as undisclosed income. To that there fell to be added two items of interest on bank deposits (amounting to $956.95) which it was common ground ought to have been but which had not been disclosed. The appellant having failed to discharge the burden of proof resting upon him, there was thus a sum of $55,519.83 representing additional chargeable income for the year. Accordingly, to the extent that the respondent's assessment was based on a figure in excess of that sum, the appeal was allowed and the matter was remitted to the respondent for assessment of that sum as chargeable income for the year. The Board, however, found that there was no evidence of gross neglect such as to justify a charge to additional tax under section 39(4) and allowed in full the appellant's appeal against the additional tax assessed under this sub-section.

From this decision the respondent appealed to the Court of Appeal. That court (Kelsick C.J. and Warner and Persaud JJ.A.) allowed the appeal to the extent of (a) increasing the figure of the appellant's chargeable income to a sum of $115,519.83 and remitting the matter to the respondent for income tax and unemployment levy to be assessed on that figure and (b) imposing additional tax under section 39(4) on unreported income of $25,256.42 (being half the amount of the appellant's additional chargeable income as found by the Board after deduction of the sum of $5007 which had been disclosed in the appellant's return for the year 1971).

In fact, in both increasing the figure of the appellant's chargeable income to a sum of $115,519.83 and calculating the additional tax imposed by reference to a sum of $50,512.83, the Court of Appeal wrongly assumed that the figure of $55,519.83 representing the additional chargeable income as found by the Board included the $5,007 which had been returned by the appellant for the year in question. The respondent does not now seek to challenge the figures resulting from this incorrect assumption (which operated in favour of the appellant) and accordingly does not seek any amendment of the sums $115,519.83 and $25,256.41 which appear in the Order of the Court of Appeal.

As regards the increase in the amount of the chargeable income the court held that the Board had clearly misdirected itself in its computations by rightly including the sum of $60,000 loaned by the company to the appellant as a source of funds but wrongly failing to take into account as an application of funds the fact that that sum had in fact been expended by the appellant in reduction of his overdraft with his bankers. That sum, accordingly, fell to be added to the amount of the chargeable income of the appellant for the year. As regards the additional tax, the court held that the Board had misdirected itself in point of law in concluding, on the ground that there was "no evidence of gross neglect that would justify" the imposition, that no additional tax was payable. This reversed the burden of proof which was cast by section 39(4) upon the appellant and the Board had already found that "the appellant could offer no satisfactory explanation to account for a discrepancy thrown up under the source and application method". The court accordingly determined that additional tax was properly assessed under section 39(4) on the amount of unreported income determined by the Tax Appeal Board (subject to the adjustment already mentioned) but further determined that additional tax should not be assessed on the further chargeable income of $60,000. The respondent does not seek to challenge that determination.

It is from this decision that the appellant appeals to their Lordships' Board. The first submission made on behalf of the appellant is that the Court of Appeal misdirected itself as to the application of the burden of proof as contemplated by section 43E(2) of the Ordinance in as much as Warner J.A. stated that "the burden rests with the taxpayer, on his objection, to his assessment before the Revenue, on his appeal before the Tax Appeal Board and on the appeal by case stated before the Court of Appeal". So far as their Lordships have been able to follow the relevance of this submission in the context of this appeal, it appears to be this, that the appellant contends that although initially the burden rested upon him of disproving the correctness of an assessment, nevertheless once he had identified on oath a particular receipt as derived from a

non-taxable source, the evidential burden shifted to the Revenue to show that that sum represented taxable income. In the context of a comparison of source and application, however, this is irrelevant. What is relevant is simply whether the amount applied exceeds the amount received and whether the appellant satisfactorily accounts for the discrepancy. In any event, having regard to the express terms of the section, their Lordships are entirely unable to see any inaccuracy in the statement of the position by Warner J.A. and find no substance in this submission.

It is then submitted that the court misdirected itself in increasing the amount of the appellant's chargeable income by the sum of $60,000. Their Lordships need say no more than that they find the court's reasoning as regards this sum and their conclusions unassailable. On the appellant's own documents it was clear that the sum of $60,000, whether treated as capital or income, had been applied in reduction of the appellant's overdraft and there could be no justification for including it on one side of the account in order to boost the amount received whilst omitting it from the application side of the account so as to reduce the excess. Either it was a self-cancelling entry which should not have figured in the account at all or it had to be brought in both on the source and the application sides for the purpose of calculating the excess.

Their Lordships equally find no substance in the appellant's final submission that the court misdirected itself in finding, as regards the additional tax, that the Tax Appeal Board had wrongly reversed the burden of proof. The provisions of section 39(4) are quite unequivocal and quite clearly placed upon the appellant the burden of demonstrating positively that his omission to disclose was not due to any of the circumstances enumerated in that section. The Tax Appeal Board's approach was, therefore, quite clearly erroneous. Even if, as Warner J.A. was prepared to assume, the Board had correctly appreciated that the burden lay upon the appellant and had intended, by their judgment, to express themselves as satisfied that the burden had been discharged, there was not in fact any material before them from which such a finding could be substantiated.

In their Lordships' opinion this appeal involves no possible point of principle. It lacks both merit and substance and must be dismissed with costs.