~~C.I.4 C.2~~

Judgment 22, 1959 Tanganyika

IN THE PRIVY COUNCIL No. 27 of 1958

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N

GEORGE N. HOURY, Q.C. Appellant

- and -

THE COMMISSIONER OF INCOME TAX Respondent

RECORD OF PROCEEDINGS

FIELD, ROSCOE & CO.,
52, Bedford Square,
London, W.C.1.
Solicitors for the Appellant

CHARLES RUSSELL, & Co.,
37, Norfolk Street,
London, W.C.2.

Solicitors for the Respondent

IN THE PRIVY COUNCIL No. 27 of 1958

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RECORD OF PROCEEDINGS

INDEX OF REFERENCE

LIST OF DOCUMENTS NOT TRANSMITTED TO THE PRIVY COUNCIL

No.	Description of Document	Date
1.	Decree of the High Court	12th Nov. 1956
2.	Notice of Appeal	19th Nov. 1956
3.	Notice of Motion (and annexures thereto) applying for extension of time to file Notice of Intention to appeal.	
4.	Order of High Court extending time.	28th Dec. 1956
5.	Notice of Motion and annexures thereto applying for leave to appeal to the Court of appeal.	
6.	Order of Court of Appeal granting leave.	31st Dec. 1956
7.	Application and annexures thereto for Conditional leave to appeal to Her Majesty in Council.	
8.	Application and annexures thereto for Final leave to appeal to Her Majesty in Council	

IN THE PRIVY COUNCIL No. 27 of 1958

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N

GEORGE N. HOURY, Q.C. Appellant

- and -

THE COMMISSIONER OF INCOME TAX Respondent

RECORD OF PROCEEDINGS.

No. 1

NOTICE OF REFUSAL - ASSESSMENT No. T. 1234

No. 1
Notice of Refusal Assessment No.T 1234 23rd July 1955.

EAST AFRICAN INCOME TAX DEPARTMENT

FILE NO.10880A

NOTICE OF REFUSAL

(Ss. 77 and 78 of the East African (Management) Act, 1952)

Assessment No: T1234.

INCOME TAX - YEAR OF INCOME 1951

Regional Commissioner of Income Tax,
Private Bag,
Dar-es-Salaam.

23.7.55.

To:- Mr.G.N.Houry, Q.C.,
P.O. Box 57,
Dar-es-Salaam.

Sir,

With reference to your objection to the assessment made upon you in respect of Additional assessment T 1234 for the year of Income 1951 -

No. 1
Notice of Refusal Assessment No. T 1234 23rd July 1955. (continued)

I hereby give you notice that I am not prepared to amend the assessment.

You are entitled -

(a) to appeal to the Local Committee on giving me notice in writing within 30 days of the date of this notice; or

(b) to appeal to a Judge on giving me notice in writing within 60 days of the date of this notice.

Such notice cannot be accepted after 30 days or 60 days, as the case may be, unless you are able to satisfy the Local Committee or the Judge that you were prevented from giving due notice owing to absence from the Colony, sickness or other reasonable cause. In the event of an appeal to a Judge you are also required to present a memorandum of appeal to the Court within 60 days after service of this notice.

If no appeal is made, the tax assessed, amounting to Shs.104,304/-is payable on or before the 25th day of September, 1955 and if payment is not made by that date a penalty of 20 per cent will be added.

Will you kindly attach the remittance slip when making payment.

I am, Sir,
Your obedient servant,
(Sgd) E.S. BENNETT.,
REGIONAL COMMISSIONER OF INCOME TAX.

No. 2
Notice of Refusal Assessment No.3718 23rd July 1955

No. 2

NOTICE OF REFUSAL - ASSESSMENT No. 3718

Form I. T. No. 23

EAST AFRICAN INCOME TAX DEPARTMENT

File No.10880A

NOTICE OF REFUSAL

(Ss.77 and 78 of the East African (Management) Act. Assessment No. 3718.

INCOME TAX - YEAR OF INCOME 1952.

Regional Commissioner of Income Tax,
Private Bag,
Dar-es-Salaam.
23.7.55

To:-
Mr.G.N.Houry, Q.C.,
P.O. Box 57,
Dar-es-Salaam.

Sir,

With reference to your objection to the

No. 2
Notice of Refusal Assessment No. 3718 23rd July 1955. (continued)

Assessment made upon you in respect of Additional Assessment 3718 for the year of Income 1952 -

I hereby give you notice that I am not prepared to amend the Assessment.

You are entitled -

(a) To appeal to the Local Committee on giving me notice in writing within 30 days of the date of this notice; or

(b) To appeal to a Judge on giving me notice in writing within 60 days of the date of this notice.

Such notice cannot be accepted after 30 or 60 days, as the case may be, unless you are able to satisfy the Local Committee or the Judge that you were prevented from giving due notice owing to absence from the Colony, Sickness, or other reasonable cause. In the event of an appeal to a Judge, you are also required to present a memorandum of appeal to the Court within 60 days after service of this notice.

If no appeal is made, the tax assessed, amounting to Shs. 72,900/-, is payable on or before the 25th September, 1955 and if payment is not made by that date a penalty of 20 per cent will be added.

Will you kindly attach the remittance slip when making payment.

I am, Sir,
Your obedient servant,
(SGD) E.S.BENNETT
Regional Commissioner of Income Tax.

No.3.

In the High Court of Tanganyika

No.3
Memorandum of Appeal Assessment No.T.1234 27th September 1955.

MEMORANDUM OF APPEAL - ASSESSMENT No. T.1234.

IN HER MAJESTY'S HIGH COURT OF TANGANYIKA AT DAR-ES-SALAAM.

Misc. Civil Appeal No. 18 of 1955

George N. Houry, Q.C. .....Appellant

versus

The Commissioner of Income Tax .....Respondent

MEMORANDUM OF APPEAL

The Appellant above-named, being aggrieved by Notice of Refusal dated 23/7/55 issued by the Respondent in relation to additional Assessment No. T. 1234 for the Year of Income 1951 made upon him by

In the High Court of Tanganyika

No.3

Memorandum of Appeal. Assessment No. T 1234 27th September 1955. (continued)

the Respondent, appeals to this Honourable Court against the said Assessment on the following grounds :-

The said Assessment which purports to charge the Appellant with tax in respect of :-

(a) under the provision of s.22 of the East African Income Tax (Management) Act, 1952, the income of a Company deemed to have been distributed to the Appellant (and his wife), as at 30th September, 1951, quae shareholders in such Company; and additionally:

(b) under the provision of s. 24 of the said Act, the income of the said Company deemed to have been distributed at the same date to the minor children of the Appellant, quae shareholders,

is, as regards the income referred to in paragraph (b) above, misconceived and erroneous in law in that :-

(1) Income deemed to have been distributed under the provisions of section 22 of the said Act is not income arising by virtue or in consequence of any settlement to which section 24 of the said Act applies.

(2) Income deemed to have been distributed under the provisions of section 22 of the said Act is not income paid to or for the benefit of a child.

(3) Section 24 of the said Act cannot operate retrospectively in respect of accounting periods ending before its operative date, i.e. 1st January, 1951.

(4) Pursuant to Rule 5 of the Income Tax (Appeal to the Tanganyika High Court) Rules, 1955, the Appellant attaches:-

(a) A copy of the said Notice of Refusal

(b) A Statement of Facts.

The Appellant therefore prays :-

(a) That the said Assessment be varied; and

(b) For the Costs of this Appeal.

DATED this 27th day of September, 1955, at Nairobi.

(Sgd) K.BECHGAARD

.....

K. BECHGAARD

Advocate for the Appellant.

No. 4
MEMORANDUM OF APPEAL - ASSESSMENT
No. 3718

In the High Court of Tanganyika

No. 4
Memorandum of Appeal Assessment No. 3718 27th September 1955.

IN HER MAJESTY'S HIGH COURT OF TANGANYIKA

AT DAR-ES-SALAAM.

Misc. Civil Appeal No. 17 of 1955

George N. Houry, Q.C. ..... Appellant

versus

The Commissioner of Income Tax .... Respondent

MEMORANDUM OF APPEAL

The Appellant above-named, being aggrieved by Notice of Refusal dated 23/7/1955 issued by the Respondent in relation to additional Assessment No. 3718 for the Year of Income 1952 made upon him by the Respondent, appeals to this Honourable Court against the said Assessment on the following grounds:-

The said Assessment which purports to charge the Appellant with tax in respect of :-

(a) under the provision of s. 22 of the East African Income Tax (Management) Act 1952, the income of a Company deemed to have been distributed to the Appellant (and his wife), as at 30th June, 1952, quae shareholders in such Company; and additionally:

(b) under the provision of s.24 of the said Act, the income of the said Company deemed to have been distributed at the same date to the minor children of the Appellant, quae shareholders.

is, as regards the income referred to in paragraph (b) above, misconceived and erroneous in law in that:-

(1) Income deemed to have been distributed under the provisions of section 22 of the said Act is not income arising by virtue or in consequence of any settlement to which section 24 of the said Act applies.

(2) Income deemed to have been distributed under the provisions of section 22 of the said Act is not income paid to or for the benefit of a child.

(3) Section 24 of the said Act cannot operate retrospectively in respect of accounting periods ending before its operative date, i.e. 1st January, 1951.

In the High Court of Tanganyika

No. 4
Memorandum of Appeal Assessment No.3718 27th September 1955. (continued)

(4) Pursuant to Rule 5 of the Income Tax (Appeal to the Tanganyika High Court) Rules,1955, the Appellant attaches :-

(a) A copy of the said Notice of Refusal.

(b) A Statement of Facts.

The Appellant therefore prays:-

(a) That the said Assessment be varied; and

(b) For the Costs of this Appeal.

Dated this 27th day of September 1955, at Nairobi.

(Sgd) K. Bechgaard.
.....
K. BECHGAARD
ADVOCATE FOR THE APPELLANT

No. 5

STATEMENT OF FACTS - ASSESSMENT No.T.1234

No.5 Statement of Facts Assessment No.T.1234

IN HER MAJESTY'S HIGH COURT OF TANGANYIKA AT DAR-ES-SALAAM.

MISC. CIVIL APPEAL No.18 of 1955

GEORGE N. HOURY, Q.C. ..... APPELLANT

versus

THE COMMISSIONER OF INCOME TAX ... RESPONDENT

STATEMENT OF FACTS.

1. Assessment No.T.1234 of the Year of Income 1951 is additional to Assessment No.17949 and treats as taxable income an amount of £11,040.

2. (a) The Appellant, an advocate practising in Tanganyika Territory, is a shareholder in a private Company entitled "Coastal Freights & Co.Ltd.," (hereinafter called the Company)

(b) The paid-up share capital of this Company is Shs.500,000,divided into 500 shares of Shs. 1,000/- each.

(c) At all material times the shareholders in the Company were :-

(i)	The Appellant -	251 shares
(ii)	The Appellant's wife -	49 "
(iii)	The Appellant's son, Christopher -	100 shares
(iv)	The Appellant's son, Robin -	100 "
	Total -	500 shares

(d) The Appellant's son Christopher was born on 20th July, 1934, and the Appellant's son Robin was born on the 26th November, 1937; at the material time these children were children within the meaning of section 24(9) of the Act.

(e) For the period ended 31.12.1950, the taxable income of the Company was Shs. 307,400.

(f) Additionally, for the period ended 31.12.1950, the Company as a shareholder in a Company entitled Mauzi Sisal Estate Ltd., was deemed to have received a dividend of Shs.60,620/-, being calculated by reference to that Company's 1949 income.

(g) By a direction dated 17th November, 1954, the Respondent ordered that an amount of Shs. 220,812/- being 60% of the total taxable income of Shs.368,020/-, be deemed to have been distributed amongst the Company's shareholders as at 30.9.51.

(h) The proportionate share of each shareholder which falls to be included in the total income of such shareholder for the purposes of the Act are:-

	Gross	Tax	Nett
(i) The Appellant	110,848	22,170	88,678
(ii) The Appellant's wife-	21,640	4,328	17,312
(iii) The Appellant's son, Christopher-	44,162	8,832	35,330
(iv) The Appellant's son, Robin -	44,162	8,832	35,330
Shs:	220,812	44,162	176,650

(i) The gross dividend deemed to have been distributed has been treated by the Respondent as the Appellant's taxable income, and after making the appropriate personal allowances and after making allowance for the tax already assessed, tax deducted at source and further life Assurance Allowance, tax has been charged in an amount of Shs. 104,304/-.

3. Subject to any admission on the part of the Respondent, the Appellant proposes at the hearing of this Appeal to call witnesses and to produce documentary

In the High Court of Tanganyika

No.5
Statement of Facts. Assessment No.1234 (continued)

evidence to substantiate the facts set out in the preceding paragraphs hereof.

(Sgd) K. Bechgaard
.....
K. BECHGAARD
ADVOCATE FOR THE APPELLANT

No. 6

STATEMENT OF FACTS - ASSESSMENT No.3718

IN HER MAJESTY'S HIGH COURT OF TANGANYIKA

AT DAR-ES-SALAAM

No.6
Statement of Facts. Assessment No. 3718

Civil Appeal No.17 of 1955.

GEORGE N.HOURY, Q.C., ... Appellant

versus

THE COMMISSIONER OF INCOME TAX ... Respondent.

STATEMENT OF FACTS.

1. Assessment No.3718 of the Year of Income 1952 is additional to Assessment No. T. 1902, and treats as taxable income an amount of £8,391.

2. (a) The Appellant, an advocate practising in Tanganyika Territory, is a shareholder in a private Company entitled "Coastal Freights & Co. Ltd." (hereinafter called the Company)

(b) The paid-up share capital of this Company is Shs.500,000, divided into 500 shares of Shs. 1,000/- each

(c) At all material times the shareholders in the Company were :-

(i)	The Appellant -	251 shares
(ii)	The Appellant's wife -	49 "
(iii)	The Appellant's son, Christopher -	100 "
(iv)	The Appellant's son, Robin -	100 "
	Total -	500 shares.

(d) The Appellant's son Christopher was born on 20th July, 1934, and the Appellant's son Robin was born on 26th November, 1937; at the material time these children were children within the meaning of section 24(9) of the Act.

(e) For the period ended 31.12.1951 the taxable income of the Company was Shs.73,740/-.

(f) Additionally, for the period ended 31.12.1951 the Company as a shareholder in a company entitled Mauzi Sisal Estate Ltd., was deemed to have received a dividend of Shs.205,990/-, being calculated by reference to that Company's 1950 income.

(g) By a direction dated 17th November, 1954, the Respondent ordered that an amount of Shs. 167,838/-, being 60% of the total income of Shs.279,730, be deemed to have been distributed amongst the Company's shareholders as at 30th June, 1952.

(h) The proportionate share of each shareholder which falls to be included in the total income of such shareholder for the purposes of the Act are :-

	Gross	Tax	Nett
(i) The Appellant -	84,255	21,064	63,191
(ii) The Appellant's wife -	16,448	4,112	12,336
(iii) The Appellant's son, Christopher -	33,567	8,391	25,176
(iv) The Appellant's son, Robin -	33,568	8,392	25,176
Shs.	167,838	41,959	125,879

(i) The gross dividend deemed to have been distributed has been treated by the Respondent as the Appellant's taxable income, and after making the appropriate personal allowances and after making allowance for the tax already assessed, tax deducted at source and further Life Assurance Allowance, tax has been charged in an amount of Shs. 72,900/-.

3. Subject to any admission on the part of the Respondent, the Appellant proposes at the hearing of this Appeal to call witnesses and to produce documentary evidence to substantiate the facts set out in the preceding paragraphs hereof.

(Sgd) K. Bechgaard
.....
K. BECHGAARD
Advocate for the Appellant

Addition Agreed by Parties at Hearing on 1.11.56.

It is agreed that the shares held by the appellant's two sons, Christopher and Robin were transferred to them by the appellant without valuable

In the High Court of Tanganyika

No.6
Statement of Facts Assessment No 3718 (continued)

consideration, which transfer constitutes a settlement for the purposes of section 24 of the East African Income Tax (Management) Act, 1952, and that such settlement was made after the 1st January, 1939.

No. 7.

NOTES OF MR. JUSTICE LOWE

IN HER MAJESTY'S HIGH COURT OF TANGANYIKA

AT DAR-ES-SALAAM.

MISC. CIVIL APPEAL NO.17 OF 1955.

No.7
Notes of Mr. Justice Lowe 1st November 1956

GEORGE N. HOURY, Q.C. ..... APPELLANT

versus

THE COMMISSIONER OF INCOME TAX .... RESPONDENT

4th October, 1955.
Appeal admitted.

(Sgd) R. Mackay.
Deputy Registrar.
4/10/55.

1.11.56.

Bechgaard for Appellant.

Newbold, Q.C., for Respondent.

BECHGAARD.

Two separate appeals but same law and similar facts. Civil Appeals 17 and 18 to be consolidated.

(Sgd) A.G.Lowe
Judge

FACTS:

Contained in annexure
One slight agreed addition.
Facts read. Appeal No. 17.
On 18 first 4 sub-paragraphs identical but (e)
Coastal freights Ltd and dividends.
Addition to facts put in.
Transfer of shares constitutes a settlement for Sec.24.
Sections 22 and 24.

Total income definition Section 2.
Sources Sections 8, 9 and 10.
Conceptions in Part IV 11, 12 and 13
Not concerned with these.
Part V contains both sections concerned.
Sections 14 and 15. deductions.
Section 16 Valuation.
Sections 17 to 21 - Scheme of Part V deals with general and then specific and at end descend into fiction.
Section 22. Deemed to have been distributed like Section 23A of Indian Act with affinities 245 U.K. Fatorini 1942 1 A.E.A.619 Penal Section at p.625. Lord Atkin, quasi penal p. 629 Lord Macmillan - Section Penal.
Penal - affects interpretation.
Section 23 fictional.
Section 24 deems income as income of settlor and not beneficiary.
Simon Volume 1, 41.
The tendency etc. (sentence 2).
Equitable constructions etc. .....
P.42 again it has ....."Literal constructions of words".
This considered in Russell and Scott1948(2)E.A.R.1. at p.5.
Lord Symonds "inambiguously impose"
Page 6 again on same maxim.
Page 7 Lord Oaksey, agrees.
Sections 22 and 24.
One point stands out, section 24 first introduced in 1952 Act - no previous source in E.A. related hereto 1/1/51.
Section 22 had prev. Tanganyika Income Tax Ordinance 1950.
Same as that Section 21.
Section 22 Commissioner may require some undistributed profits to be deemed distributed.
Not questioned that direction and not challenged.
But challenging that once deemed under section 22. That fiction can be imposed on it from second section.
1 E.A. Tax Cases (Case No. 7) 43.
Page 62.
Present point these not considered.
Para 4. When the legislature cannot go behind plain language of enactment. Internal effects of Section 22 only these and not much help.
"DEEMED" Burrows Volume 2 Words and Phrases important to consider reason.
Cave J - principle.
Section 22 sub-section 1. fiction.
sub-section 2. not material.
sub-section 3. nominees.
sub-section 4. election.
5. Material - where paid and subsequently distributed.

In the High Court of Tanganyika

No. 7
Notes of Mr. Justice Lowe 1st November 1956 (continued)

Clearly shows two separate circumstances :

1. No profits distributed but deemed and Tax assessed and paid.

2. Following on deemed distribution there is actual distribution. Proportionate share included.

   Seems to imply deemed and subsequent actual distribution

Sub-Section 6 - effect is Coastal Freights Ltd.was shareholder in Muzi and when deemed distribution from former because part of distribution in Coastal freights.

Here a fiction within a fiction - then seems to have been necessary to agitate specially.

In case of dividend Legal right to receive depends on resolution Hals. 6 3rd Edition 403.

In case of deemed - no legal right to insist on payment.

Section 24.

(1) "Try virtue or in consequence"

No particular definition but Sub-Section (2) expands
"paid to or for benefit of .....
"deemed to be paid to or for benefit of a child".

Necessary to make legislature provision for fiction within fiction.

Ground 1. "not by virtue or in consequence".

Phrase used deliberately - to denote income must arise within the settlement".

No other normal meaning.

Settlement is transfer of assets in this case.

Settlement is group of legal rights.

Engaged by shareholders by being shareholders.

Shareholder under Ordinance gives right to receive when declared but cannot force Company to declare.

Cannot go outside settlement to find rights enjoyed.

Cannot include any income.

Arising where statutory provision

Arises creating statutory fiction.

Sub-section (1) second part.

Deemed distribution cannot be income paid to or for benefit of child.

Certainly expanded in Sub-Section 2

Last deals with contingent beneficiaries rights.

Sub-Section from 398 (1) (a) and (b)

Paid 104 Volume 3 Simon.

"Paid to or for benefit"

398(1) is parent of Section 24 and in addition to payments which fall within.

If any other extraordinary meaning specific provision should have been made.

"At the time when it is so dealt with"
"The usual way" "Within meaning of"

Sub Section 2 clearly only refers to contingent interest of beneficiary and does not cover right where does not exist.

"Is so dealt with"

Sub Section 2 (a)

Denotes physical dealing.

Permissible to see how dealt with in other Acts.

U. K. Section 411 (1) (b).

E. A. Law - (has been apportioned)

Section 245 U.K. Point specifically covered.

If in U.K. necessary to make specific provision in E.A.

Obvious draftsman had U.K. Act inter alia - If wanted to achieve this result.

India - Section 22 originates.

Section 16 (2) - does not appear to be accepted

In the High Court of Tanganyika

No. 7

Notes of Mr. Justice Lowe 1st November 1956 (continued)

"paid" includes deemed to have been paid without specific provision.

South Africa Section 9 (3).

Received by etc or has been deemed to have been received by .....

Specific provision made.

Section 24 "Income" seems to be used in several senses in ordinary meaning of something coming in.

St. Lucia U. (1924) A.C. 508 p.512

"must be a coming in" Not merely notional something which may not.

Land Case 18 Tax Cases 212 P. 218.

"sums coming in"

Cannot say child deemed or not something coming in.

Opposite of income - can be liability

To what case Section 24 be applied by?

Section 22. 1. deemed.

2. actual.

No one can say 24 applies to both - no double tax.

Section 24; Can only apply to actual distribution. Only want natural construction. Must be applied to facts.

What was purpose of section 24. Obvious was unnecessary distribution of persons under control of settlor.

Only when someone had legal right.

Cannot affect person deemed to have something to which has no legal right.

Fiction upon fiction again - must be legislated for.

Ask for assessment to be discharged.

In the High Court of Tanganyika

No.7
Notes of Mr. Justice Lowe 1st November 1956 (continued)

In appeal No. 17.

Part of 1950 income caught in net.

In No. 18 part of 1949 income caught.

1952 Act given retrospective effect to 1.1.1951 - Any interpretation which had result of making it go back should be resisted unless clear.

If that intention should have been clearly stated

NEWBOLD :-

Reference to fiction and within address - based on fiction.

Two general matters.

Reference to rules of construction and statement that Section 22 penal and must be construed strictly.

If means will only operate in reference to Section 24 if a tax is clearly imposed no quarrel. If says must be construed as to give beneficial construction to tax payer.

Disagree entirely.

Maker of news in relation to construction of Tax Criminal and Civil statutes - Take profits out of content lead to imposition must let tax payer escape. Frowned upon now-a-days E.A.C.A. construction.

Case No. 21.

2 E.A. Tax Cases 1.

at p.8 "But I do not think" construction of E. A. Act in question "perfect strictness".

Only when doubt arises that question arises.

Reference by Bechgaard - U.K. legislation - comparative table - Don't know why. Indian and S.A. legislation.

Dangerous. Unless where legislation case law.

Reference to part dealing with revocable and irrevocable, sections - do not exist here.

In the High Court of Tanganyika

No. 7
Notes of Mr. Justice Lowe 1st November 1956 (continued)

Finds ref. to another part - bears only or any general parentage to ours.

Argues because ref. in U.K. and none in ours - words do not include deemed to be paid.

Cannot find provision of foreign legislation and say same follows because not in ours.

In determining and construing local legislation must look to local authorities E.A.C.A. says same.

Has no persuasive value.

Must know all other facts.

These grounds of appeal.

1. Not income arising etc.
2. Income deemed under section 22. Not to or for benefit.
3. Section 24 cannot operate retrospectively.

3. End of Bechgaard's address.

Says cannot operate retrospectively re accounting periods. It brings into change on child or settlor income received in a particular year. Income tax Act and Taxes income.

Section 24 deals only with receipt of income.

Said had dividend been paid would have been taxable.

Income received in 1951.

Immaterial how arose.

Coy frequently pays dividends out of profit made many years before.

Reserves carried for many years.

Rate of tax might be changed and apply to a year.

No reference to accounting periods.

Section 24 deals with income arising to child. 1951 in one case, 1952 in other case.

Ground No. 1 - says settlement in group of legal rights of shareholders by virtue of their shareholding.

That is misconception.
Settlement is defined 24 (9).
includes any disposition - Arrangement rights which beneficiary has between settlor and settlee. Does not relate to assets of settlement. Relationship between the two.

Hearing avertion whether deemed and aid to or to benefit - Clear that income arose by virtue of or in consequence of settlement or would not of arisen at all. Shareholding obtained under settlement.

Income can only be so.

Implicit in Bechgaard's statement if paid no argument as to being assessable. Same way - if deemed same as dividend.

No case under grounds ground 3 and 1 to amend.

Ground 2. Main ground and basic.

In essence this based on "paid to or to benefit of child" Bechgaard says if paid income assessable

Case 20 1 E.A.T.C. 205

23 2 E.A.T.C. 32.

In each shares settled on son and dividend paid. Was transaction a settlement under Section 24. Held it was and that income distributed was income in consequence of settlement and assessable against father.

Had it been paid here - assessable conceded.

Says deemed distinction neither income or paid to etc child

Must see Section 2. "10% shall be deemed"- "as dividends."

Shall be included in total income.

If something deemed to be - result is that considered as if it had occurred.

If occurred would have been income to or for benefit.

In the High Court of Tanganyika

No. 7
Notes of Mr. Justice Lowe 1st November 1956. (continued)

In this case no part distributed.

Section clear.

BECHGAARD: Admit taxable on payment -only consequential which effects position.

NEWBOLD: If dividends declared probably assessable says "B". Gun. says if not distributed shall be treated as if they had. Clear this contemplated. Whole section shows this. Sections show specific notional receipt of payment Bechgaard does not mean paid.

Whole purpose of section.

Whole payment assessable on child and not father says B.

Income treated as if paid to child.

Says while agree income to child but do not agree same if father is to pay tax. Necessary corollary to argument of B.

Only assessable if paid to but says also not income paid to etc.

Section 6. When deemed to have received dividend payment, same as paid income.

Agreed not physically paid.

B. submits - where legislature deems must construe different from obvious intention.

Section 11. "deemed" etc.

Case No. 7 1. E.A.T.C. pp. 61 and 62.

Page 61. concerned with different aspects but considered what deemed :-

meant - at bottom page 61.

"The money is treated" etc.

Page 62 "Now Section 7 (1) (d) etc." onwards.

21(1) here is same as 22 in our new Act.

Case No. 21 (Privy Council Judgment).

Different again from Case No. 7.

"It will be seen etc".

Plain words of statute. Consequence exactly same as if had been paid.

Two cases make clear meaning.

Asks for dismissal with costs.

Adj. to 2.15 p.m.

2.15 p.m. - as before

BECHGAARD:

Newbold having created fiction cannot agree with it.

Not seeking to avoid Coy tax has been paid.

Not denied shareholders liable to tax and surtax.

Law puts on additional surtax.

Have not striven for beneficial.

Construction. Want accurate construction only.

Relation to comparative table to show close affinity section 24 and English Act.

None of Section 24 stands alone.

Has counterpart in U.K. Act.

Cannot ask to ignore ancestry.

Only for guidance. Intimate and detailed similarity.

Grounds :-

3rd. Section 24 "in any year of income"

Year of income defined section 22

Yardstick by inference is limited to 1. 1. 50.

Meant to show that interpretation is unlikely result.

"By virtue or in consequence of"

This inter-connected with 2nd ground.

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(continued)

This is transfer of assets - settlement here transfer of asset only. Rights attach by ordinary law.

2nd Ground. Not income paid to or to benefit of child. Cases 20 and 22 no point arises. If paid then to or to benefit etc. Concede distribution correct.

In-so-far as individual shareholders assessed as if distributed Object to further fiction. Once deemed to have received that becomes further fiction under Section 24 Tax Case No. 7 p. 62. "What the legislature ....."

And plainly indicates.

Section 22 persons between whom fiction to be resorted to is shareholders individually and Commissioner.

Nothing saying "inter se" to be victims of fiction.

Case move in favour of appellant.

Deemed and actual distribution two parts of section 22.

Not dealt with by Newbold. Section 24 can be employed, on one but not both. Natural application "Actual".

In section 24. Any income is paid to or for benefit.

Would have been "assessable" if Newbold correct.

Income paid to not same as assessable.

Paid to be equivalent to "deemed to have been paid" also unlikely

22 (6) Why not say paid.

Ask for paid in Section 24 to be construed in natural source.

Section 24 Regard can be had to way other legislation has dealt with same provision.

More clear aimed at clear result.

Would have been easy to have made provision within 24.

In absence of expansion of the word "paid" deliberate sub-sec. 4 - "is paid".

Only reference to physical fact.

Both Appeals - may be allowed.

NEWBOLD : Sub Sec. (4) Applying only to physical fact. Entitles person assessed but not received can pass payment on.

BECHGAARD: To person who has received.

Judgment reserved.

(Sgd.) A.G. Lowe
JUDGE.

Attendance of Counsel excused.

Copies of judgment to be posted to Counsel and one available for appellant.

(Sgd.) A.G. Lowe.
JUDGE.

No. 8

SHORTHAND NOTES OF PROCEEDINGS
IN HER MAJESTY'S HIGH COURT OF TANGANYIKA
AT DAR-ES-SALAAM
Miscellaneous Civil Appeals Nos. 17 and 18 of 1955.

GEORGE N. HOURY Q.C. ... ... APPELLANT
- versus -
THE COMMISSIONER OF INCOME TAX RESPONDENT

Bechgaard for Houry.
Newbold for Commissioner of Income Tax.
Before Lowe, J. 1st November, 1956.

BECHGAARD :

These are two separate appeals, your lordship, and I would ask your lordship to make the usual order to consolidate them for

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hearing. The grounds of appeal and the background of facts are, for all practical purposes, identical.

NEWBOLD:

No objection, my lord.

BECHGAARD:

As far as the facts are concerned, your lordship, these are contained in the annexure to the Memorandum of Appeal and Statements of Facts and I understand from my learned friend that with one slight agreed addition these statements can be accepted as the background to these appeals. If I may mention the statement of facts to your Lordship - I will omit the first one which is merely a recital of the assessment in question and commence at the second one. (Bechgaard reads Statement of Facts to Court).

That is the statement of facts on appeal No. 17, Your Lordship, and on 18 the first four sub-paragraphs of para. 2 are identical but 'E' reads as follows :- (Reads 'E' to Court).

Basically we are here concerned with the shareholding in the Coastal Freights Co. Ltd. and the deemed dividends which are included in that Company's income. The addition which we would ask your Lordship to make to these facts is contained in an agreed statement which is to the following effect : (Bechgaard reads statement to Court). In other words, we agree that the shareholding of the two infant sons is a settlement for the purposes of section 24.

This appeal involves a careful consideration of sections 22 and 24 of the Act. Now these two sections are contained in the 1952 Act and if I may be forgiven I will trace their background by reference to the definition of 'Total Income' which is contained in Section 21. Total Income is there defined as the aggregate amount of the income of any person .....specified in Part 3 ..... remaining for the examination ..... part 5. Now the sources specified in Part 3 are sections 8, 9 and 10, and we are not concerned with them here. The exceptions in Part 4 are sections 11, 12 and 13 and again, we are not concerned with these sections, but Part 5, which relates to the ascertainment of total income contains both the sections with which we are concerned.

Now as we have to interpret them against the background of the Act as a whole I will very briefly go through that part. Sections 14 and 15 are sections with which Your Lordship will already be very familiar in a recent case. They deal with deductions to be allowed and deductions not to be allowed. Then we have a series of sections dealing with specific exceptions, 16, Valuation of stock, 17, Profits of non-resident persons, 18, Insurance Companies 19, Non-residentship owners, 20 Air Transport Undertakings, 21, the grossing up of dividends.

Now Your Lordship will notice that the scheme of this Part seems to be first of all to deal with the general and then to deal with the specific instances and right at the end of the part we descend into what we may call the realm of fiction. Section 22 creates a statutory fiction whereby in the case of certain companies their profits can be deemed to have been distributed. They create a statutory fiction. Now that section, its perentage is obscure but it seems to be more like Section 23, Cap A of the Indian Income Tax Act than any other section but it has certain close affinities to section 245 of the 1952 Income Tax Act. Now there have been pronouncements by the House of Lords on the comparable English Act and in Fattorini's case, which is (1942) 1 A.E.R.it is described as a penal section, page 619. At page 625 Lord Atkin in the House of Lords refers to the English provisions as the section is highly penal and at page 629 Lord Macmillan states:"It is obvious that the section is penal in character" with emphasis on the penal element, as Your Lordship will realise because of repercussions on interpretation.

The next section in this part is section 23 which again enables the Commissioner, for the purposes of tax, to ignore certain transactions. In other words, again to create a fiction and section 24, which again creates a fiction deemed that the income from certain property shall be deemed to be that of the ....? (inaudible) and not of the beneficiary. Now the principles of construction which apply in tax cases are set out in Simonds, Vol. I page 41, I will not read all of it as it is before Your Lordship but I would however point out one or two what I think are important points. The second sentence which begins : "The tendency ..... or effect"; then the next paragraph which says: "Equitable construction ..... that effect". On the

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next page the first paragraph is material: "again it has been pointed out ..... by plain words." Very recently that particular point has been considered by the House of Lords in the case of Russell & Scott, (1948) 2. A.E.R. page 1. That was a tax case on the question of construction. At page 5 Lord Simonds says as follows : "There is a matter .... impose the tax upon him". On page 6 Lord Simonds again comes back to the matter : "I am brought back ..... matter demands". Lord Oaksey on page 7 says, speaking on the question of interpretation, "On this question ..... impose tax on him".

Dealing more specifically with sections 22 and 24 there is one point which I think stands out and it is very important in this case, and this is that section 24 was first introduced in the 1952 Act and had no previous source or genesis in East Africa. In other words, it was introduced in 1952 and related back to the 1st January 1951. Section 22, on the other hand, had a previous history and would be found in the previous enactment which is The Tanganyika Income Tax Consolidation Ordinance, 1950, in which it appeared in substantially the same shape as section 21.

If I may now turn to an analysis on section 22, in section 22 in certain circumstances the Commissioner is empowered to acquire undistributed profits to be treated as distributed. He can deem them to have been distributed. In both the assessments which are under review or which are under appeal it is not questioned in any way but that the direction of the Commissioner was legal. We are not challenging the correctness of the directions under section 22. We are, however, challenging the fact that once they have been deemed by one statutory element to have been distributed under section 22 you can then evoke the second statutory fiction and super-impose that fiction on the first one. We are concerned therefore with the legal effects which flow from the deeming of a dividend to have been distributed under section 22. In one East African Tax case, the case on page 7, My Lord, it is 1. E.A. Tax Cases, page 43, at page 62 Sir John Grey deals. en passant, with some of the facts. I should emphasise, however, that in that particular case the present point was not under consideration at all. Page 63, 4th paragraph says : "Similarly ..... of the enactment". He then refers to Brookes and Baker which was a case dealing with the householders franchise. In my submission that case is of no particular value

to us because it was concerned only with the internal effect in section 22 and did not deal with its repercussions on section 24. The usual meaning of the word "deem" can be conveniently seen in Burrows Vol. 2. "Words and Phrases" where several authorities are quoted. There is an Australian authority on the word "deem" (read to Court) and it also quotes the well known dictum of Mr. Justice Cave, "Generally speaking ..... that nature."

COURT

It seems to have been challenged by the learned Judge as section 24 'E' which reads : (Court reads passage from section 24). I think those are very classical but have no reference to this case.

BECHGAARD: Of course, My Lord, but I believe that is word for word from the U.K. source.

COURT: I cannot see how else it could have been explained.

BECHGAARD: Sometimes one has to repeat oneself practically ad nauseum to achieve a satisfactory result, but to return to section 22, the first subsection creates a statutory fiction. The second explanation of the Companies .... are within the Section and it is not material in this case because we quite clearly concede that sub section 3 applies to Coastal Freights and nominee transactions. Section 4 lays down that when a distribution is made the shareholder may elect whether to pay the tax himself, which of course is unlikely, or alternatively the Company will pay it. Subsection 5 is, however,material as it says: "Where tax has been paid ..... income".

That is important because in my submission it quite clearly shows that there are two separate instances which are within the contemplation of the section. The first instance is where no profits are distributed and they are deemed to be distributed and tax is actually assessed and paid. That is the first instance. The second instance is where, following upon a deemed distribution an actual distribution is made. There is an actual declaration of dividend and in that case it is laid down that when that tax applies the proportionate aspect of any shareholder shall be excluded from computing its total. In other words, he gets his subsequent distribution tax free, but

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in my submission it seems to imply that there is not only a deemed distribution on contemplation but also a subsequent actual distribution. Sub-section 6 again provides : "when a Company ..... (reads) .... accordingly". The effect is, of course, as Your Lordship will see in this particular case, Coastal Freights, Ltd., being a Company, as a Company it was a shareholder in Mauzi Estates and when a Deemed distribution was made in respect of Mauzi Estate that in its turn became part of the total income of Coastal Freights and the subject of a deemed distribution again. The importance of the point which I will deal with in greater detail is in my submission this - that here we have a fiction within a fiction, and in the case of a fiction within a fiction it appears to have been necessary to make a specific legislative provision for it.

Before leaving the subject of Section 22, I would point out one fact which is of course, that in the case of a dividend the legal right of the shareholder to receive that dividend hinges upon the declaration of dividend. It is a trite piece of Company Law. The Authority for it, if it is in fact required, is Halsbury, Vol. 6, 3rd Edition, page 403. "upon the declaration of the dividend ... (reads) ... for the dividend". Before that point there is no legal right. It will, of course, be apparent to Your Lordship that in the case of a deemed dividend the shareholder as such requires no legal right to insist on the actual payment.

Turning now to section 24, which is the actual one under which the assessment to the extent that it is complained of is made, the important part of sub-section 1 with which we are here concerned are the following phrases : "Were by virtue .... (reads) .... of any other person". Now that phrase is not the subject of any particular definition. The phrase is used in that sub-section, but sub-section 2 expands the meaning of the words : "Paid to or for the benefit", and it says: "Subject as ....(reads).. ... of a child". Now, here again we have fiction within fiction. "Certain payments should be deemed ...(reads)... of a child", and here again it has been found necessary to make specific legislative provision for fiction within fiction.

Now dealing with Section 24 piecemeal, the first ground of appeal is, of course, "that the deemed dividend cannot be said to be by virtue or in consequence of the settlement" Now that

phrase is used several times subsequently, and in my submission it is a phrase which is not used accidentally or loosely. It is used for a specific purpose to denote that the income must arise due to something within the settlement itself by virtue or in consequence of it. It can have no other meaning, which is only normal in any event. The settlement in this case is the transfer of assets. It is not the normal form of settlement but it comes within the definition of settlement contained in Section 9 (b) - transfer of assets - and the settlement in this case in my submission is the group of legal rights which the minor shareholders enjoy by reason of their position as shareholders. It arises from the Company Law. If you become a shareholder you have certain rights under the Companies Act, which include the right to receive a dividend when it is declared, but as a shareholder you cannot force the Company to declare a dividend. Therefore you cannot, in my submission, go outside the settlement or the rights which the shareholders enjoy under the Companies Ordinance for the purposes of that Section. It certainly cannot include any income arising where a statutory discretion is exercised which creates a statutory fiction.

Now the second branch of that sub-section, which I submit requires very careful scrutiny, is the second ground of appeal, and that is that this deemed distribution cannot be said to be ---------- to or for the benefit of the child. It is true that thatphrase is used and is expanded in sub-section 2, but it is my submission that sub-section 2 does not cover a deemed distribution. Sub-section 2 deals merely with the instance where the beneficiaries' rights are contingent as opposed to intended, and the normal instance to which that sub-section applies is that of a directed accumulation. That particular sub-section springs, directly as Your Lordship will see, from the comparative table, from section 398(1) (a) and (b) of the U.K. Act, and at page 104 of Volume 3 of Simon Your Lordship will see that that is the headnote to the paragraph: "paid to or for the benefit of the child". The commentary reads as follows: " ...(reads)....". In other words, the inference which I think may be drawn by sub-section 2 to section 1 deals with the extraordinary meanings which are included, and therefore if there had been any other extraordinary inclusions, specific provision should have been made for it.

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It also goes on to comment: "By section 398 (1) ....reads .... may benefit". Under the English Law, of course, certain equivocal settlements are taken out of the section, but that is not the case here, and in my submission, sub-section 2 quite clearly only refers to the contingent interest of the beneficiary and it does not cover a case where there is no legal right on anybody to insist on payment. That is the essence. In the case of a contingent trust the beneficiary cannot insist on payment but the trustee can. He is the person in actual receipt of the income.

Your Lordship will note in the commentary in Simon, the recurring use of the phrase, "is so dealt with". That phrase again is found in sub-section 2 (a) .....Reads. It connotes a physical dealing with income, not merely a statutory fiction in my submission. I think it is in view of the very close parentage between Section 24 of the U.K. Act that it is permissible that this particular problem has been dealt with in our acts. In the U.K. the particular section is covered in 411(b). That section deals with the interpretation of Chapter 3. Chapter 3 deals with revocable settlements and to that extent, of course, it is quite in parentium because in East African Law, except for a very minor point, the question of revocability is immaterial, but in section 411 (b): "Income arising under a settlement...reads..... Act". That is section 245 of the English Act, so, in other words, in the U.K. this particular point is in relation to revocable settlements specifically covered, and one might draw the inference, if it were necessary to do so, if in the U.K. with its rather similar provisions it was necessary to make specific provision why was it not done in the East African Act when it was drafted in 1951/52? It is quite obvious that the draftsman of the East African Act had in front of him inter alia, the U.K. Act, and that if he had desired to achieve this result, there it was right in front of him.

In India, from which Section 22 originates, the comparable Section on settlement is section 16, and in sub-section 2 of that section : "For the purposes of ...(reads)..... or distributed." In other words, in that Act they seem to make a difference between actual payment and a deemed payment. The force of the reference, in my submission, is the fact it does not appear to be accepted that the word "paid" includes the word "deemed" to have been paid without the specific legislative provision.

In South African Section 9(3), which deals with the same point, reads as follows: "Any income ...reads ..... received by". Again, specific provision is made to bring the fiction within the revocable head.

In Australia, the point does not arise because the corporate surtax is a direct tax on the Company and the individual shareholder does not come into it. In that particular section 24, I would also point out the inherent use of the word "income" which appears to be used in several senses, but I submit that the use of the word "income" there is in the ordinary meaning of something coming in. In other words, it is used by reference to a physical income.

The authorities for that are St.Lucia Usines & Estates Co., v. St. Lucia Colonial Treasury, (1924) Appeal Cases, 5-8 at page 512: "There must be a coming in to satisfy the word "income". There must not be merely a notional something which may never eventuate". And again, in Lambe's case, which is 18 Tax Cases, at page 218, where Mr. Justice Finlay, after a comprehensive review of cases on this point, says "I think it cannot be denied .....(reads)..... coming in". It is the ordinary meaning of the word, and I do not think anybody can say that where you have a child as a shareholder and he is deemed to receive a dividend that that is in any sense something coming in. It is, on the other hand, of course, a liability. It is if anything the opposite of income. The question is to what in this particular case can we apply Section 24? Your Lordship will recall that in dealing with section 22 I stressed the fact that there could be two instances, one a deemed distribution and two, an actual distribution. I take it that nobody can claim that section 24 can apply to both because there can only be one tax. There cannot be double tax. Section 24 cannot apply to the fiction and the fact. In my submission, reading section 24 in its proper context, and having regard to its origin, it can only apply to the actual distribution. That, in my submission, is the crux of the matter. It is a choice of applying it to the fiction or the fact, and I say apply it to the fact. If this had been a dividend ordinarily declared, of course, there would be no argument about it.

I think we may also consider, in interpreting Section 24, what was the purpose or the mischief

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at which it was aimed. It is quite obvious that the mischief was the unnecessary distribution of income amongst persons who were under the control of the said Law in some way or another. The Mischief is a physical distribution of that income or in the distribution to the extent that somebody had a legal right to it, but now can it be aimed at a situation where the person is deemed to have received something to which he has only (inaudible). In both sections 22 and 24 specific provision has been made to deal with cases of fiction within fiction. Therefore I submit that these assessments should be discharged on that point.

There is one further point. Your Lordship will have noticed that in the case of the first appeal caught in the revenue net are parts of 1950 income of the subsidiary Company, paragraph 2 (f) of the Statement of Facts, and in the case of the Second Appeal, para 2 (f) that part of the 1949 income is caught. Section 24 was introduced in the 1952 Act and was given retrospective effect to 1.1.51. It is my submission that on the general principle that there should be no retrospective effect in respect of substantive law unless that is clearly indicated, I would submit that any interpretation which had the result of enabling the revenue to go back to the years 1949 and 1950, should be resisted unless it is very very clear because in effect in 1951 we are dipping back two years, and I submit that if that had been the intention it should have been clearly stated.

NEWBOLD: May it please your Lordship, having listened to my learned friend refer so often and stress so emphatically reference to fiction and fiction upon a fiction I feel, one might say, that one is driven to the almost irresistible conclusion that the whole of my learned friend's address is based on fiction.

Before dealing with the specific grounds of Appeal I should refer to two general matters which my friend has touched on in his address. In the first place he has referred to rules on construction and has stated that section 22 is a penal Section and therefore it must be construed strictly. If by that he means that it will only operate in reference to section 24 if a tax is clearly imposed then I have no quarrel with him. If by that, however, he means that you must construe or the court must

construe the provisions of that section, and indeed the provisions of all the sections of the taxes Act in such a manner as to give it beneficial construction to the tax payer with all due respect to my learned friend I could not disagree more. There are, as your Lordship is aware, a number of views in relation to the construction, not only of Taxing Statutes, but also on Criminal Statutes and indeed on Civil Statutes, and there have been on occasions dicta or judgments of learned judges dealing with taxes cases which if taken out of their context would leave one at first blush with the impression that any taxing legislation must be construed if possible so as to enable the tax payer to escape the tax. These dicta and these views, however, have been frowned upon more and more of late years. As far as we in this court and your Lordship is concerned your Lordship is of course bound by the views expressed by the E.A.C.A. on any question of construction of the East African Income Tax Act and on this matter I would refer to only one of a number of references to construction and I would refer to case No. 21 reported at 2 East Africa Tax Cases, starting at page 1. The particular passage to which I refer appears in the Judgment of the learned Vice-President at page 8. (Court has no copy of 2 E.A. Tax Cases: Bechgaard passes his copy to Court) The passage to which I refer occurs on the latter part of the third para on page 8: "But I do not think ..... benevolent construction". That is the decision of the learned Vice-President in relation to the construction of our Act but I do not think that in determining this question ..... (inaudible) That in my submission is the guiding principle which must be adopted by your Lordship in construing the provisions of the Act. You take neither a favourable construction for the tax payer nor a favourable construction for the Crown; Your Lordship is merely to be satisfied that in plain and ordinary meanings of the words used in the section the tax is imposed.

COURT: Yes, but the law has never been that as far as I know .....(inaudible) was benevolent construction should be put on the Act.

NEWBOLD: With great respect that is exactly the position, my Lord, but often one hears the argument, the suggestion that you must construe plain words in another way in order to give benefit to the tax payer. As your Lordship rightly points out if the plain words impose a tax or do not impose a tax you apply them. It is when some doubt arises as to the words it is then the duty of the Court to ascertain whether these words, where a doubt exists, has or has not imposed a tax.

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That is the first chief comment which I usually deal with. The second comment is that in the course of his address my learned friend referred at some length to the English legislation and indeed, put in a comparative table. For what purpose it is not at present quite clear. He referred also to the Indian and to the South African legislation on the subject. May it please your Lordship, I cannot submit too strongly that it is a most dangerous thing for a Court to be referred to particular provisions of foreign legislation as an aid to the interpretation of our legislation unless the Court is also asked at the same time to examine the whole of the foreign legislation in which these particular provisions appear and to examine all the case law of the foreign territory of that particular statute. This, with great respect my Lord, would be an intolerable burden to place upon this Court which is charged with the construction of our legislation and with the legislation of no other territory. One example of the dangers which flow from that was the reference which my learned friend made to the part dealing with Revocable and Irrevocable settlements in the English legislation. It has no counterpart in ours and in that part it simply does not exist in our legislation. He finds a particular reference to another part of English legislation which, as the E.A.C.A. has held bears only a very general parentage to our corresponding part and from that very vague and tenuous ground he then proceeds to argue that because there is a reference in the English legislation to a particular provision and no reference in our legislation to our corresponding provision, therefore the words in our legislation dealing with settlements do not include deemed dividends. I cannot submit too strongly that any argument based on such an assumption would be extremely dangerous and would, to use a trite phrase, result in producing very erroneous assumption to an incorrect conclusion.

COURT: I think you would agree you should say "may result".

NEWBOLD: I beg your Lordship's pardon, I mean "may". I do not need to submit in the course of my address that one cannot pick out a particular provision of foreign legislation and say this contains or this does not contain something and therefore because our legislation contains it or does not contain it a certain conclusion follows. Not only would one have to examine the particular provision in relation to the whole of our legislation but one

would be forced also to examine the case and of the territory to which that legislation relates in order to ascertain the meaning. They may be all very interesting if one were dealing with this subject as a society for comparative legislation but, with all respect, this is not the function of this Court, that is not the matter before us. Your Lordship is charged with the construction of our legislation and as your Lordship is aware, in numerous cases the Courts have held that while local legislation may be based on foreign legislation, unfortunately in determining and construing the meaning of local legislation one must look to that and that alone and what one must not attempt to construe is the meaning of foreign legislation. This was said most emphatically ..... (inaudible). It has been cited very recently in the East African Court of Appeal in relation to another tax case which unfortunately has not yet been published.

COURT: I do not think Mr. Bechgaard was trying to say that because of existing other legislation our legislation was defective he was giving it as an illustration from foreign legislation that specific provision had been made. I do not think he produced his authority to show that our legislation was necessarily defective. That is as I understood it.

BECHGAARD: I was only saying that they have some persuasive value, not that they are conclusive.

NEWBOLD: That is what I am submitting should not be done, in my submission it has no persuasive value unless your Lordship ascertain the exact circumstances in which the foreign extract was made and the whole of the puzzle into which it fits. One cannot be persuaded on any particular fact by reference to another fact unless you know the relation of that other fact to all the surrounding circumstances. If my learned friend is referring to it merely as an existing example of comparative legislation..... if however he is referring to it as an authority, which he denies, so as a persuasive value I submit it has none.

I now turn to the three grounds of appeal; now these three grounds appear in the Memorandum of Appeal in each of the two cases. The first is "Income deemed ..... Act applies", the second, "Income deemed ..... a child" and third, "Section 24 ..... 1st January 1951"

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COURT: On reading them it seemed to me that it is not a question of operating, it is in respect of a receipt or deemed receipt of income.

NEWBOLD: I was going to deal with the third ground of appeal first, then with the first ground and finally with what I do not think would be disputed between us, is the main ground, that is the second ground of appeal. Now he dealt with the third ground of appeal very briefly at the end of his address and that third ground is that section 24 cannot operate retrospectively in respect of accounting periods before 1st January, 1951. With all respect to my learned friend section 24 does not deal with accounting periods at all. Section 24 brings into charge either upon the child or upon the .... (inaudible) depending whether or not the second applies. The Act as a whole deals with income, income received in any particular year. I would ask your Lordship to look at the provisions of section 24(1) which reads: "Where by virtue .....that person". This section deals only with the receipt of income. Now if I understood my learned friend correctly, there is no argument whatsoever that income was received in 1951, subject to the first part of his ground. For instance, in the course of his address he said that had dividends actually been paid then the set law would be taxable or subject to the other two grounds of appeal, there is no argument that the income was received in 1951. How that income arose in the hands of some other person not a recipient is completely immaterial to the purposes of the Act or to this Court. We are concerned only with the date on which the income was received.

COURT: In other words, your argument is that it is an Income Tax Act.

NEWBOLD: Yes, my Lord, it is an Act. As your Lordship is aware, it frequently is the position if a company pays a dividend out of profits made by the Company many years in the past. A Company makes profits upon which, as far as the Company is concerned, it pays Company tax in the year in which these profits were made. It then applies a percentage of those profits to a general reserve which it carries for many years possibly and then subsequently distributes to the shareholders. Now these profits are taxed in the hands of the shareholder until they are distributed ..... applies to the year in which the income of the individual is taxed. We are not concerned with the year for which the profits arose in somebody

else's hands. There is no reference to section 24, for accounting purposes it may have arisen this year, the year before or ten years before, it is completely immaterial. What that section is dealing with and dealing with only is the year in which the income arose to the child.

That is the year 1951 in the one case and the year 1952 in the second case. I don't think I need refer to that matter any further.

Now, the second ground of appeal to which I would refer Your Lordship is the first ground in the Memorandum of Appeal. That is "That income deemed to have been distributed ... reads..... in settlement". Again my friend, in dealing with this ground of appeal, was brief in the extreme, but if I understood his argument correctly, his argument is this simply that the settlement in this case is a group of legal rights which the shareholders have by virtue of their shareholding, and to make it perfectly clear, I asked my learned friend to repeat it, and he did so. If I understood him correctly, he is saying that the settlement is the rights of the shareholders by virtue of their shareholding. With all respect to my learned friend, that is a complete misconception of the position.

COURT: I think you could infer that he did enunciate that in particular and then went on to say that until they have a right to exercise a right nothing has come into being. Until a dividend has been declared no income can arise.

NEWBOLD: That again is based upon the fact that the settlement consists of the legal right of the shareholders. I am attacking that basis so that any corollary falls if that is what the settlement is. That is a complete misconception of what the settlement is. Settlement is defined in subsection 9 of Section 24 as including any disposition, trust, covenant, agreement, arrangement, or transfer of assets, but does not include various things. What is a settlement? It is the rights which the beneficiary has under the arrangement or transaction between the settlor and the settlee. The settlement does not relate to the assets of the settlement. The settlement is the arrangement, transaction, deed, be it what it may. It is a relationship which has existed between the settlor and the settlee - the beneficiary. In one settlement shares may be transferred; in another land, in a third something else. Various rights to anything, but in each case the settlement is

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not the rights arising under the assets transferred. It is a right arising under the relationship between the settlor and the beneficiary. That is a settlement.

COURT: I thought Mr. Bechgaard was trying to satisfy me that income being distributed under section 2 is not income arising by virtue of etc. because no dividend was declared.

NEWBOLD: If that is so, the first ground is merely a necessary corollary of the second ground. If it forms part of the second ground then I understand the position, but if it stands on its own legs, when I asked my learned friend that, he said the settlement is the legal rights; if he means that, then, with great respect, I submit that that is a complete misapprehension of the position. If he really means that the first ground of appeal is nothing other than an extension of the second ground then I follow the argument. But in my submission, leaving aside the question of whether these deemed dividends are paid to or for the benefit of the child, which I will deal with later, it is clear that this income arose by virtue of or in consequence of the settlement, for the simple reason that had it not been for the settlement the income would not have arisen to the child. It arises to the child by virtue of the shareholding of the child which the child has obtained under the settlement, and the definition of income originating - and indeed, with respect, one does not need to refer to that definition - the income arising to the child can only be income arising by virtue of or in consequence of the settlement because had it not been in consequence of the settlement the child would not have received it. He has received under the settlement the shares which result in the income to him. Therefore the income is received under or by virtue of the settlement. Indeed, that position is implicit in the statement which my learned friend made that had the dividends actually been paid, no argument would have arisen about the fact that those dividends would be assessable on the estate. In exactly the same way, in that case where he admits the income to the child would arise by virtue of the settlement, in this case, subject always to deemed dividends being the same as dividends, the income to the child arises under or by virtue of the settlement. I hope I have submitted clearly that as far as grounds 3 and 1 of the Memorandum of Appeal are concerned, there is no case at all for Your Lordship to review or amend or discharge this assessment.

We now come to the second ground of appeal, which I do not think can be doubted to be the main ground of appeal, and to be the basic ground upon which my learned friend is submitting to this court, that the assessment should be discharged. However one looks at it, in essence this ground of appeal which reads: "Income deemed....reads.... of the child", is based upon what the words "paid to or for the benefit of the child" means. Now, my learned friend has conceded that if the dividends had actually been paid, then the income received by the child would have been assessable upon the father, and indeed on that it would have been temerity on my learned friend's part to argue to the contrary, having regard to the provisions of Case 20, 1 East African Tax Cases, at page 205, and case 23, 2 East African Tax Cases, page 32. In each of those cases a father settled shares in a company upon the son and dividends were paid and the taxing authorities assessed the dividends paid upon the father. The argument in each of those cases was as to whether the transaction under which the child acquired the shareholding was a settlement within the meaning of Section 24. In each case it was held that it was such a settlement and that in consequence the income distributed as dividends to the child was income arising by virtue or in consequence of a Settlement, and assessable upon the father. So that we have now arrived at a spot in my argument in which it is clear, and indeed is conceded, that had the dividends actually been paid, then in such a case they would have been assessable upon the appellant in this case.

The argument then proceeds as follows:- This deemed distribution of dividends is neither income of the child nor is it paid to or for the benefit of the child. That is the whole fulcrum of the argument. If that fails, then the whole basis of my learned friend's argument falls, and in my submission the appeal must be dismissed. Is this deemed distribution income paid to or for the benefit of the child? In order to ascertain that one must have regard, in my submission, to the provisions of Section 22. Section 22 (1) reads as follows: I won't deal with the first part, but only the latter part, which reads: "Where .... (reads) .....for purposes of this Act". The important words are "shall be deemed to have been distributed as dividends and the proportionate share shall be included in the total income". When in an Act something is deemed to be what it obviously is not, in my submission the result of that is and can only be that what has not in fact occurred is considered as if it had occurred. Now, if it had in fact occurred

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and the dividends had in fact been distributed, they would be income paid to or for the benefit of the child. That is the position, which is not disputed. If the dividends had in fact been distributed, they would be income paid or for the benefit of the child. Section 22 says that although the dividends were not distributed they shall be deemed to have been distributed and form part of the income. The only result in my submission which can follow from those words is that exactly the same position arises. Whatever portion it is that is deemed to have been distributed, my argument very simply is this, that the words of that section can have only one meaning, that whatever is deemed to have been distributed is treated in exactly the same way as if it had in fact been distributed. That is what the Section says. It is as clear as possible. My learned friend, to succeed in his argument, must satisfy Your Lordship that words which are clear, which say beyond any doubt whatsoever that you must treat this thing which has not been distributed as if it had been distributed means something different from what it clearly says.

COURT: Your argument is this. Mr. Bechgaard says that although this Section purports to say that the undistributed income shall be considered as dividends they cannot be taxable because they have not come in.

BECHGAARD: No, My Lord, quite different. I admit that they are taxable on the shareholders. I am not disputing that the shareholders are individually taxable as a result of Section 22, but I am saying you cannot, having created that fiction, pray in aid another fiction and aggregate the minor income on the said law, but I am not disputing that Section 22 operates. It is only the consequential results.

NEWBOLD: I am not concerned in the course of my arguments with fictions or fictions within fictions. I am concerned purely with the plain words of the statute. If the dividends had been declared they would properly have been assessed upon the appellant.

I turn from that to the section which deems these dividends to have been distributed, and that Section says as clearly as it could possibly say that although the dividends were not in fact distributed, they shall be treated in all respects and included in the income of the shareholder as

if they had been distributed. If that is so, then one looks at the position which would arise if they had been distributed, and it is conceded that if they had been distributed they are properly assessable upon the appellant. That in essence is the case for the Crown - that it is clear that that position is intended and contemplated appears from the whole Section. Indeed in two sub-sections of that Section words are used specifically referring to a notional receipt and payment of the deemed distribution. Section 22 merely says "shall be deemed to have been distributed". My learned friend says those words do not mean that they are paid. My answer is that you cannot deem something to be distributed without necessarily deeming it to have been paid and received, and indeed, that is obviously the purport of the whole Section because it is assessed upon the taxpayer. Indeed, in this case it cannot be contended by my learned friend that the tax upon the deemed dividends is not at any rate assessable upon the child. In fact, that is the whole of his argument, that is assessable upon the child and not upon the father. If it is assessable upon the child it must be income received by the child, and that is exactly what I am contending. This is income treated for all purposes of the Acts as if it had been paid to and received by the child. My learned friend is driven to the position of saying that while we agree that it is the income of the child it is treated as being paid to the child and assessable upon the child. Nevertheless, we do not agree that it is the same position if it is the father who is to pay the tax. That is a necessary corollary of my learned friend's argument, and merely stating it in that way shows how absurd it is. It can only be assessed upon the child if it is the income of the child and if it is paid to the child. In one breath he is saying it is income of the child paid to or for his benefit and in another breath he is saying exactly the same words meaning it is not the income paid to or for the benefit of the child. In my submission any argument based upon such a premise must be incorrect.

I have submitted that there are two sub-sections which refer to the notional payment and receipt by the shareholder of this deemed distribution. That is sub-section 6. As Your Lordship will recall, sub-section 1 deals only with the deemed distribution. It says: "Where a Company ..... (reads)..... to have received a dividend." It cannot be deemed to have received a dividend unless it

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has been paid to it.

BECHGAARD: There would be no need to deem to have received it. It is deemed because it has not been paid.

NEWBOLD: It is my submission that something which is deemed paid is for the purpose of the legislation paid. It is no ground of my submissions that it was physically paid. In fact it was agreed between us that it was not physically paid, but the statute says it is to be treated in all respects as if it had been paid and this sub-section says: "Is deemed to have received the dividend". In other words, it is treated as if it had received a dividend, and it continues: "The amount of the dividend thus deemed to have been paid". My learned friend's argument is based upon this; "If it is paid I agree it applies. If it is deemed to have been paid I do not agree that Section 24 applies". That is attacking the basis of all legislative drafting in relation to the use of the word "deemed". In other words, his submission in essence boils down to this, that where the legislature deems something to be done, the Court must construe it in a way different from the plain words of the statute, different from the obvious intention of the legislature, and one is forced to the corollary that the Court is asked to pay no regard to specific words of a Section inserted obviously for any specific purpose. What does the word "deemed" mean if the physical incidence which has not occurred are to be treated as if they had it? That is the simple meaning of the word "deemed". Indeed, it was put simply by the learned judge in the commentary to which my learned friend referred.

The other sub-section of Section 22 which shows the results which follow from this deemed distribution is sub-section 11, which reads: "Where a trustee ..... (reads) ..... dividend". Nobody says he received it, but he is treated in all respects as if he had received it. I am not asking Your Lordship to treat these words "deemed" as meaning what I submit they should mean - that is you should treat something which has not physically occurred as if it had physically occurred without authority. There is an abundance of Authority as to how the Court construes the word "deemed" but I shall refer Your Lordship to only two East African cases on this same section and on these words "deemed". The first is Case No. 7, 1 East African Tax Cases to which my learned friend has already referred and on this I refer to pages 61 and 62.

The first passage appears at page 61. I agree that these cases are concerned with different aspects of Section 22 but in considering those different aspects the Court had to consider what the words "deemed" meant so that in so far as they are considering the words "deemed" in my submission these judgments are a direct authority upon the point. The first one is a judgment by the Court of Appeal, the second is a judgment by a Court in another Territory. At the bottom of page 61 the learned Chief Justice of Zanzibar said: "Dealing with the deemed distribution ...(reads)... Company itself". Those words in my submission are as clear as they can possibly be. The money is treated notionally as having been paid over to the shareholder in the same manner as money representating dividends actually declared by the Company itself. Page 62 says "..... (reads) .... plain language of ...". That is a simple reference to these specific words.

NEWBOLD: The next case to which, I will refer is case No. 21 and I was wrong, Your Lordship, in saying it was a judgment of the Court, it is a judgment of the Privy Council on appeal from these territories. Case No.21 and the passage to which I refer appears on page 25 (Vol.2). Now again the Privy Counil was considering section 22 and it also brought in Case No. 7 and in considering that the Privy Council referred to this word "deemed". The passage starts about the middle of the page,my Lord, and reads: "It will be seen ..... payable by them". There is therefore, in my submission, not only the plain words of the statute which directs that although in fact this income has not been received these dividends have not been paid they shall be treated in all respects as if they had been paid and if that is so, if they are treated as having been paid, the consequence which follows is exactly the same consequence as would follow if they had been paid and it is conceded that the consequence which follows had they in fact been paid is the assessment of these dividends upon the appellant. Therefore the plain words of this statute require exactly the same consequence to follow where the dividends are deemed to have been ..... because they are deemed to be the income of the child, paid to the child. Not only are these the plain words of the statute but the two cases to which I have referred Your Lordship, both cases from the Courts the decision of which is binding to this Court have made it clear that it is a meaning of these words. If that is so, all that I am asking your Lordship to say is that as the statute

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says the consequences which follow the deemed distribution are exactly the same as the consequences which follow an actual distribution. In the light of that, which is a submission of the Crown, an assessment was made upon the appellant in this case because had the money been actually distributed as dividends it would have been and is, it had notionally been distributed as dividends the same thing follows and I ask your Lordship to dismiss these appeals with costs.

11.45 a.m. Court adjourned until 2.15 p.m.

2.15 p.m. Court as before:

BECHGAARD: May it please your Lordship, having listened to my learned friend I have come to the reluctant conclusion that having created this fiction he is now incapable of distinguishing it from fact. I almost came to the conclusion that he was casting aspersions on the validity of the Income Tax Ordinance.

Perhaps at the outset I should stress one fact and that is that we are not here concerned with the case of a tax payer who is seeking to avoid liability to tax. Company tax has been paid on all this money. That is the first measure; in addition it is not denied that the share-holders as such are liable, not only to tax but also to surtax individually but what we are complaining about is that in the case of the set law there is an additional element of surtax which it is sought to impose. There is no question of tax avoidance, shall we say, or anything like that. Not only tax but surtax is due and admitted to be due.

Now in his address my learned friend first dealt with two general matters, the first one was concerned with interpretation. Now he seemed to be under the impression that I had striven for beneficial construction, though, of course, I did not but I did invite your Lordship's attention to Simonds where it specifically says at page 42 - I think I read the actual passage - and I am merely contending that an accurate construction. The second part of his general observation referred to this comparative table. Your Lordship, that has been put in by me to show, to underline, the very close affinity and relationship between section 24 and the English Act. There is not a single part of section 24 which stands by itself as completely original. It has its counterpart, each section and sub-section, in the English or U.K. Act. It is in para ..... if not

exactly the same. Therefore I think my learned friend is a little bit cynical when he asks your Lordship to decide the case as if we could not look at other legislation to see what had happened in comparable circumstances. I do not claim, of course, that any reference to U.K. or Indian or South African legislation is in any way conclusive. It is agreed that it is not but I think it is constructive.

COURT: I think the implication was that even if there may be a difference local registration may attain the same object in a different way.

BECHGAARD: I think we can only, shall we say, use it for purposes of guidance and illustration but the real point in putting in this comparative table is that it is an intimate and detailed similarity. Going to the grounds of appeal, my learned friend dealt first of all with the third ground which referred to the retrospective operation. Now if I may again refer to section 24 - the actual section reads: "Whereby virtue .... year of Income" I ask Your Lordship to regard those words "in any year of income" as being underlined just for the purpose of this little argument. Year of income is defined as "the year of income means the twelve months commencing 1st January, 1951". Subsequent not antecedent was the year of income which is the yardstick employed in section 24 is by inference limited to the 1st January, 1951 and therefore the burden of my argument was not so much as to couple it as a ground of appeal but as to say in arriving at interpretation the Court may be guided by the fact that the retrospective operation is an unlikely result.

The next ground of appeal dealt with by my learned friend is the one which deals with the phrase "by virtue or in consequence of". I would like to say here and now that while this is a separate ground of appeal it is to a very large extent inter-connected with the second ground because they both depend on the meaning attributed to income but what I had in mind and what I probably failed to make clear to my learned friend was this, that this is a transfer of assets which by the definition contained in section 9(b) is a settlement. Now in a normal settlement you have a trustee and in the trustee is laid down the way the asset is to be dealt with. Here there is the mere transfer of an asset and therefore this settlement ..... (inaudible) is merely the rights which attach to that subject matter by ordinary law and by ordinary

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law in this instance I would say a share. A share is a creature of statute.

To deal with the meat of matter, the second ground that this is not income for the benefit of the child. There was a reference to cases 20 and 23 which I think are immaterial. My learned friend then went on to deal with section 22 and to the legal consequences. Now section 22 obviously creates a statutory fiction and we do not try to escape from that statutory fiction or its consequences as long as it is not unduly extended. We concede that the distribution is correct and that as far as the individual shareholders are concerned the consequence of the distribution is that they are assets as if they had been distributed. That is inescapable but what we object to, and I must stress this as further fiction, that once these shareholders are deemed to have received money which they have not received, that in turn becomes the subject matter of the fiction under section 24 and if I may quote a case on which my learned friend depended as far as I can see, it is tax case No.7, and your Lordship will notice one very significant part in the judgment of Sir John Grey, page 62, the paragraph beginning : "Similarly .... resorted to".

Now if your Lordship looks closely at section 22 I submit that your Lordship will come to the inescapable conclusion that for the purposes of that section the persons between whom the statutory fiction is to be resorted to .... the shareholders individually as such and the Commissioner of Income Tax. Individually. There is nothing in that section which says that the shareholders inter se, are to be the victims, call them that, of this statutory fiction. The section specifically refers to the shareholders so to the extent that that particular case is the one on which the Crown leans, I submit it is more in my favour.

In dealing with section 22 I did point out that there were two possibilities in which one was a deemed distribution and secondly an actual distribution. My learned friend did not deal with that position, but I think I make it quite clear it was part of my case that section 24 could obviously be employed on one of them but not on both and the natural application would be actual (natural) distribution. If my learned friend is correct in his claim it is strange that in section 24 the words used are "Any income paid to or for the benefit of the child". I think that phrase must have been

used for a definite purpose. If my learned friend had been correct it would have been "any income assessable" ..... Child". He contends, in fact, that the words "income paid to or for the benefit of a child" is the same as assessable to a child which in my submission, is a strange and unlikely event. That paid is equivalent to deemed to have been paid, which is another branch of his argument, is again unlikely because you have only to look at the actual sub-section, sub-section 6 of section 22, in order to explode that fallacy.

In sub-section 6 the wording runs: "When a Company is a ..... (reads) ..... deemed to have been paid". Why not say: "Thus paid" if my learned friend is right? If the result of the fiction is to destroy for all purposes any distinction between paid and deemed to have been paid, why is that phrase used in sub-section 6? My learned friend contends that "paid" is equivalent to "deemed to have been paid". Therefore it would have been logical for the sub-section to have continued:"the amount ..... (reads)." If your Lordship now turns to section 24, if I understand the Crown case correctly, in line 3 of that section my learned friend is asking your Lordship to read:"Any income is paid" to read, in brackets, "including deemed to have been paid". Basically our argument can be narrowed down to this point,that the Crown contends that the one word "paid" there in the context includes "deemed to have been paid". My argument is that "paid" in that context means "paid". I am not asking for any exotic construction or any addition. I am asking for the word "paid" to be construed in the normal and natural sense.

To sum up, in my submission in arriving at the correct interpretation of section 24,regard can be had to the way in which other legislation has dealt with a similar problem. I do not claim that that is conclusive but I submit also that looking at the section itself it is very clear, or it is more clear, that it is aimed at a physical fact than at a theoretical one. Of course, there is no evil, or the evil desire is almost non-existent, where (a) full Company tax is paid, and (b) individual surtax is paid. In addition, of course, there is the point that if it had been contended this type of settlement should be the subject of section 24, it would be very easy to make provision for it and the existence within sections 22 and 24 themselves, if, shall we say, opportunities to widen the scope

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of the applicability of the section is a pointer to the fact that the absence of any expansion of the word "paid" is deliberate. If your Lordship merely looks at sub-section 4, your Lordship will see there that the same phrase can only have reference to a physical and not a theoretical fact: "Where by virtue .....(reads)..... so paid". It can only refer to a physical fact. In my submission, your Lordship, both of these Appeals should be allowed with costs.

NEWBOLD: My learned friend has raised a new point about sub-section 4 applying only to a physical fact. In my submission that is not so. Sub-section 4 entitles the person who has been assessed but who has not in fact received the income to pass the payment on in accordance with the provisions..

BECHGAARD: To the person from whom the income is received. That was the whole point of my argument.

NEWBOLD: I am sure that your Lordship knows that actually what happens in this case is that while the income is assessed either upon the shareholder, the son, or upon the appellant, as I contend, in either of those cases it is open to the person upon whom it is assessed. He has a right to pay it. He has an indemnity.

COURT ADJOURNS AT 2.45 P.M. ON 1.11.56.

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No.9

JUDGMENT OF MR. JUSTICE LOWE

J U D G M E N T

Lowe, J:-

These two appeals have been consolidated and are against an additional assessment of tax made upon the appellant by the respondent for the year of income 1952. The Memorandum of Appeal states that the assessment which purports to charge the appellant with tax under the provision of Section 24 of the East African Income Tax (Management) Act, 1952, on the income of a company, which income is deemed to have been distributed as at the 13th June, 1952, to the minor children of the appellant, quae shareholders. The appellant contends that the assessment is misconceived and erroneous

in law because -

(1) income deemed to have been distributed under the provisions of Section 22 of the Act is not income arising by virtue or in consequence of any settlement to which Section 24 of the Act applies;

(2) income deemed to have been distributed under the provisions of Section 22 of the Act is not income paid to or for the benefit of a child; and

(3) Section 24 of the Act cannot operate retrospectively in respect of accounting period ending before its operative date - i.e. 1st January, 1951.

The appellant filed with his Memorandum of Appeal a statement of facts, as follows :-

1. Assessment No.3718 of the Year of Income 1952 is additional to Assessment No.T.1902, and treats as taxable income an amount of £8,391.

2.(a) The appellant, an advocate practising in Tanganyika Territory, is a shareholder in a private company entitled "Coastal Freights & Co. Ltd." (hereinafter called the Company).

(b) The paid-up share capital of this Company is Shs. 500,000, divided into 500 shares of Shs. 1,000/- each.

(c) At all material times the shareholders in the Company were :-

(i)	The appellant	- 251 shares
(ii)	The appellant's wife	- 49 "
(iii)	The appellant's son Christopher	- 100 "
(iv)	The appellant's son Robin	- 100 "
	Total	- 500 shares

(d) The appellant's son Christopher was born on 20th July, 1934, and the appellant's son Robin was born on 26th November, 1937; at the material time these children were children within the meaning of Section 24(9) of the Act.

(e) For the period ended 31.12.1951, the

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taxable income of the Company was Shs.73,740/-.

(f) Additionally, for the period ended 31.12. 1951 the Company as a shareholder in a company entitled Mauzi Sisal Estate Ltd., was deemed to have received a dividend of Shs. 205,990/-, being calculated by reference to that Company's 1950 income.

(g) By a direction dated 17th November, 1954, the respondent ordered that an amount of Shs. 167,838/- being 60% of the total income of Shs.279,730/-,be deemed to have been distributed amongst the Company's shareholders as at 30th June, 1952.

(h)The proportionate share of each shareholder which falls to be included in the total income of such shareholder for the purposes of the Act are:-

	Gross	Tax	Nett
(i) The appellant	84,255	21,064	63,191
(ii) The appellant's wife	16,448	4,112	12,336
(iii)The appellant's son Christopher	33,567	8,391	25,176
(iv) The appellant's son Robin	33,568	8,392	25,176
Shs.	167,838	41,959	125,879

(i) The gross dividend deemed to have been distributed has been treated by the respondent as the appellant's taxable income, and after making the appropriate personal allowances and after making allowance for the tax already assessed, tax deducted at source and further life assurance allowance,tax has been charged in an amount of Shs. 72,900/-.

All of these facts were agreed by learned Counsel for the respondent. Both Counsel agreed also that the shares held by the appellant's two sons, Christopher and Robin,were transferred to them by the appellant without valuable consideration,which transfer constituted a "settlement"for the purposes of Section 24 of the Act and that such settlement was made after the 1st of January, 1939.

The relevant portions of Sections 22(1) and

24 of the East African Income Tax (Management) Act, 1952, are as follows :-

"22(1) Where the Commissioner is satisfied "that, in respect of any period for which the "accounts of a company resident in the Territories have been made up, the amounts distributed as dividends by that company up to the "end of twelve months after the date to which "such accounts have been made up, increased by "any tax payable thereon, are less than sixty "per cent of the total income of the company "ascertained in accordance with the provisions "of this Act for that period, he may ..... "order that the undistributed portion of sixty "per cent of such total income of the company "for that period shall be deemed to have been "distributed as dividends amongst the shareholders as at the end of the sixth month after "the date to which such accounts have been "made up, and thereon the proportionate share "thereof of each shareholder shall be included "in the total income of such shareholder for "the purposes of this Act: .....

"24(1) Where, by virtue or in consequence of "any settlement to which this section applies "and during the life of the settlor, any income "is paid to or for the benefit of a child of "the settlor in any year of income, the income "shall be treated for all the purposes of this "Act as the income of the settlor for that year "and not as the income of any other person.

" (2) Subject as hereafter provided, for the "purposes of this section -

" (a) income which, by virtue or in consequence " of a settlement to which this section applies, is so dealt with that it, or assets " representing it, will or may become payable " or applicable to or for the benefit of a child of the settlor in the future (whether " on the fulfilment of a condition, or the " happening of a contingency, or as the result " of the exercise of a power or discretion, " or otherwise) shall be deemed to be paid to " or for the benefit of that child:"

The year of income is defined in Section 2 as follows :-

" 'year of income' means the period of twelve " months commencing on the 1st January, 1951, " and each subsequent period of twelve months."

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and "total income" is also defined as meaning the aggregate amount of the income of any person from the sources specified in Part III remaining after the exemptions provided for under Part IV and computed in accordance with the provisions of Part V. It is not disputed that the respondent was lawfully entitled to issue the direction dated the 17th November, 1954, ordering that the sum therein stated and being 60% of the total income concerned, be deemed to have been distributed amongst the company's shareholders as at the 30th June, 1952.

This appeal has been argued with that commendable clarity the Court has come to expect from both Counsel. Learned Counsel for the appellant said that his client was complaining regarding the imposition of tax on the deemed dividends which were included in the income of Coastal Freights Co.Ltd. in relation to the two sons of the appellant, and after a brief outline of the scheme of taxation contained in Part V of the Act and in particular that portion of Part V which relates to the ascertainment of total income, he traced the history of the relevant legislation and said that Section 22 created a statutory fiction whereby in a case of certain companies 50% of their total income can be deemed to have been distributed and that Section 24(1) and (2) created another fiction within the first fiction by deeming that income in connection with the shareholding of the sons of the appellant was deemed to have been paid to the sons and to be the income of the settlor, who is of course the appellant in this case.

He referred the Court to various Sections of the United Kingdom 1952 Income Tax Act, the Indian Income Tax Act, and the South African Income Tax Act, and asked the Court to look at those Sections wherein special provision was made for such a "deeming", whereas, he said, no such provision existed in the Act. He stressed that in his view the lack of any such specific provision was fatal to the respondent and that although the Act purported to allow the respondent to charge tax to the settlor on certain monies shown as income in the company's accounts, the Act itself did not in fact go far enough to make that provision certain. He invited the Court to look on Sections 22 and 24 as penal sections and referred to Fattorini's case, 1942 (1) A.E.R. 619, where at page 625 Lord Atkin in the House of Lords referred to the English provisions which are similar in nature to Sections 22 and 24 as highly penal and at page 629 Lord MacMillan said: "It is obvious that the section is

penal in character." For these reasons Counsel said that the sections with which the Court was dealing should be interpreted strictly and, he contended, an accurate interpretation would show them to be in favour of the "taxpayer". He referred to Simon's Income Tax, 2nd Edition, Volume I, at page 41, also to show that the Act should be construed strictly. The learned author there says :-

> "The rules of construction which apply to "statutes generally also apply to taxation "statutes. Thus the rules, for example, which "require effect to be given to the words in "the light of the intention shown by the stat- "utes as a whole or of another statute in pari "materia or which apply to repealing, amending "or consolidating statutes, apply also to tax- "ationacts",

and at page 42 he goes on to say:-

> "again, it has been pointed out that the cases "that decide that taxing Acts are to be strictly "construed and that no payment is to be exa- "cted from a taxpayer which is not clearly and "unequivocally required by the Act probably "merely mean that as, apart from statute, there "is no liability to pay any tax and no antece- "dent relationship between the taxpayer and "the taxing authority, no reasoning founded on "any such a priori liability or relationship "can be used in the construction of the Act, "and the taxpayer therefore has a right to "stand upon a literal construction of the words "used. The imposition of a tax must be effec- "ted by plain words."

Counsel also referred to Russell (Inspector of Taxes) v. Scott, 1948 (2) A.E.R. 1, where, at page 5, Lord Simon said:

> "There is a maxim of income tax law which, "though it may sometimes be overstressed, yet "ought not to be forgotten. It is that the sub- "ject is not to be taxed unless the words of the "taxing statute unambiguously impose the tax on "him. It is necessary that this maxim should on "occasion be reasserted and this is such an occ- "asion."

And at page 7 Lord Oaksey said:-

> "On this question I agree with the observations

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"of my honourable friend Lord Simon on the "maxim of income tax law that the subject is "not taxed unless the words of a taxing sta- "tute unambiguously impose the tax on him."

Counsel pointed out that Section 24 of the Act was first introduced in the 1952 Act and had no previous source or genesis in East Africa. It was introduced in 1952 but related back to the 1st January, 1951, Section 22, however, was taken from Section 21 of the Tanganyika Income Tax (Consolidation) Ordinance, 1950. He argued that in certain circumstances the respondent was empowered by Section 22 to require undistributed profits to be treated as distributed, and could deem them to have been distributed, but he challenged the fact that once they had been "deemed" by one statutory element to have been distributed the respondent could invoke the second statutory fiction and superimpose another fiction, again deeming them to be paid, on the one created in Section 22. If I understood his argument correctly it was, in plain words, that whereas the Commissioner was entitled to direct that 60% of the total income of the company could in the circumstances of this case be deemed to have been distributed as dividends among the shareholders, he could not say, by reason of Section 24, that certain of that income of the company which had been deemed already to have been distributed to the shareholders of whom the children of the settlor form part, could be deemed again to have been paid to or for the benefit of the children and treated as the income of the settlor for purposes of the Act. This, he implied, was taxing the same income twice which surely was not the intention of the legislature. He referred to 1 E.A. Tax Cases, 43, at page 62 where the then Chief Justice of Zanzibar, sitting as a member of the East African Court of Appeal, said :-

"Similarly, when Section 21(1) of the Income "Tax Ordinance (which is the same as Section "22 of the Act) enacts that 'the undistributed "portion of 60% of the total income of the "company for that period shall be deemed to "have been distributed as dividends among the "shareholders', a shareholder cannot be heard "to say that the undistributed portion so "distributed ought to be less than 60%. When "the legislator enacts that something shall be "deemed to have been done, which in fact and "in truth has not been done, and plainly indi- "cates between what persons that statutory "fiction is to be resorted to, the Court is

"bound to treat the thing which shall be "deemed to have been done, as having been "done and cannot go behind the plain language "of the enactment "

That dictum, Counsel pointed out, was of no particular value in this case because it was concerned only with the internal effect of Section 22 and did not deal with its repercussions on Section 24. However, I do not think either Counsel have any quarrel with dictum with which, with respect, I agree He also referred to subsection (5) of Section 24 to stress the fact that there were two instances within the contemplation of that Section, the first where no profits are distributed but are deemed to have been distributed and tax is properly assessed and paid, and the second where, following upon a deemed distribution, an actual distribution is made. He also argued that the deemed dividend could not be said to be by virtue or in consequence of the settlement, in the terms of Section 24(1). He claimed that the only true purpose of those words was to denote that the income must arise due to something within the settlement itself and by virtue or in consequence of that settlement. In this case the settlement was a transfer of assets by the acquisition of which the children of the settlor had certain rights under the Companies Act, including a right to receive a dividend when it was declared, but that they could not compel the company to declare a dividend.

For this reason Counsel urged that this section could not include any income arising where a statutory discretion exists in the company but has not been exercised, namely the declaring of a dividend. He said that subsection (2) of Section 24 dealt merely with the instance where the beneficiary's right was contingent as opposed to intended and the normal instance to which the subsection applied would be that of a directed distribution, and in view of the apparent intention to give an extraordinary meaning to the words "paid to or for the benefit of the child" it was necessary to make specific provision. He referred again to Simon to show that the words "is so dealt with" contained in subsection (2) (a) of Section 24 connote a physical dealing with the income and not merely a statutory fiction, and to St. Lucia Usines and Estates Co. v. St. Lucia Colonial Treasury, (1924) A.C. 508, at page 512, to show that there must be a "coming in" to satisfy the word "income"

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and that there cannot be a mere notional something which may never eventuate.

Concluding his original argument, Counsel pointed out that in Appeal No.17 parts of the 1950 income of the subsidiary company referred to in paragraph 2(f) of the filed Statement of Facts were caught in the revenue net and in the case of Appeal No. 18, part of the 1949 income was also caught. Section 24, he stressed, was introduced in the 1952 Act with retrospective effect to the 1st January, 1951. He submitted that on general principles there should be no retroactive effect by substantive law unless that was clearly indicated, and that any interpretation which had the result of enabling the respondent to go back to the accounting years 1949 and 1950 should be resisted unless it was abundantly clear from the legislation that such was intended to be the result flowing from the enactment as, he argued, was not so in the instant case.

The submissions, and others which are contained in the typescript of the proceedings, were opposed strenuously by learned Counsel for the respondent. He argued in effect that it was a dangerous suggestion that a Court should look to other legislation and see how similar provisions have been drafted in order to arrive at a conclusion as to the meaning of Sections 22 and 24 of the Act. He contended that so long as the provisions of the relevant portions of the Act were clear and unambiguous no beneficial construction should be put on them nor was there any necessity to treat them with that strictness which had in former days been applied to the interpretation of penal sections. He referred the Court to Case No. 21, E.A. Tax Cases (1) at page 8, where the learned Vice-President, as he then was, said:-

> "But I do not think that in determining this "question there is any obligation on the "Courts to favour this subject by a benevolent "construction. I prefer the rule of construc- "tion as expressed in Konstam's Income Tax, "11th Edition, page 10 :-
>
> " 'It is often said that a taxing act must be " 'construed strictly in favour of a subject: " 'it may perhaps be more correct to say that " 'a taxing act must be construed either " 'against the Crown or the person sought to " 'be charged,with perfect strictness - so far " 'as the language of the Act enables the " 'Judges to discover the intention of the " 'legislature.'

"To which perhaps I should add that I respect-
"fully adopt the view expressed by Cohen,L.J.,
"in Littman v. Barron (1951) 1 Ch. 995, at
"page 1003 :-

" 'The principle that in case of ambiguity a
" 'taxing statute should be construed in
" 'favour of a tax-payer does not apply to
" 'provisions giving a taxpayer relief in
" 'certain cases from a section clearly
" 'imposing liability.'"

I would say at this stage, and with respect, that I agree entirely with what the learned Vice-President there said and with the references he cited from other dicta. Counsel went on to stress that it was only when some doubt arose as to the meaning of the words in a taxing statute that it became the duty of the Court to ascertain whether those words had or had not imposed a tax. He dealt with the third ground of appeal first and, in brief, said that the Act was not concerned with any "accounting year" but was concerned with income under the settlement. The income in question in this appeal was, he said, "received" in 1951 and that was not disputed. How the income arose in the hands of some other person and not the recipient or deemed recipient was immaterial for the purposes of the Act which was concerned, he stressed, only with the date on which the income was "received".

As to the first ground of appeal,he considered that the submission that the settlement itself was "the rights of the shareholders by virtue of their shareholding" was a complete misconception of the position. "Settlement" is defined in subsection(1) of Section 24 as "including any disposition, trust, covenant, agreement, arrangement or transfer of assets ..." and the settlement itself, he said, did not relate to the assets of a settlement. He said that in the instant case it was under the settlement that the settlee obtained the shares which resulted in the income, the subject of the directions by the respondent and that therefore the income itself must be considered as having been received under or by virtue of that settlement. He pointed out that learned Counsel for the appellant had said that if the dividends had actually been paid to the settlee no argument would have arisen but in this case the Act provided that those dividends were deemed to have been paid to the settlor and become part of the deemed income of the settlor and so attracted income tax.

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The second ground of appeal, Counsel urged, could clearly be taken to be the basic ground upon which the appellant relied in his contention that the assessment should be discharged. Again he pointed out that it had been conceded for the appellant that if the dividends had actually been paid the income received by the child would have been assessable upon the father. That being so, he said, Section 24(2) (a) made it clear that the income in question could also be assessed against the father. He referred the Court to Case No. 20, 1 E.A. Tax Cases, 205, and Case No. 23, 2 E.A. Tax Cases, 32, to show that there could be no question whatsoever that where the Court was satisfied that a settlement had been made and that in consequence the income distributed as dividends to the child was income arising by virtue or in consequence of that settlement, the tax was assessable upon the father. He said the whole fulcrum of the appellant's argument was that this deemed distribution of dividends was neither income of the child nor paid to or for the benefit of the child. This, he said, was a fallacy. The provisions of Section 2 were clear and unambiguous, and where that section deemed something to be what it was obviously not, the result of that was really that what had in fact not occurred was to be considered as if it had occurred and Section 22 says that although the dividends were not distributed they were to be deemed to have been distributed and to form part of the income. These words, Counsel said, can have only one meaning, which was as clear as possible. He then went on to show that Section 24 brought the disputed income within the orbit of the Act and argued that there could be no doubt that the respondent had properly made an assessment on that income and tax was payable by the appellant.

He referred also to Case No. 7, 1 E. A. Tax Cases, at page 61, which is concerned with different aspects of Section 22 of the Act, but in which the Court of Appeal had considered what the word "deemed" meant in these words :-

> "If,therefore,the Commissioner in the exercise "of his jurisdiction sees fit to make an order "under Section 21,what he in effect does is to "declare a dividend in respect of 'the undis- "tributed portion of 60% of such total income "of the Company' and the proportionate share of "each shareholder in the amount thus allocated "for purposes of dividend becomes for purposes "of the Ordinance part of the total income for "such shareholder. The money is treated as

"notionally having been paid over to a share- "holder in the same manner as money represent- "ing dividends actually declared by the Company "itself."

And at page 62 :-

"When the legislature enacts that something "shall be deemed to have been done, which in "fact and in truth has not been done, and "plainly indicates between what persons that "statutory fiction is to be resorted to, a "Court is bound to treat the whole thing which "'shall be deemed' to have been done as having "been done and cannot go behind the plain lan- "guage of the enactment."

He referred also to Case No.21, 2 E.A. Tax Cases 1, at page 25, where in a Privy Council judgment it was stated :-

"It will be seen that when the conditions stated "in subsection (1) of existing Section 21 are "satisfied the Commissioner has the power to "make an order under which the undistributed "portion of 60% of the total income of a Company "for a period specified in the subsection is "notionally to be regarded as having been dis- "tributed, and the proportionate share thereof "of such shareholder is to be regarded as having "been received by the shareholder for purposes "of assessing the amount of income tax payable "by him."

The submissions of learned Counsel for the appellant that this Court should look at "foreign" legislation in order to arrive at a correct interpretation of Sections 22 and 24 of the Act seem to me to be rather in the nature of putting the cart before the horse. The duty of the Court is first to analyse the sections under review before doing anything else, and if it is found that the words of those sections leave no doubt as to the intention of the legislature there is no need, and in fact no point, in going any further. It would be only in exceptional circumstances that the Court should turn to "foreign" legislation, which achieves a definite result, and by a study of the construction of that legislation, consider whether such a result was achieved by local legislation. The submissions on behalf of the appellant in this connection amounted to a clear, interesting, academic analysis of comparative law, but I do not think they can be of any benefit to the appellant in this appeal, nor

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do I consider that I should accept the invitation to look at the "foreign" legislation. The words of Section 22 leave no doubt in my mind as to the intention of the legislature. If the Commissioner is satisfied that within the period mentioned in that section certain dividends plus tax are less than 60% of the total income of the Company ascertained in accordance with the provisions of the Act for the specified period he can direct that the undistributed portion of 60% of such total income for the period shall be deemed to have been distributed as dividends amongst the shareholders as at a certain specified time; and Section 24 seems to me to state very clearly that where in consequence of a settlement and during the life of the settlor the income is paid to or for the benefit of a child of the settlor in any year of income, the income is to be treated as the income of the settlor for that year and when by virtue or in consequence of the settlement the income is so dealt with that it will or may become payable or applicable to or for the benefit of the child at some time in future that income is to be deemed to be paid to or for the benefit of the child. I am satisfied that the income in this case arose in consequence of the settlement and it is agreed that it was a settlement within the meaning of the Act. It arose during the life of the settlor and it was within the period covered by Section 22. It is deemed to have been paid for the benefit of the child, and there seems to me no doubt that by necessarily including income in the accounts of the Company in the year in question that income may become payable to or for the benefit of the two sons of the appellant and so must be treated under Section 24 as his income for the year of income and not the income of the children.

It is agreed that the Company itself has paid tax on the declared income, and it is argued for the appellant that the legislature could not have intended that further tax would be paid on part of the same amount while the money was still in the hands of the Company. I cannot find that to be the position. Although the appellant may consider it to be extremely harsh it seems to me to have clearly been intended by the words of the sections in question that such was to be the case.

No doubt, prior to the enactment of Section 24 of the Act, persons in receipt of large incomes found that they were not debarred by the provisions of the Act from settling, perhaps considerable

sums by way of transfer of assets, on their minor children and so could create a separate income, in effect extracted from their own income, in order to save the imposition of a certain amount of surtax. Section 24 seems to have been enacted to prevent this until the minor children reach a prescribed age.

I have reached my conclusion as to the effect of Sections 22 and 24 for the following reasons- In part III of the Act provision is made for the imposition of tax and Section 8(1) provides that:

> "Tax shall, subject to the provisions of this "Act, be charged in respect of each year of "income at the rate imposed for that year by "the appropriate Territorial Income Tax "Ordinance upon the income of any person "accruing in, derived from, or received in "..... East Africa ..... in respect "of ..... dividends."

Section 22, the effect of which is not disputed, provides that the respondent may direct that 60% of the total income of a company for a specific period shall be deemed to have been distributed as dividends amongst the shareholders.

The settlor and his children, Christopher and Robin, were during the appropriate period, shareholders in the company Coastal Freights & Co. Ltd., a proportion of the income of the Company was directed to be classed as dividends actually distributed and so became taxable. This part of the Company's income no doubt would have gone to the shareholders in due course but it was properly assessable for tax under Sections 8 and 22. Section 24 goes further. The income of the company included certain monies or perhaps assets represented in the Company's accounts as monies, which may have become payable or applicable to the benefit of Christopher and Robin in the future. The section deems those monies to be paid to or for the benefit of those children of the settlor and by subsection (1) any income paid to or for the benefit of a child of the settlor in any year of income is to be treated for all the purposes of the Act as income of the settlor for that year. Such income being by way of dividends, in that it has been so deemed, comes within the orbit of Section 8(1) of the Act and is assessable for tax. I cannot accept the submission of learned Counsel for the appellant that the income must arise by reason of some internal

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provision within the settlement. The Act clearly states: "in consequence of any settlement". The settlement in this case is one to which Section 24 applies, that is not disputed. The income arises in the accounts of the company and so to the ultimate benefit of the shareholders of whom Christopher and Robin became part in consequence of the shares having been settled on them by the settlor. For that reason it seems to me that the income arose, in so far as the children are concerned, in consequence of the settlement. There does not seem to be any other way in which it could have arisen in the circumstances in this case and that income being shown in the accounts of the company in a year of income to which the Act applies is properly assessable. I agree with the statement of learned Counsel for the respondent that it does not matter at all if the income actually arose in a prior accounting period, for the accounts of the company were made up for a year of income which comes within the orbit of the Act. The company has "so dealt with" the income by including in its accounts for that particular year and the children being shareholders, I do not think it could reasonably be suggested that it will not or may not become payable or applicable to their benefit at some time in the future.

By what means any "foreign" legislature has arrived at a result, I do not think is a matter of concern. I consider that the Act can achieve and has achieved the same result by its own legislative method in the various sections to which I have referred. Nor do I think the position is any way affected by the construction of subsection (6) of Section 24. This subsection certainly has all of its "deeming" within itself but subsection (2) of Section 24 deems the income to be "paid to or for the benefit of a child" after having made provision as to income "paid to or for the benefit of a child". In other words subsection (2) has the effect of defining, subsequently, the application of those words in so far as they apply to children of a settlor who have acquired their income in consequence of the settlement.

It is, perhaps, unnecessary repetition but I will refer now to the grounds of appeal in order. I consider that, as to the first ground, the income deemed to have been distributed under the provisions of Section 22 of the Act in this case is income arising by virtue or in consequence of the settlement made by the appellant in favour of his sons, and that Section 24 applies. As to the second ground, this income which was deemed to have been distributed under Section 22, is not perhaps income factually paid to the sons but is

in fact income which has been so dealt with by the company that it will or may become payable or applicable to the benefit of the sons of the Settlor in the future, and so is correctly deemed to be paid to or for their benefit and is to be treated as the income of the appellant. It is therefore, in my view, correctly included in the respondent's assessment.

As to the third ground, Section 24 of the Act does not purport to operate retrospectively in respect of accounting periods ending before its operative date, namely the 1st January 1951, but it does operate in respect of the income of the company which was shown in accounts for a period which was itself within the orbit of the Act.

These appeals therefore must be dismissed with costs to the respondent.

Delivered in Court at Dar-es-Salaam this 12th day of November, 1956.

A. G. LOWE.
JUDGE.

NO.10.

MEMORANDUM OF APPEAL

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA AT DAR-ES-SALAAM.

CIVIL APPEAL NO.4 OF 1957.

BETWEEN

GEORGE N. HOURY, Esq., Q.C. ..... Appellant

AND

THE COMMISSIONER OF INCOME TAX ..... Respondent

(Appeal from a Judgment of the High Court of Tanganyika at Dar-es-Salaam (Mr. Justice Lowe) dated 12th November, 1956, in Miscellaneous Civil Appeals Nos.17 & 18 of 1955, between the same parties).

MEMORANDUM OF APPEAL

George N. Houry, the Appellant above named, appeals to Her Majesty's Court of Appeal for Eastern Africa against the whole of the decision abovementioned on the following grounds namely :-

In the Court of Appeal for Eastern Africa

No.10
Memorandum of Appeal. 7th January 1957. (continued)

1. The learned Judge was wrong in law in holding that dividends deemed to have been distributed to infant shareholders under the provisions of Section 22 of the Eastern African Income Tax (Management) Act,1952 could, in the absence of physical payment be held to be income paid to or for the benefit of a child of the Appellant Settlor during the relevant year of income.

2. The learned Judge was wrong in law in holding that in the circumstances set out in Ground(1) above,such income, if paid to or for the benefit of the child (which is denied) was so paid by virtue or in consequence of the "settlement".

The appellant therefore prays :-

(a) that the decision of the High Court be reversed; and

(b) that Assessments No. T. 1234 of the Year of Income 1951 and 3718 of the Year of Income 1952 be varied to exclude the sums erroneously included;

(c) for such further and other relief as this Honourable Court may see fit to grant;

Together with the costs of this appeal and of the appeals in the Court below.

Dated this 7th day of January, 1957.

(Sgd) G.N. HOURY.
APPELLANT.

To the Honourable the Judges of Her Majesty's Court of Appeal for Eastern Africa.

And to C.D. Newbold, Esq., Q.C.,
Legal Secretary to the East Africa High Commission, Advocate for the Respondent.

The address for service of the Appellant is c/o K. Bechgaard, Advocate, P.O. Box 2339, Nairobi.

Filed this 8th day of January, 1957. at DAR-ES-SALAAM.

(Sgd)
.....
Deputy Registrar,
Court of Appeal for Eastern Africa.

NO.11.
NOTES OF ARGUMENT BY THE PRESIDENT

CIVIL APPEAL NO. 4 of 1957.
GEORGE N. HOURY, Q.C. vs. THE COMMISSIONER OF INCOME TAX.

In the Court of Appeal for Eastern Africa

No.11.
Notes of Argument by the President 28th February 1958.

NOTES TAKEN BY THE HONOURABLE THE PRESIDENT - SIR KENNETH O'CONNOR.

28.2.58. Coram: O'Connor P.
Forbes J.A.
MacDuff J.

Bechgaard for Appellant.
Hooton for Respondent.

Bechgaard :

Transcript of Counsel's argument included. Judge had proceeded on a ground which had not been argued.

p. 53 'distribution.'

I did not say that.

p. 13 lines 17 to 19.

pp. 13/14. Diametrically opposite to what I said.

p. 28 line 2.

When Judge relied on sub-section (2) of s.24 he relied on something which was not relied on by Counsel.

While the beneficiary's interest may be contingent the right of the trustee must be vested. Under s.22 the beneficiary has no right to receive the dividends.

Record p. 10.

p. 5. 2nd appeal.

It was agreed that the transfer of the shares to the children without consideration constituted a settlement within s. 24(9)(b).

s. 24 is the charging section.

s. 22 derivative.

We had no quarrel with the direction under that.

In the Court of Appeal for Eastern Africa

No.11.
Notes of Argument by the President 28th February 1958. (continued)

Having deemed a distribution under s.22 you cannot invoke s.24 to aggregate those distributions on the settlor.

In the absence of specific legislative provision you cannot superimpose s.24 on s.22.

Grounds of appeal.

Ground 1.

Ground 2.

Deal with both together.

Judgment from p. 57.

We say that 'paid' in s.24 means actually 'paid' in cash.

Crown says 'paid' includes 'deemed to have been paid.' If it were meant to include 'deemed to have been paid' that should have been provided as it has been in other legislation.

John Hudson v. Kirkness (1954) 1 A.E.R. 29, p.32.

Point was whether 'sale' included nationalization. 'Was there a sale .....'

p. 3 'wagons.'

I say that 'paid' means 'paid.'

Inland Revenue Commissioners v. Wood Bros. Ltd. (1957) 3 A.E.R. 305, 321.

Point was whether the balancing charge was 'income'. p. 322. 'Some clear and unambiguous provision that the amount of the balancing charge shall be deemed to be an addition to the income of the Company.'

Russell v Scott (1948) 2 A.E.R. 1.

p. 5. 'My Lords there is a maxim .....'

p. 7. G. 'On this question I agree .....'

I am not asking for a benevolent construction, but that the liability to tax should be unambiguously stated.

p. 57. The duty of the Court.

s. 24 is completely derived from various portions of the English legislation.

List of Sources handed in.

No reason why the Court should not look at the English provisions.

p. 57

Lines 13 et seq. of p.58. Judge wrong. Sub-section 2 is not in point.

'arose'. We are not concerned with how it arose.

'deemed to have been paid'. That must depend on sub-section (2).

'by virtue or in consequence of' in s.24(2)(a).

Commissioners of Inland Revenue v Pay. 36 Tax Cases 109. Points whether there was a settlement and whether payments were made by virtue of it.

The arrangement was made by the taxpayer. p.115 last paragraph.

'She created the charge'.

D. The 'deemed dividends' were created by the statutory act of the Commissioner which is not 'part of the arrangement'. p.58 'deemed to have been paid on' misdirection

s.24(2)

(a) the direction of the Commissioner is not 'by virtue or in consequence of the settlement'.

Simon Vol. 3, p.91.

'Most of the above sections ..... capital.'

ib. p.104. 'Paid by or for the benefit' (1st 4 paragraphs)

s.24 obviously refers to cases where the income has been received and the trustee is accumulating it in accordance with the settlement.

Legislature does not say 'income arising', they say 'is so dealt with'. How can you deal with anything when you have not got it?

Judgment p.58. I do not rely on harshness.

In the Court of Appeal for Eastern Africa

No.11
Notes of Argument by the President 28th February 1958. (continued)

Not disputed that the dividends are taxable under s.22.

p.59 lines 29 to 30. 'classed as actually distributed.' Section says 'deemed to have been distributed.'

'Represented in Company's accounts.' We aren't concerned with that.

It is only if the money comes within the meaning 'by virtue of the .... settlement is so dealt with' that s.24 applies.

p.60 line 8. 'income arose'.That is not the point. It might have 'arisen' in consequence of the section; but we are concerned with whether it was 'paid' by virtue or in consequence of the settlement.

Don't now argue that the income did not arise in 1951.

p.60 line 20. 'The Company' has 'so dealt with'. That is not done by virtue or in consequence of the settlement.

s.22. 'deemed to have been distributed' 'each shareholder'.

'such shareholder'.

'paid' means physically paid.

sub-section (4)

" " (5) contemplates a notional, followed by an actual, distribution.

" " (6) Important. 'thus deemed to have been paid.' That phrase is used. In the sub-section there is specific provision for a fiction on a fiction. It was thought to be necessary to make specific provision for that.

So if s.24 were superimposed on s.22 specific provision would be necessary.

s.9(1) Proviso (c) (p.28) 'tax paid or deemed to have been paid'. In the whole of the Act there is not one place where 'paid' is not used in the physical sense.

s.24 (1). (derived from s.397).

s.24(2). (derived from s.398(2)(b)). Contain words 'or in any enactment relating thereto.'

s.402.

s.403.

s.411(1)(b) 'income arising.'

In England s.22 direction is included in income only because s.411 says so.

s.411(4).

'Each shareholder' can elect to have the tax paid by the Company under s.24.

How can s.24 sub-section (4) operate if the money is not paid? That is the point of s.411 (4) of the 1952 Act.

Respondent's argument only tenable if (1) 'income' defined as in the English Act; (2) there was a provision connecting a Company with the settlement.

Our s.22 is based on s.23A of the Indian Act.

p.556, 2nd edition Kanga & Palkhivala. 'Or deemed to have been paid or distributed.'

S. Africa. Silk. 5th Edn. p.490.

s.9.

'received ..... or deemed to have been received.'

Sub-section (3)

Every time payment is treated as one thing and deemed payment another. In no legislation is 'paid' used to embrace 'deemed to have been paid'.

Case No.7. 1 E.A.T.C. 43, 62.

'Now s.7(1)(d) - else'.

That is no authority for holding that 'paid' includes 'deemed to have been paid'. The passage in Brookes was obiter.

See cases on 'deemed' in Stroud and Burrows.

Most of the cases are opposed to this.

In the Court of Appeal for Eastern Africa

No.11.
Notes of Argument by the President 28th February 1958. (continued)

Everything must be set down unambiguously. 'Paid' means 'paid' and it does not mean 'not paid.'

Paton v. Inland Revenue Commissioners (1938)1 All E.R.786, p.794. D. 'My Lords .....'

Legislature could have achieved this, but has not done so. If the beneficiaries have not had the money there is no one against whom settlor could proceed.

Appeal should be allowed.

Hooton:

Your jurisdiction is 'the power and authority vested in the Court from which an appeal is brought'. S.16 Order in Council.

Function of the Court under s.78 of the Act is to examine the assessment and confirm it,etc. Case 16.

You are entitled to draw your conclusions from the agreed facts.

I did not attempt to justify the assessments under s.24(2). Judge also relied on s.24(1).

No authority for the proposition that because another statute has done a thing differently, you can assume any particular intention. You would have to examine the case law also.

If the sections were in identical terms the judgment of the House of Lords would assist you.

Bechgaard doesn't say that there is ambiguity. Reference to earlier statute is limited to cases of ambiguity.

R. v Titterton (1895) 2 Q.B. 61, 67.

If language is clear give effect to it. Refer to earlier Acts only if there is ambiguity.

Dangerous to consider English Act until you are going to examine whole scope of English Act.

Under the English provisions same result would arise. But scheme of English Act is different.s.411 of the English Act on which Bechgaard relied refers only to Chapter III of the English Act and that relates only to revocable settlement where the settlor retains an interest. There are no comparable

provisions. s.411 interprets 'income arising under a settlement'.

You are concerned with 'where by virtue or in consequence of a settlement' which is a larger conception.

s.405 English Act those words arise. Bechgaard argues that because the deeming provisions s.205 are dealt with by specific provisions (s.411) the income of the child cannot be subject to s.24 of our Act.

s.245 relates only to surtax 'and the amount thereof shall be apportioned among the members.'

c.f. s.22 shall be included in the total income of such shareholder 'for the purposes of this act' = all purposes of this Act.

In England the results are left to be dealt with by a subsequent section - s.249.

Sub-section (3) different scheme from ours 'assessed upon that part in the name of the Company.'

Whereas under our Act the money is included in the total income of the taxpayer. In the U.K. he is not entitled to personal relief in respect of payments under this section.

s.22 'for the purposes of this Act' it is income of the shareholder in question. Those words are conclusive. 1 E.A.T.C. 62. 'When the Legislature enacts .....'

Case 21. 2 E.A.T.C. 25. 'is to be regarded as having been received'.

It must be taken to have been paid to the child.

s.24.

Was the income received "by virtue or in consequence of the settlement"?

If you agree that under s.22 at law that money has been paid to the child, it must have been paid by virtue and in consequence of the settlement.

Bechgaard submits that if it had been physically paid it would be income received by virtue and in consequence of the settlement.

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No.11.
Notes of Argument by the President 28th February 1958. (continued)

So all that is left of his argument is that the money has not been paid.

s.22(6) This is recalling something which has happened under sub-section (1).

The matter is settled by the words of s.22 (1) 'for the purposes of this Act.'

For the purposes of s.24 the income is the income of those children and taxable on the father.

Adjourned to 2.30.

28.2.58. 2.30 p.m. Bench and Bar as before.

Bechgaard in reply.

Bechgaard:

Court can't succeed without disowning judgment below.

Without s.24(2) Judge would not have accepted Crown argument that 'paid' means deemed to have been paid.

Not disputed that you have power.

Not one place in the Act where 'paid' doesn't mean 'paid.'

If the Crown contention is right on s.22 (1), s.22(6) is superfluous.

Where 'deemed to have been paid' is meant, that phrase is used.

Hooton said that s.245 was distinguishable because it related to surtax only.

But s.22 can only relate to surtax because Company tax at 5/- in the £ has already been paid it can only apply to surtax.

The only difference is that in East Africa the tax is assessed on the taxpayer who passes it on to the Company: in the U.K. it is assessed on the Company on behalf of the Company.

Under s.24 there is no adequate machinery for insuring payment of the tax unlike s.411 (4) in the U.K. The settlor cannot come back on the Company here. He might not be a shareholder. He might be the father of 3 minor shareholders who had received no money. There is no machinery provided for the

Crown contention.

s.411 does refer to revocable settlements, but point is that in the U.K. where notional income arises, provision is made for it.

Case of 1 E.A.T.C.

Crown contends that the person to whom that is to be resorted to is the Commissioner and the shareholders.

But unless the fiction is to be resorted to between the members of the Company inter se.

s.22(1) 'each shareholder.'

But in s.24 Crown is seeking to extend the fiction to include the shareholders as a group.

Company has paid tax at 5/-.

Commissioner makes direction and each shareholder pays surtax.

Then Commissioner says that they must be aggregated again to pay surtax.

P.C. case is limited to s.22.

Act says 'distributed' not 'paid'.

s.22 says 'the' 'each' shareholder. It doesn't say 'any shareholder'.

Settlor may not be a shareholder.

'By virtue or in consequence'.

Hooton did not deal with I.R.C. v. Paton which shows that Commissioner is not a party to the settlement.

You can only look to the settlement not outside it. 'By virtue or in consequence of the settlement' doesn't mean by virtue of a direction by the Comissioner.

c.f. s.398(2)(b).

'Paid' here can only mean 'paid'.

Case No.7 obiter. No other authority produced.

s.24 could have given an extended meaning to 'income' or brought a Company in.

In the Court of Appeal for Eastern Africa

No.11.
Notes of Argument by the President 28th February 1958. (continued)

They did neither.

Allow appeal.

Hooton:

If you confirm this assessment, costs should follow the event.

C.A.V.

K.O'CONNOR,
P.
28.2.58.

2.4.58. Coram: Forbes J.A.

Bechgaard for Appellant.

Hooton for Respondent.

Judgments read by Forbes J.A. Appeal dismissed with costs.

No.12.
Notes of Argument by Mr. Justice Forbes.
28th February 1958.

NO.12.
NOTES OF ARGUMENT BY MR. JUSTICE FORBES

CIVIL APPEAL NO. 4 OF 1957.
GEORGE N. HOURY. Q.C. vs. THE COMMISSIONER OF INCOME TAX.

NOTES TAKEN BY THE HONOURABLE THE JUSTICE OF APPEAL - MR. JUSTICE FORBES.

28.2.58. Coram: O'Connor P.
Forbes J.A.
MacDuff J.

Bechgaard for Appellant.
Hooton for Respondent.

Bechgaard:

Transcript of Counsel's argument included. Judge proceeded on a ground not argued and not relied on by respondent. P.53 of record - line 35 - Did not say this - see p.13-lines 17/19, pp.13-14. That is different from what Judge said I said.

See also p.27.

Where Judge relied on ss.24(2) it was directly contrary to what I said and not based on any submission of the Crown.

Judge has equated "deemed" interest under s.22 with "contingent" interest under s.24(2).

Deemed interest gives no legal rights to receive payment.

Statement of facts at p.10. Agree facts - and p.5.

In addition, agreed at hearing that transfer of shares without consideration constituted a "settlement" for purposes of s.24(9)(b) of Act.

Appeal concerns interpretation of ss.24 and 22.

Re s.22,we are not quarrelling with directions issued under that section. But say that s.24 cannot be invoked to aggregate "deemed" distribution on the settlor - i.e. cannot superimpose s.24 on s.22 - without specific provision.

(a) Because in absence of physical payment a deemed distribution cannot be money paid to or for the benefit of a child.

(b) Because such payment if made to or for benefit of child is not in consequence of settlement.

Grounds inter-connected.

Judgment. pp.57-58.

We claim that "paid" in s.24 means paid in cash.

Crown claims that "paid" includes case where payment not made but deemed to have been paid.

We say that should have been specifically provided.

Submit first you look at word and prima facie take its natural meaning.

John Hudson & Co. v. Kirkness (1954) 1 A.E.R. 29 at p.32 - last paragraph.

Refer Inland Revenue Commissioners v. Wood Bros. (1957) 3 A.E.R. 305 at p.321 (at foot).

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Notes of Argument by Mr. Justice Forbes. 28th February 1958. (continued)

Must be clear and unambiguous words.

Russell v. Scott (1948) 2 A.E.R. 5.

I only asked for natural construction - (Foot of p.5 - p.7) last sentence of 1st paragraph of Lord Oaksey. Not asking for benevolent construction - only that tax liability should be unambigiously stated

pp.57 - 58 Judgment.

Consideration of foreign legislation.

s.24 completely derived from various portions of comparable English legislation. Hand in list showing origins of s.24. Submit Court can look at English provisions.

Submit Judge wrong in bringing in ss.24 (2) (pp.57-58 of Record).

"Arose" - phrase not used in section - we are concerned with "paid" "deemed to have been paid". Why is it deemed to be paid.Submit only by wrongly bringing in s.24(2).

Commissioners of Inland Revenue v. Pay,36 T.C. 109 at p.115. In present case notional settlement is transfer of shares without consideration. But deemed dividends have nothing to do with that. Arise by reason of exercise of statutory power. It is not part of the arrangement between settlor and beneficiaries. Submit at pp.57-58 "deemed to have been paid for benefit" is basic misconception. s.24 (2) - Only possible dealing in this case is direction of Commissioners. - Cannot be said to be by virtue or in consequence of settlement.

Simon Vol.III (2nd Edition) p.91, paragraph 92, half way down. (398).

P.104 - Point is even more clear.What s.24(2) obviously refers to is income in existence which trustee is accumulating by virtue of a settlement. Qualifications in ss. 24 (1) or 24 (2) are quite deliberate and legislature must have intended - "by virtue or in consequence of a settlement" must be given meaning. Cannot deal with something if you don't have it.

Judgment p.58. I did not say that.p.59 lines 29/30 dispute "classed as dividends actually distributed" - not words of section.Not concerned with what happens in Company's account.

Submit section does not deem money to be paid. Only intended meaning to be given to "paid" in 24(1) is that in 24(2).Section does not use word "arose", uses "paid". I say income did not arise by virtue or in consequence of settlement, but even if it was, I say it was not "paid".

p.60. How can Company "so deal with income" by virtue or in consequence of settlement. May well be a future distribution. But ss.(2) deals with a vested legal right in a trustee to get the income.

Under s.22 owner has no legal right to income whatever.

Refer ss.22 and 24 in the Act.

"deemed to have been distributed" "each shareholder".

"paid" where used means physically paid.

ss.(4) -"payment" used in sense of physical payment.

ss.(5) important. "paid" used in a physical sense.

ss.(6) most important. "deemed to have been paid" is phrase used - not paid.

Secondly, specific provision made for "fiction upon a fiction".

I say that when s.24 is superimposed on s.22, again specific provision is necessary.

Also refer to s.9 - Proviso to paragraph (c).- reference to "deemed to have been paid". Challenge Crown to show any instance apart from s.24 of "paid" used in other than physical sense.

s.24 - hotchpotch of English provisions English set - s.398(2)(b) "or any enactment relating thereto" extends meaning.

s.401(2)(b) - references to sums "deemed to be paid".

s.403 - "income" includes etc.

Cap.3 - s.411 - Interpretation section.

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Notes of Argument by Mr. Justice Forbes.
28th February 1958.
(continued)

definition of income.

i.e. Interpretation section expressly includes s.22 income in settlement income cf. ss.411(4).

Each shareholder can elect to have money paid by Company under ss.(4).

Subsection 411(4)-provision for reimbursement. Under ss.22 (4) there is no money from which to recover tax.

Submit in s.24(9) "Income" should have been expanded as in English Act. Should also have been provision connecting Company with taxpayer or else settlor/taxpayer has no remedy against Company.

s.22 based on old s.23A of Indian Act. Kanga & Palkhivala - p.556.

In India distinction made between physical and notional.

S.A. Silke - 5th Ed. p.490.

Similarly.

No legislation with sections similar to ss.22 and 24 is "paid" used to include "deemed to have been paid".

Crown founded on Case No.7, E.A.T.C. Vol. 1, p.43 at p.62. Submit that is no authority for holding that "paid" includes "deemed to have been paid". Dicta obiter.

Refer to cases in Stroud or Burrows dealing with "deemed". Most of cases opposed to it. Very few support that proposition.

I submit everything must be set down unambiguously.

Submit "paid" means paid.

Refer Paton's Case (1938) 1 A.E.R. 786 at p.794.

Legislature could have achieved the result but have not done so. No machinery to enforce tax against Company.

Submit appeal should be allowed.

Hooton:

Observations on Judgment.

s.16 of E.A. Order - Jurisdiction of Supreme Court is to examine the assessment, i.e. to look at assessment and see if it is right. ss.78(6) of Act.

Case No.15 of E.A.T.C.

(Bechgaard - Concede Court can draw what inferences it wishes from agreed facts).

I do not wish to attempt to justify assessment by s.24 (2) of Act. Submit anyway room to read Judgment as relying in particular on s.24(1).

English law. Submit no authority for proposition that because another statute has done a thing differently, a conclusion can be drawn as to meaning of local Act.

I concede that if exceptions were in identical terms, judgments of House of Lords would be of assistance. It might be permissible if terms of statute identical to refer to earlier Act if app. contending for ambiguity. But not so contending.

R. v. Titterton (1895) 2 Q.B. 61 at p.67. I will urge that language here is clear. On general principles suggest no merit in following provisions of English Act and would be dangerous so to do.

Scheme of English Act is different and draftsman has put things differently in that Act.

e.g. the section 411 of English Act refers only to Chapter III of English Act. Cap. III relates only to revocable settlements - no comparable provisions in our law. Words of s.411 - section is in interpretation of phrase "income arising under a settlement". Here only concerned with words "by virtue or in consequence of any settlement" - much wider. s.245 of English Act - deeming provisions - suggestion in absence of similar provision in our Act income of child not subject to s.24.

But s.245 of English Act relates only to surtax and ability for "deeming" provision is limited to "purposes of assessment to surtax" - "apportioned among the members". Refer s.22(1) - emphasize - "shall be included ..... for the purposes of this Act". - Submit means for all purposes of the Act. Different from English Act where this is dealt with

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Notes of Argument by Mr. Justice Forbes.
28th February 1958.
(continued)

in s.249. Different theory of collection. s.249(3) significant departure from scheme of local Act.

In our Act "deemed" dividend is included in total income.

s.22 - for all purposes of the Act the money deemed to be distributed is income of the shareholder in question. Submit those words conclusive.

Refer Case No.7, 1 E.A.T.C. 62.

That dictum not cut down by context.

Vol. II of Part I of E.A.T.C. at p.25. Judgment of P.C. 10

Submit "deemed to have been received" = "taken to have been paid" and so falls within s.24.

s.24 "by virtue or in consequence" of settlement. If my argument as to effect of s.22 accepted and at law money has been paid to child, it is difficult how it has been so paid unless it is by virtue and in consequence of settlement.

Conceded that if money physically paid it would be money received by virtue and in consequence of settlement. Having conceded, that can only fall back and say money has not been paid. 20

Notional payment must arise by virtue or in consequence of the settlement.

s.22(6) - "deemed to have been paid" - merely recalls something which has been done, i.e. the deeming.

Submit matter is settled by words "for purposes of this Act" - include legal effects of s.24.

Notional income is the income of the children and by operation of s.24 is taxable on father. 30

Adjourned to 2.30 p.m.

A.G.F.

2.30 p.m. Bench and Bar as before.

Bechgaard in reply:

Crown cannot succeed without disowning Judgment in Court below.

Judge nowhere finds in favour of Crown on 24(1).

Matter to bear in mind on costs.

Crown cannot point to one instance of "paid" used in wide sense.

If Crown contention right,no need anywhere to deal with "deemed" income.

ss.(6) of s.22 - no need to deal specifically with a fiction upon a fiction.

s.245 relates only to surtax. When it was originally introduced it was referable to surtax - and can only refer to surtax. Company tax already paid.

In case of E.A., tax is assessed on taxpayer and he can elect whether to pay or pass it on to Company.

In U.K. assessed on taxpayer but paid by Company unless taxpayer otherwise elects.

Under s.24 no adequate machinery to ensure payment of tax by Company - settlor cannot come back on the Company. Even more obvious if settlor is not a shareholder.

No machinery to provide for the Crown contention.

Case No. 7 in E.A. Tax Cases. p.62.

Crown contends under s.22 persons between whom fiction is to be resorted to is the Commnr. and the shareholders.

Dealing with each shareholder individually Crown contention unsound unless shareholder inter se resort to fiction.

Crown seeking to extend fiction to shareholders as a group - seeking to aggregate their incomes.

First of all Company has paid tax at 5/- in £. Then Commissioner issues a direction and 60% deemed to have been distributed and shareholders assessed to surtax.

Object to further aggregation under s.24.

P.25 of E.A. Tax Cases Vol. II, Part I.

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28th February 1958.
(continued)

"to be regarded as received by the shareholder". Agree and submit it does not take it any further.

Nowhere does Act refer to "any" shareholder. In this case settlor happens to be a shareholder. But fiction cannot extend to settlor who is not a shareholder.

"by virtue and in consequence"

Pay case - not dealt with. Only applies where settlor is a party. Commissioner is not a party.

Sole cause of income being deemed to arise is direction under s.22.

Submit can only look at normal rights under settlement.

Submit appeal should be allowed.

Hooton:

Submit if appeal fails costs should follow the event.

C.A.V.

A.G. FORBES,

J.A.

28.2.58.

2.4.58. Coram: Forbes J.A.

Bechgaard for Appellant.

Hooton for Respondent.

Judgments read. Appeal dismissed with costs.

A.G. FORBES,

JUSTICE OF APPEAL.

In the Court of Appeal for Eastern Africa

No.13.
Notes of Argument by Mr. Justice Mac Duff
28th February 1958.

NO.13.
NOTES OF ARGUMENT BY MR. JUSTICE MAC DUFF

CIVIL APPEAL NO. 4 OF 1957.
GEORGE N. HOURY, Q.C. vs. THE COMMISSIONER OF INCOME TAX.

NOTES TAKEN BY THE HONOURABLE MR. JUSTICE MacDuff.

28.2.58. Coram: O'Connor P.
Forbes J.A.
MacDuff J.

Bechgaard for Appellant

Hooton for Respondent.

Bechgaard:

Judge proceeded on ground not argued hence.

Agreed that transcript of addresses be included.

Refers to pp.52,53 - judgment.

Argument on pp.14-15 - as underlined.

Judge has misunderstood, and wrongly recorded argument.

See also pp.28/29 of typescript.

To show that Respondent did not rely in any way sec.24(2).

Difference between sec.22 and sec.24(2). 22 - shareholder no right to receive payment. 24 (2) While payment to beneficiary contingent payment to trustee vested.

Statement of facts, p.10, p.5.

Agreed addition - that transfer of shares to children without consideration came within scope of sec.24(9)(b).

Once having deemed distribution under s.22 you cannot invoke s.24 to aggregate distribution on settlor in absence of specific legislative authority.

In the Court of Appeal for Eastern Africa

No.13.
Notes of Argument by Mr. Justice MacDuff
28th February 1958.
(continued)

Because (a) ground 1 of memorandum of appeal.

(b) ground 2 of memorandum of appeal.

Largely interconnected.

Contentions appear "Paid" in sec. 24 means "paid" in cash or equivalent of cash.

Crown: "Paid" means deemed to have been paid as well as actually paid.

Look at word and prima facie give it its ordinary meaning.

John Hudson & Co. v Kirkness (1954) 1 A.E.R. 29, at p.32.

I.R.C. v Wood Bros. Ltd. (1957) 3 A.E.R. at 321.

Where you go outside normal meaning and seek to give notional meaning this must be done in clear and unambiguous words.

Russell v Scott. (1948) 2 A.E.R. 5.

Taxpayer is entitled to have his liability to tax set out in clear and unambiguous words.

On foreign legislation - it is open to Court at any time.

Sec.24 taken from U.K. legislation.

(Hands in list showing sources of E.A. sec. 24).

Sec.24(2) "by virtue and in consequence of"

C.I.R. v Pay 36 T.C. 109 at p.115.

Cannot be said that distribution of income was "part of arrangement".

"deemed to have been paid for the benefit of the child" is basic misdirection.

Only possible dealing is that by Commissioner under s.22 - is that dealing "by virtue or in consequence of".

On U.K.Regulation sec.398 and 397(1),Simon 2nd Edition, Vol. 3 p.91; p.104 "income accumulated".

Sec.24 (2) obviously refers to where trustee has received income and is accumulating it under terms of settlement.

The qualifications in sec.22 and 24(1) (2) are deliberate.

It is only if money comes within sec. 24a that extended meaning is given to paid under sec. 24 (1) and this would be "by virtue or in consequence of" the settlement.

Refers to sec.22 and 24 in Act.

In Sec. 22 paid wherever it occurs means physically paid.

Sec. 22(1)

(4)

(5) contemplates (a) notional followed by (b) actual distribution.

(6) (1) words used "deemed to have been paid" as distinct to paid.

(2) specific provision has been made for second fiction, i.e. superimpose 22 on sec.22.

Same specific provision should apply to sec. 24 on sec.22.

Sec. "paid or deemed to have been paid" - sec.9(1) proviso (c).

In whole Act paid means physically "paid".

24(1).

U.K. 398 2 (b) "enactment"

401 2 (b) "proved to be paid".

403 income includes other things.

411 (1) (b) income "arises" under a settlement.

Income included only by virtue of this interpretation.

In the Court of Appeal for Eastern Africa

No.13.

Notes of Argument by Mr. Justice MacDuff. 28th February 1958. (continued)

(A) Company brought written order of settlement. Without this Company could not pay.

24 (4) Settlor pays but cannot get reimbursement from Company under sec.22 - each and such shareholder. Further requirements.

Income should have been expanded as in U.K. Act.

Sec.411 (4) of U.K.

Our Sec.22 based on 23A Indian Income Tax Act.

In sec. 16 phrase used is "paid or deemed to have been paid". 10

Ref. p.556. 2nd Edition Indian Income Tax Act.

Silke 5th Edition, S.A. Income Tax Act, p.490.

Sec. 9 (2) received or deemed to have been received.

(3) " "

et seq.

In no legislature based on same principles as sec. 22 and 24 cannot find one example where paid includes deemed to have been paid.

Case 7 E.A.T.C. Vol. 1 43 at p.62, 4th paragraph. 20

No authority that paid means deemed to be paid.

Completely obiter.

Stroud and Burrows opposed to this meaning.

Paton v I.R.C. 1938. 1 A.E.R. 786 at p.794, on meaning of "paid".

This is clear omission from Ordinance.

Hooton:

Sec. 16 of C. of A. Order. 30

Jurisdiction of High Court in Income Tax Appeal in sec.78 is to examine assessment and see if it is right. Sec. 78(6).

Case 15 1 E.A.T.C. explains.

Agreed Court is looking at matter res integra and can make own finding on statement of facts.

Hence do not rely on sec. 24 (2) to support assessment.

U.K. Law.

No authority that because another statute has done a thing differently we should draw conclusions as to our law.

Concede that if sections and scope of Act identical decisions would be of use.

Reference to earlier statute only if ambiguity.

R. v. Titterton (1895) 2 Q.B. 61 at p.67.

Therefore no profit to be gained from other legislation unless whole of provisions are exhaustively examined.

Danger - Sec. 411 U.K. refers only to Chapter 3.

Chapter 3 relates only to revokable settlements and while settlor retains an interest.

There are no comparative provisions in E.A. and in any case interpretation "income arising under a settlement". Sec. 405 is only one which uses these words.

Argument of appellant.

Sec. 245 U.K. - deeming sections dealt with under 411 of U.K. Act. Therefore in absence of similar specific provisions in our Act we cannot so deal.

But sec.245 relates only to surtax - sec.22, section finishes "for the purposes of this Act",i.e. even for provisions of sec. 24, sec. 245 leaves it to sec. 249 to say what are results - in collection and scheme completely different to E.A.

In E.A. amount included in "total income".

sec.22. Moneys deemed to be distributed is such "For all purposes of this Act and is part of total income of person in question."

In the Court of Appeal for Eastern Africa

No.13.

Notes of Argument by Mr. Justice MacDuff. 28th February 1958. (continued)

See Case 7, 1 E.A.T.C. at p.62.

Case No.21, 2 E.A.T.C. Part 1, p. 25 (P.C.) "received".

Sec.24 "by virtue and in consequence of".

If sec.22 means paid and received then in law money has been paid to child.

How can it be paid except by virtue or in consequence of settlement.

Sec.22(6) deemed to have been paid refers only to machinery of what has happened. 10

"shall be included in the total income of such shareholder for the purposes of this Act" conclusive.

12.45 p.m. Adjourned to 2.30 p.m.

2.30 p.m. Bench and Bar as before.

Bechgaard in reply:

Bechgaard:

Without praying in aid sec.24(2)(a) the learned Judge has been unable to convert paid into deemed to have been paid. 20

Has bearing on question of costs.

If Crown contention is correct that after words "the share ..... Act" has wide meaning then Section 22(6) is superfluous.

No instance inside or outside Act where paid means deemed to have been paid.

Paid in sec.24(1) hedged in by "by virtue or in consequence of" "for the benefit of"

Sec.22 first introduced in 1943 for avoidance of surtax. If now invoked it can only be so for 30 the object of taking it into surtax class.

Only practical difference between sec.22 and sec. 245 (U.K.) option to pay tax is different - but in practice Company always pays.

Under sec. 24 no adequate provision to ensure

payment of tax assessed in this manner. The settlor cannot come back on the Company. If settlor outside Company - he would have no right whatsoever against Company under sec.24(4).

Crown contends that "shall be deemed" applies "that thing has been done" applies as between Commissioner and shareholder. This is right.

Coming to sec. 24 Crown seeks to contend that interpretation applies as between shareholders inter se.

Sec. 22 (1) deemed to have been distributed not paid.

Reference is to such shareholder, the shareholder, each, not any shareholder by virtue and in consequence.

Ignores that settlor only party to arrangement.

Sole cause of income arising was direction of Commissioner. He was not part of arrangement. Where is nexus between Commissioner and settlement.

C.A.V.

J. MACDUFF,
J.

In the Court of Appeal for Eastern Africa

No.13.
Notes of Argument by Mr. Justice MacDuff.
28th February 1958.
(continued)

NO.14.
JUDGMENT

No. 14.
Judgment
2nd April 1958

JUDGMENT OF FORBES J.A.

This is an appeal from a judgment of the High Court of Tanganyika dismissing an appeal by a taxpayer against certain assessments to income tax.

There was no dispute as to the facts of the case, which were agreed by the parties and are set out in the Statement of Facts filed in the High Court. For the purposes of this appeal it is sufficient to state that the appeal concerns notional income arising by reason of an order made by the Commissioner of Income Tax under section 22 (1) of the East African Income Tax (Management) Act, 1952 (hereinafter referred to as the Act) directing that a portion of the undistributed income of a company

In the Court of Appeal for Eastern Africa

No.14. Judgment 2nd April 1958. (continued)

shall be deemed to have been distributed as dividends amongst the shareholders. The particular shares to which the appeal relates were held by sons of the appellant who, at the material time, were "children" within the meaning of section 24 (9) of the Act. The appellant conceded (and had conceded before the High Court) that the Commissioner's order under section 22(1) was properly made, and that the transfer of the shares in the company by the appellant to his sons constituted a settlement for the purposes of section 24 of the Act, the appellant being the settlor. The short points for decision were (a) whether the notional income arising on such shares by reason of the Commissioner's order under section 22 (1) of the Act was, or was to be treated as, "income paid to or for the benefit of a child of the settlor" under section 24 (1) of the Act, and (b) if it was to be so treated, whether it was so paid "by virtue or in consequence of" the settlement.

Section 22 (1) of the Act provides that in certain circumstances where the Commissioner is satisfied that,in respect of any period for which the accounts of a company have been made up, the amounts distributed as dividends by the company, increased by any tax thereon, are less than sixty per cent of the total income of the company, he may

> "by notice in writing order that the undistributed portion of sixty per cent of such total income of the company for that period shall be deemed to have been distributed as dividends amongst the shareholders ..... and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purposes of this Act."

And section 24(1) of the Act provides

> "Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of income, the income shall be treated for all the purposes of this Act as the income of the settlor for that year and not as the income of any other person."

The learned Judge in the Court below, in

dismissing the appellant's appeal to the High Court, relied largely on paragraph (a) of subsection (2) of section 24 of the Act, which reads as follows:

> "(2) Subject as hereafter provided, for the purposes of this section -
>
> (a) income which, by virtue or in consequence of a settlement to which this section applies, is so dealt with that it, or assets representing it, will or may become payable or applicable to or for the benefit of a child of the settlor in the future(whether on the fulfilment of a condition,or the happening of a contingency, or as the result of the exercise of a power or discretion, or otherwise) shall be deemed to be paid to or for the benefit of that child."

He said

> "Section 24 goes further. The income of the company included certain monies or perhaps assets represented in the company's accounts as monies, which may have become payable or applicable to the benefit of Christopher and Robin in the future. The section deems those monies to be paid to or for the benefit of those children of the settlor and by subsection (1) any income paid to or for the benefit of a child of the settlor in any year of income is to be treated for all the purposes of the Act as income of the settlor for that year ..... I cannot accept the submission of learned counsel for the appellant that the income must arise by reason of some internal provision within the settlement ..... The income arises in the accounts of the company and so to the ultimate benefit of the shareholders of whom Christopher and Robin became part in consequence of the Shares having been settled on them by the settlor. For that reason it seems to me that the income arose, in so far as the children are concerned, in consequence of the settlement ..... The company has 'so dealt with' the income by including it in its accounts for that particular year and the children being shareholders, I do not think it could reasonably be suggested that it will not or may not become payable or applicable to their benefit at some time in the future .....

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No.14. Judgment 2nd April 1958. (continued)

As to the second ground, this income which was deemed to have been distributed under section 22, is not perhaps income factually paid to the sons but is in fact income which has been so dealt with by the company that it will or may become payable or applicable to the benefit and is to be treated as the income of the appellant. It is therefore, in my view, correctly included in the respondent's assessment."

With great respect to the learned Judge, I think his argument shows some confusion of thought between subsection (1) and subsection (2) of section 24. So far as paragraph (a) of subsection(2) is concerned, the question is not merely whether the income arises by virtue or in consequence of the settlement, but whether "by virtue or in consequence of the settlement" the income is "so dealt with that it, or assets representing it, will or may become payable or applicable to or for the benefit of a child of the settlor in the future." It appears to me that this clearly contemplates a "dealing" with the income by reason of some internal provision within the settlement, e.g. a direction to accumulate income during minority. It is true that the action of the company in withholding the profits from distribution may result eventually in a share of the profits or assets representing that share becoming payable to the children of the appellant in the future. But I am unable to see that the withholding of distribution is in any sense a dealing with the income "by virtue or in consequence of the settlement". In my opinion, therefore, the assessment cannot be supported on the basis of paragraph (a) of subsection (2) of section 24, and, in fact, counsel for the respondent did not seek to rely on that paragraph, either on the appeal before the High Court or on this appeal.

Counsel for the respondent did, however,rely on subsection (1) of section 24 read in conjunction with subsection.(1) of section 22 to justify the assessment.

For the appellant it was argued that "paid" in section 24(1) meant paid in cash,that is physically paid, and not "deemed to have been paid"; that that was the natural prima facie meaning of the words in section 24(1), and that express provision would be necessary to extend it; that sections 22(1) and 24 each created a fiction and that

express provision would be necessary to superimpose one fiction on the other; that in subsection (6) of section 22 where income deemed under the section to have been paid is referred to, the phrase "deemed to have been paid" is used, but that no such phrase appears in section 24; that subsection (6) of section 22 does in fact make express provision for superimposing one fiction upon another; that if notional income under section 22 is to be treated as income of a settlor under section 24, a settlor would be unduly penalised since he would not be entitled to recover the amount of tax from the company under section 22(4) and that such an injustice cannot have been intended.Counsel for the appellant also described section 24 as a "hotchpotch of the provisions of the English Act", and sought to draw a comparison between the provisions of the English Income Tax Act,1952, and the provisions of the East African Act, arguing that in the East African Act the legislature had failed to achieve the result for which the Crown contended, that result being achieved by other means in the English Act.

It is, of course, legitimate to refer to corresponding legislation in other territories when seeking to ascertain the true construction to be placed on provisions of a local statute and, if the provisions in question are identical or nearly identical, judicial decisions relating to the provisions of the foreign statute may be of great assistance in the consideration of the local provisions. Where, however, the scheme of the two statutes is different, it is difficult to draw a conclusion as to the effect of the one from a study of the method by which a particular result has been achieved in the other. The question was considered by the Privy Council in Commissioner of Stamps, Straits Settlements v. Oei Tjong Swan (1933) A.C. 378 at pp. 387 and 389, where Lord Macmillan in the course of his judgment says

> "The answer to the question must be found from an examination of the Ordinance itself, for the best and safest guide to the intention of all legislation is afforded by what the legislature has itself said.
>
> .....
>
> The difficulty in which the learned judges find themselves in accounting for the terms of s. 73, sub-ss. 2 and 3, consistently with their decision is entirely occasioned by their

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No.14. Judgment 2nd April 1958. (continued)

"approach to the problem of construction which the case presents. Instead of first considering the terms of the Ordinance itself, they have at once entered upon an elaborate comparison of its provisions with those of the (Imperial) Finance Act of 1894, and proceeded to draw inferences from the variations between the Ordinance and the Imperial statute. This is a perilous course to adopt and one which certainly does not commend itself to their Lordships. Decisions of the Imperial Courts on statutes dealing with the same subject-matter may often be useful in the interpretation of similar provisions in colonial measures, and a comparison between similar measures of the Imperial and the Colonial Legislatures may on occasion be helpful: cf. Alcock, Ashdown & Co. v Chief Revenue Authority, Bombay (1923) L.R. 50 I.A. 227, 238. But it is quite a different thing to institute a textual comparison such as has here been made and to rely on conjectures as to the intention of the draftsman in selecting some and rejecting other provisions of his presumed model."

In the instant case I have studied the provisions of the Income Tax Act, 1952, to which the Court was referred (i.e. Chapter III of Part IX and Chapters II and III of Part XVIII) but find myself unable to derive any useful guidance from a textual comparison between those provisions and the provisions of sections 22 and 24 of the East African Act. I propose therefore to base my conclusions as to the construction to be placed on those sections of the East African Act purely on a consideration of the provisions of the Act itself.

In the first place, I agree with counsel for the appellant that "paid" in section 24(1) prima facie means physically paid, and that special provision is necessary to extend that meaning. I disagree, however, that such special provision does not exist. If I understood counsel's argument correctly, he contended that such special provision ought to be contained within section 24 itself. I cannot, however, see any reason for this so long as the Act makes it clear that the special provision is intended to apply to section 24; as, for instance, is normal procedure in the case of an interpretation section. The relevant special provision here is the material part of section 22 (1) which is set out above. That section expressly provides that the undistributed portion of sixty per

cent of the total income of the company " shall be deemed to have been distributed as dividends" and that notional income which is deemed to have been distributed to each shareholder "shall be included in the total income of such shareholder for the purposes of this Act." It seems to me that the plain meaning of the words of the section is that notional income arising in consequence of an order made under the section is to be treated for all the purposes of the Act as income actually paid to the shareholder, and that, therefore, for the purposes of section 24 such notional income must be treated as income actually paid. I see no inference arising from the inclusion in section 22 of subsection (6) which would affect the construction I have put on subsection (1). Subsection (6) is intended to remove any possible doubts as to the construction to be placed on the earlier provisions of subsection (1) itself, and I do not see that it can affect the application of subsection (1) to other provisions of the Act. As to the phrase "deemed to have been paid" in subsection (6), its use in the context to indicate notional income arising under subsection (1), and that notional income only, appears to me to be a normal and natural use of language. I certainly cannot draw the inference that throughout the rest of the Act there should be express reference to the income "deemed to have been paid" whenever an instance arises where that income is to be treated as income actually paid. To do so would render superfluous the final provision of subsection (1) of section 22. In my view, the main significance of subsection (6) is that it makes it quite clear that income "deemed to have been distributed" under subsection (1) is regarded as "deemed to have been paid" to a shareholder.

Counsel for the appellant also argued that apart from section 24 there is no instance in the Act where the word "paid" is used in a sense which would include notional income under section 22. That may well be so, but clearly the subject matter to which the word "paid" refers in each case must be governed by the context. Certainly no instance was pointed out where a reference to income paid was coupled with an express reference to income deemed to have been paid under section 22.

As to the argument that a settlor would be unable to recover from a company under section 22 (4) any tax paid by him on notional income and so be unduly prejudiced, if this were indeed the case I should still find difficulty in putting any construction other than that which I have indicated on

In the Court of Appeal for Eastern Africa

No.14. Judgment 2nd April 1958. (continued)

section 22 (1). In fact, however, it appears to me that prejudice would not result to the settlor. Subsection (4) of section 22 provides that

> "Where the proportionate share of any shareholder of a company in the undistributed profits of the company has been included in his total income for any year under the provisions of sub-section (1) the tax payable in respect of such proportionate share may ..... be recovered from the company ....." 10

It is perfectly true that the settlor is not the shareholder for the purposes of this subsection. But the settlor's remedy is under subsection (4) of section 24 which provides

> "Where by virtue of subsection (1) any tax becomes chargeable on and is paid by the person by whom the settlement was made, that person shall be entitled to recover from any trustee or other person to whom the income is payable by virtue or in consequence of the settlement 20 the amount of the tax so paid ....."

In the instant case income from the shares in the company, whether notional or otherwise, is payable to each child and the settlor is entitled to recover the tax paid from the children. I see nothing to prevent the children in their turn from recovering the amount of the tax from the company under subsection (4) of section 22.

Two cases have been cited which contain dicta which tend to support the view I have taken of the 30 construction to be placed on sections 22 and 24 of the Act. These are Case No. 7, 1 E.A.T.C. 43, and Case No. 21, 2 E.A.T.C. 1. These dicta relate respectively to section 21(1) of the War Revenue(Income Tax) Ordinance of Tanganyika and section 21 (1) of the Income Tax Ordinance of Uganda, the material parts of which are identical with section 22 (1) of the Act. In the former case the then President of this Court said (at p. 62):

> "Similarly, when section 21(1) of the Income 40 Tax Ordinance enacts that 'the undistributed portion of sixty per cent of such total Income of the company for that period shall be deemed to have been distributed as dividends amongst the shareholders', a shareholder cannot be heard to say that the undistributed portion so distributed ought to be less than 60 per cent. When

the legislature enacts that something shall be deemed to have been done, which in fact and in truth has not been done, and plainly indicates between what persons that statutory fiction is to be resorted to, the Court is bound to treat the thing which 'shall be deemed' to have been done as having been done and cannot go behind the plain language of the enactment. In Darling, J's words in Brooks v Baker (1906) 1 K.B.11 at p.15: 'the Court is sometimes obliged by the Legislature to put an interpretation on a word which it does not ordinarily bear when it has been enacted that something "shall be deemed" to be something else.'"

And in the latter case the following passage appears in the judgment of the Privy Council at p. 25:

"It will be seen that when the conditions stated in sub-section (1) of existing section 21 are satisfied the Commissioner has the power to make an order under which the undistributed portion of 60 per cent of the total income of a company for a period specified in the sub-section is notionally to be regarded as having been distributed, and the 'proportionate share thereof of such shareholder' is to be regarded as having been received by the shareholder for purposes of assessing the amount of income tax payable by him."

It is true that neither case relates to the point at issue here. Nevertheless I find myself fortified in the view I have taken by the dicta contained in the passages I have quoted.

Counsel for the appellant, if I understood him correctly, submitted that there was no authority for the proposition that "paid" included "deemed to have been paid" and that "most of the cases in Stroud or Burrows dealing with 'deemed' are opposed to that construction." In the view I take, however, it is not a question whether the word "paid" ordinarily includes "deemed to have been paid" but whether income deemed to have been paid by virtue of the provisions of the Act is to be treated for the purposes of the Act as actually paid. I can find nothing in the cases cited in Stroud's Judicial Dictionary (3rd Ed.) or Burrows' Words and Phrases opposed to the view I take. On the contrary, they appear to me to support it. It is true that the cases indicate that it is necessary "to ascertain for what purposes and between what persons the statutory fiction is

In the Court of Appeal for Eastern Africa

No.14. Judgment 2nd April 1958 (continued)

to be resorted to" (Ex. p. Walton, 17 Ch. D. 746 at p. 756 and case No. 7 supra). But I do not see that that presents any difficulty here. The object of the legislature is clear. It is to prevent the use of certain devices for the avoidance of tax. These devices are (a)accumulation of profits by a company, so that there is no dividend to include in the shareholders' taxable income, and (b) reduction of a taxpayer's income by means of settlements of capital on the taxpayer's children. It appears to me wholly consistent with the clear object of the legislature that notional income which, under section 22 (1), falls to be included in the total income of a child arising under a settlement, should be included in the income of the settlor under section 24, and that the persons to whom the statutory fiction arising under section 22 applies must include the person made responsible by the legislature for payment of tax arising under a settlement to which section 24 applies.

This brings me to the second ground of appeal, which is that the notional payment was not a payment "by virtue or in consequence" of a settlement. Counsel for the appellant conceded that if an actual payment of dividend had been made,it would have been a payment "by virtue or in consequence" of the settlement, but argued that in the case of a notional dividend it arose by virtue or in consequence of the action of the Commissioner of Income Tax and not by virtue of the settlement. I cannot accept that argument. It is true an act of the Commissioner is necessary to create the notional dividend,but for that matter an act of the company is necessary to create an actual dividend. The fact remains that the notional dividend accrues to the particular infant by virtue of his holding shares settled on him under the settlement. I consider it clear that the notional dividend can only accrue to the particular child "by virtue or in consequence" of the settlement.

For the reasons given above I consider that both grounds of appeal fail. Some suggestion was made by counsel for the appellant to the effect that, if the appeal were dismissed, the question of costs might be affected if the reasoning of the learned Judge in the Court below were held to be unsound. I do, in fact, hold the view that that reasoning was unsound, but nevertheless I consider that the costs should follow the event. Accordingly I would order that the appeal be dismissed with

costs.
A.G. FORBES
JUSTICE OF APPEAL

In the Court of Appeal for Eastern Africa

JUDGMENT OF O'CONNOR P.

No.14.
Judgment
2nd April
1958.
(continued)

I also agree. The appeal is dismissed with costs.

K.K. O'CONNOR.
PRESIDENT.

JUDGMENT OF MacDUFF J.

I agree and have nothing to add.

J. MacDUFF
JUDGE.

NAIROBI.
2nd April, 1958.

DELIVERED by Forbes J.A.

No.15.
ORDER DISMISSING APPEAL

No.
Order
Dismissing
Appeal
2nd April
1958

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI
CIVIL APPEAL NO.4 OF 1957.

BETWEEN

GEORGE N. HOURY, Q.C. ..... APPELLANT
AND
THE COMMISSIONER OF INCOME TAX ..... RESPONDENT

(Appeal from a judgment of the High Court of Tanganyika at Dar-es-Salaam (Mr. Justice Lowe) dated the 12th November, 1956 in

Miscellaneous Civil Appeals Nos: 17 & 18 of 1955
B E T W E E N
George N. Houry, Q.C. ..... Appellant
and
The Commissioner of Income Tax ..... Respondent).

O R D E R

In Court this 2nd day of April, 1958.

Before the Honourable the President (Sir Kenneth O'Connor) the Honourable Mr. Justice Forbes, a Justice of Appeal and the Honourable Mr. Justice MacDuff, a Judge of the Court.

This appeal coming on for hearing on the 28th day

In the Court of Appeal for Eastern Africa

No.15
Order Dismissing Appeal
2nd April 1958.
(continued)

of February, 1958, AND UPON HEARING K. Bechgaard, Esq., of Counsel for the Appellant and J.C. Hooton, Esq., of Counsel for the Respondent IT WAS ORDERED that this appeal do stand for judgment and the same coming for judgment this day IT IS ORDERED :

(a) that this appeal be and is hereby dismissed and

(b) that the Appellant do pay the Respondent's costs of this appeal.

GIVEN under my hand and the Seal of the Court at Nairobi, the 2nd day of April, 1958.

M.D. DESAI.
ASSOCIATE REGISTRAR.

ISSUED at Nairobi this 15th day of May, 1958.

No.16.
Order Granting Conditional Leave to Appeal.
19th June 1958.

NO.16.
ORDER GRANTING CONDITIONAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL.

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

CIVIL APPLICATION NO. 4 OF 1958.

(In the matter of an Intended Appeal to Her Majesty in Council)

BETWEEN

GEORGE N. HOURY Q.C. ..... Applicant

AND

THE COMMISSIONER OF INCOME TAX ..... Respondent

(Intended Appeal from the Judgment of Her Majesty's Court of Appeal for Eastern Africa dated the 2nd day of April 1958 in Civil Appeal No. 4 of 1957

Between

George N. Houry Q.C. ..... Appellant

and

The Commissioner of Income Tax ..... Respondent)

O R D E R.

In Chambers this 19th day of June, 1958.
Before the Honourable Mr. Justice Forbes, a Justice of Appeal.

UPON application made to the Court by the

above named Applicant on the 23rd day of May 1958, for Conditional Leave to Appeal to Her Majesty in Council under Section 3 of the East African (Appeals to Privy Council) Order-in-Council, 1951, AND UPON HEARING the Counsel for the Applicant and the Counsel for the Respondent THIS COURT DOTH ORDER that the Applicant DO HAVE leave to appeal under paragraph (a) of Section 3 to Her Majesty in Council from the Judgment and order of the Court, above named, subject to the following conditions :

1. That the Applicant do within ninety days from the date hereof enter into good and sufficient security, to the satisfaction of the Registrar, in the sum of Shillings ten thousand (a) for the due prosecution of the appeal (b) for payment of all costs becoming payable by him to the Respondent in the event of (i) the Applicant not obtaining an order granting him final leave to appeal or (ii) the appeal being dismissed for non-prosecution or (iii) the Privy Council ordering the Applicant to pay the Respondent's costs of the Appeal or any part of such costs;

2. That the Applicant shall apply as soon as practicable to the Registrar of the Court for an appointment to settle the record and the Registrar shall thereupon settle the record with all convenient speed and that the said record shall be prepared and certified as ready within sixty days from the date hereof;

3. That the Registrar, when settling the record, should state whether the Applicant or the Registrar shall prepare the record, and if the Registrar undertakes to prepare the same, he shall do so accordingly, and if, having so undertaken he finds he cannot do or complete it, he shall pass on the same to the Applicant in such time as not to prejudice the Applicant, in the matter of the preparation of the record within sixty days from the date hereof;

4. That if the record is prepared by the Applicant, the Registrar of the Court shall at the time of the settling of the record, state the minimum time required by him for examination and verification of the record, and later examine and verify the same so as not to prejudice the Applicant in the matter of the preparation of the record within the said sixty days;

5. That the Registrar shall certify (if such be the case) that the record (other than the part of the record pertaining to final leave) is or was ready within the said period of sixty days;

In the Court of Appeal for Eastern Africa

No.16. Order Granting Conditional Leave to Appeal. 19th June 1958, (continued)

6. That the Applicant shall have liberty for extension of times aforesaid for just cause;

7. That the Applicant shall lodge his application for final leave to appeal within fourteen days of the date of the Registrar's certificate above-mentioned : and the Applicant, if so required by the Registrar, shall engage to the satisfaction of the said Registrar to pay for a typewritten copy of the record (if prepared by the Registrar) or for its verification and for the costs of postage payable on transmission of the typewritten copy of the record, officially to England and shall, if so required, deposit in Court the estimated amount of such charges.

AND IT IS FURTHER ORDERED that the costs of and incidental to this application be costs in the intended appeal.

GIVEN under my hand and the Seal of the Court at Nairobi, this 19th day of June, 1958.

F. HARLAND.
REGISTRAR.

ISSUED at Nairobi this 21st day of June, 1958.

No.17. Order Granting Final Leave to Appeal. 27th August 1958.

NO.17.

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL.

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA AT NAIROBI

CIVIL APPLICATION NO. 4 OF 1958

(In the Matter of an Intended Appeal to Her Majesty in Council)

BETWEEN

GEORGE N. HOURY Q.C. ..... Applicant

AND

THE COMMISSIONER OF INCOME TAX ..... Respondent

(Intended Appeal from the Judgment of Her Majesty's Court of Appeal for Eastern Africa delivered at Nairobi on the 2nd day of April, 1958

in

Civil Appeal No. 4 of 1957

Between

George N. Houry Q.C. ..... Appellant

and

The Commissioner of Income Tax ..... Respondent).

O R D E R

In Chambers this 27th day of August, 1958.

Before the Honourable the President (Sir Kenneth O'Connor).

UPON the Application presented to this Court

on the 21st day of August 1958 by the Advocate for the abovenamed Applicant AND UPON READING the Affidavit in support thereof of K. Bechgaard sworn on the 21st day of August 1958 AND UPON HEARING K. Bechgaard, Esq., Advocate for the Applicant, and H. B. Livingstone, Esq., Advocate for the Respondent, THIS COURT DOTH ORDER that the Application for Final Leave to Appeal to Her Majesty in Council be and is hereby granted AND DOTH DIRECT that the Record including this Order, be despatched to England within fourteen days from the date of issue of this Order AND DOTH FURTHER ORDER that the Costs of this Application do abide the result of the Intended Appeal.

GIVEN under my hand and the Seal of the Court at Nairobi the 27th day of August, 1958.

F. HARLAND.
REGISTRAR.
H.M. COURT OF APPEAL FOR EASTERN AFRICA.

ISSUED this 27th day of August, 1958.

In the Court of Appeal for Eastern Africa

No.17.
Order Granting Final Leave to Appeal.
27th August 1958.
(continued)

IN THE PRIVY COUNCIL

No. 27 of 1958

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N

GEORGE N. HOURY, Q.C. Appellant

- and -

THE COMMISSIONER OF INCOME TAX Respondent

RECORD OF PROCEEDINGS

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CHARLES RUSSELL & CO.,
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