Privy Council Appeal No. 78 *of* 1932.

Rhodesia Railways, Limited - - - - - *Appellants*

v.

The Resident Commissioner and Treasurer of the Bechuanaland Protectorate and another - - - - - *Respondents*

FROM

THE SPECIAL COURT OF THE BECHUANALAND PROTECTORATE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST FEBRUARY, 1933.

Present at the Hearing:

LORD ATKIN.
LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.

[*Delivered by* LORD MACMILLAN.]

The appellants are a railway company which has its head office in London and owns and conducts an important railway undertaking partly situated in the Bechuanaland Protectorate. They are liable to income tax both in the United Kingdom and in the Protectorate.

For the year to the 30th June, 1925, the appellants were assessed to income tax by the respondent, the Collector of Income Tax of the Protectorate, under the Bechuanaland Protectorate Income Tax Proclamation, 1922, in the sum of £19,897 1*s.*, representing income tax at the rate then chargeable on that part of the appellants' income which was earned in the Protectorate. The tax was paid in November, 1925. For the following year to the 30th June, 1926, the appellants were similarly assessed in the sum of £24,883 3*s.* 6*d.*, which they paid in October, 1926.

By Section 17 of the Proclamation it is provided that :—

"(1) For the purposes of income tax payable under this Proclamation income shall be assessable without any deduction for income tax (including super-tax) payable in the United Kingdom."

But provision is made for a certain measure of relief in the immediately following subsection, which is in the following terms :—

> " (2) Any person who has paid by deduction or otherwise or is liable to pay income tax under this Proclamation for any year of assessment on any part of his income and who proves to the satisfaction of the Collector of Income Tax that he has paid income tax in the United Kingdom for that year in respect of the same part of his income shall be entitled to relief from income tax under this Proclamation paid or payable by him on that part of his income at a rate equal to the amount by which the rate of tax appropriate to his case under this Proclamation exceeds half the appropriate rate of United Kingdom tax. . . ."

For the two years in question the appellants were liable to pay income tax in the United Kingdom on their whole income, including the portion of their income earned in the Protectorate on which they paid tax under the Proclamation, but it so happened that owing to delays in settling the figures of the appellants' assessment in the United Kingdom, the amount of the United Kingdom income tax payable by them for the years 1924–25 and 1925–26 was not finally ascertained and paid until November, 1930. The appellants were thus not in a position till the end of 1930 to claim the relief provided under Section 17 (2) of the Proclamation above quoted. The amount of the relief calculated in terms of the subsection is agreed to be £1,251 11*s.* 6*d.* for 1924–25 and £3,500 7*s.* 6*d.* for 1925–26.

On the appellants intimating their claim, duly vouched, to these reliefs, they were met with the answer that it came too late and was barred by the terms of the proviso to Section 51 of the Proclamation. That section runs as follows :—

> " 51. If it is proved to the satisfaction of the Collector that the amount paid by any person is in excess of the amount properly chargeable under this Proclamation the Collector may authorise a refund to such person of any tax overpaid ; provided, however, that no such refund may be authorised unless the claim therefor is made within two years after the date when the payment was made."

If the proviso just quoted is applicable to the case, then, inasmuch as the claim of the appellants to a refund was not made until 1930 in respect of tax paid in 1925 and 1926, the appellants are out of Court.

In consequence of the refusal of the Collector to afford the relief claimed, the appellants brought an action against the respondents in the Special Court of the Bechuanaland Protectorate for payment of the said sums of £1,251 11*s.* 6*d.* and £3,500 7*s.* 6*d.*, and the parties joined issue on the sole question whether the appellants' claim was statute-barred. The Court on the 22nd June, 1932, upheld the respondents' plea in bar, and subsequently granted leave to the appellants to appeal to His Majesty in Council.

To quote the appellants' declaration, " All things have happened, all times have elapsed, and all conditions have been

fulfilled " to entitle them to the relief provided by Section 17 (2) of the Proclamation. It is for the respondents to establish with equal precision that their plea in bar is justified by the terms of Section 51.

Their Lordships observe, in the first place, that under Section 17 (1) no deduction in respect of income tax payable in the United Kingdom is permitted in the assessment of income for tax purposes in the Protectorate. The income-tax payer in Bechuanaland is thus chargeable with tax on the full amount of his income without any deduction in respect of income tax payable by him in the United Kingdom. But if he can show that he has in fact paid United Kingdom income tax on the same income for the same year, he is to be " entitled to relief " from the income tax paid or payable by him in the Protectorate to the extent provided in Section 17 (2). The conditions being satisfied, the Proclamation confers a right to the relief which the income-tax payer can enforce.

Now when Section 51 is examined, it appears that it applies only to the case where a person has paid income tax " in excess of the amount properly chargeable " under the Proclamation ; in that event the Collector " may authorise a refund to such person of any tax overpaid." It cannot be said of the appellants that when they paid their income tax in Bechuanaland for the years 1924–25 and 1925–26 without any deduction for United Kingdom tax they made payments " in excess of the amount properly chargeable " under the Proclamation, for Section 17 (1) expressly forbids any such deduction. The sums which they paid were " properly chargeable " against them under the Proclamation, and if they had not paid these sums they could have been compelled to do so. They are not now claiming a refund of any " tax overpaid," for they made no over-payment. What they are asking is relief by way of repayment of a part of what originally they properly paid. The language of Section 51 in providing that the Collector " may " authorise a refund in the case of any tax overpaid is inappropriate to the case of a person claiming under Section 17 (2) a legal right of relief which the Collector has no discretion to refuse. The respondents, in their Lordships' opinion, have not succeeded in showing that the terms of Section 51 fit the case of the appellants' claim, and consequently have failed to establish that the claim is subject to the limitation of two years imposed by the proviso to the section. Their Lordships may appropriately quote from the case of *Roddam* v. *Morley*, 1857, 1 De G. & J. 1, the following observations of Lord Chancellor Cranworth at p. 23 :—

> " I should be very unwilling to give encouragement to the notion that there is of necessity anything morally wrong in a defendant relying on a statute of limitation. It may often be a very righteous defence. But it must be borne in mind that it is a defence the creature of positive law and therefore not to be extended to cases which are not strictly within the enactment."

In the Court below the fact that Section 51 occurs in a group of sections under the heading " Miscellaneous " was invoked as indicating that it was intended to be of general application to all cases in which a refund of income tax was claimed by a taxpayer, and the circumstance that Section 17 (2) provides no procedure for the enforcement of the relief which it confers, while Section 51 is the only section in the Proclamation which deals with refunds by the Collector, was also given considerable weight. The difficulty arising from the use of the word " may " was surmounted by reading it as equivalent to " shall," where the prescribed conditions were satisfied. Their Lordships do not find in these arguments any sufficient justification for extending the language of Section 51 so as to make it fit a case to which its terms are inapposite. The Attorney-General drew attention to the fact that Section 17 (2) occurs in a part of the Proclamation which has for its heading the general title " Abatements," and, founding on the definitions in Section 6, which enacts that " taxable income " shall mean the income of any person after allowance of all deductions other than abatements, and " taxable amount " shall mean the amount remaining after deducting from any taxable income the abatements allowed, sought to make out that the words " amount properly chargeable " in Section 51 were applicable to the amount chargeable after the deduction of the relief under Section 17 (2). But this argument is sufficiently refuted by the provision in Section 17 (1) forbidding any deduction for United Kingdom income tax in assessing income for the purposes of tax under the Bechuanaland Proclamation. It is, no doubt, true that if, as their Lordships hold, Section 51 does not apply to claims under Section 17 (2), there is no time limit imposed by the Proclamation on such claims, but this affords no justification for remedying the omission judicially, if it be an omission.

Their Lordships will humbly advise His Majesty that the appeal be allowed, the judgment of the Special Court of the Protectorate of Bechuanaland of the 22nd June, 1932, be reversed, and the case be remitted to the Special Court to be disposed of on the footing that the respondents' plea in bar is not well-founded. The appellants will have their costs of the appeal and in the Court below.

In the Privy Council.

RHODESIA RAILWAYS, LIMITED

v.

THE RESIDENT COMMISSIONER AND TREASURER OF THE BECHUANALAND PROTECTORATE AND ANOTHER.

DELIVERED BY LORD MACMILLAN.

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