~~G.I.G.~~ 3, 1961

IN THE PRIVY COUNCIL No. 42 of 1958

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N :-

63631 KALLI ESTATES LIMITED Appellants

- and -

THE COMMISSIONER OF INCOME TAX Respondent

C A S E FOR THE A P P E L L A N T S

RECORD

1. This is an appeal brought by leave from the Judgment and Order of the Court of Appeal for Eastern Africa dated 22nd May, 1958, dismissing the Appellants' appeal against the Judgment dated 30th March, 1957, and the Decree dated 18th April, 1957, of the High Court of Tanganyika. p.137 p.179 p.47 p.76

2. The question submitted for the decision of the Court of Appeal arose in reference to assessments to income tax No.28435 for the year of income 1951 and No.13500 for the year of income 1952, made upon the Appellants under the provisions of the East African Income Tax (Management) Act, 1952.

3. The substantial question arising on this appeal is whether sums of £94,326 and £80,274 for the years of income 1951 and 1952 respectively (totalling £174,600) are allowable as deductions in computing the income of the Appellants for the respective years as being outgoings or expenses wholly and exclusively incurred by the Appellants during the respective years of income in the production of the Appellants' income.

4. The relevant legislation is contained in the

following enactments:

(a) the East African Income Tax (Management) Act, 1952, in particular sub-section (1) of Section 14 thereof;

(b) the Land Tenure Ordinance (Chapter 113 of the Laws of Tanganyika), the Land (Law of Property and Conveyancing) Ordinance (Chapter 114 of the Laws of Tanganyika), the Land Registry Ordinance (Chapter 116 of the Laws of Tanganyika), the Land (Amendment) Ordinance, 1947-49, and the Land Regulations, 1948;

(c) the German Property (Disposal) Ordinance (Chapter 258 of the Laws of Tanganyika), and the German Property (Disposal) Regulations, 1948;

(d) the Sale of Goods Ordinance (Chapter 214 of the Laws of Tanganyika).

5. Sub-section (1) of section 14 of the East African Income Tax (Management) Act, 1952, provides that for the purpose of ascertaining the total income of any person there shall be deducted all outgoings and expenses wholly and exclusively incurred during the year of income by such person in the production of income.

6. The Appellants will refer to the said Land Laws of Tanganyika for the purpose of showing the legal nature of a right of occupancy of land and the separation of the land from any and every asset or development created on land by the occupier, particularly by reference to the classification of unexhausted improvements. The Appellants will refer to the said German Property (Disposal) Ordinance and Regulations for the purpose of showing what was the nature of the rights and property granted and conveyed by the Government of the Trust Territory of Tanganyika to the Appellants (as hereinafter appearing), and to the said Sale of Goods Ordinance for the purpose of showing that certain of such property was "goods" within the meaning of such Ordinance.

p.5 p.47 p.137 7. The facts of the case appear from the Statement of Facts by the Appellants, the Judgments of the High Court and the Court of Appeal for Eastern

Africa, and may be summarised as follows:- p.137

(i) By the German Property (Disposal) Order, 1948, certain sisal estates, including the Lanconi & Mjesani Sisal Estates together with an additional 6,000 hectares of undeveloped land adjacent thereto (hereinafter referred to as "the Ralli Estates") were transferred to and vested in the Tanganyika Government as from 1st July, 1948.

(ii) As from 1st July, 1948, Ralli Brothers Limited, the parent company of the appellant company, managed the Ralli Estates on behalf of the Custodian of Enemy Property in his capacity as agent for the Tanganyika Government under the German Property (Disposal) Ordinance.

(iii) In 1950 the Tanganyika Government took steps to dispose of ex-enemy sisal estates, and after various notices more particularly described in the Statement of Facts Ralli Brothers Limited lodged an application for the Ralli Estates, undertaking to form the appellant company as a subsidiary company to work the Ralli Estates.

(iv) On 26th October, 1950, Ralli Brothers Limited were advised that their application had been successful, and thereafter, although no formal offer of a right of occupancy had been made to them, they were required to pay on account of the "premium" which was payable a deposit of 10% to wit, £31,700 in October, 1950, and a further 50%, to wit, £158,500, in November, 1950. p.16

(v) The appellant company was incorporated on 21st December, 1950, and after that date all payments and disbursements, including the balance of premium of £126,800, have been paid by the appellant company.

(vi) The payments above referred to were made by reference to a letter dated 30th September, 1950, in which the "premium" payable in respect of the Ralli Estates was shewn to be £311,000 plus an additional £6,000 for the undeveloped area adjacent to the Lanconi Estate. p.13

(vii) On the 20th December, 1950, after instalments

p.17

amounting to £190,200 had been paid on account of the premium, a formal offer of a right of occupancy was issued to the Appellants, stating, inter alia, that the offer had to be accepted by 31st December, 1950, and that if default was made in any payment under the offer, the Appellants would not be entitled to any refund of any sum already paid under such condition. The agreed copy of the letter of 20th December, 1950, by error incorporated certain amending provisions set out in a letter of 16th August, 1951, addressed by the Department of Lands and Mines to the Appellants. The originals of the letters of 20th December, 1950, and 16th August, 1951, will be available for production upon the hearing of this Appeal if required.

pp.13 & 17 (viii) Under the letters of 30th September and 20th December payments in respect of the Ralli Estates were to be made as follows:

(a) as "Premium" a total of £317,000.

(b) a yearly rental of 2/- per acre.

(c) a further amount of £174,600.

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This further amount of £174,600 was in the letter of 30th September, 1950, described as "balance due on royalty" but in the letter of 20th December, 1950, was described as "balance of such purchase monies". Such balance was to be paid by monthly instalments assessed on the tonnage of sisal line fibre exported by the Appellants each month as declared by them under the Sisal Industry Rules of 1948. At the end of each month the Collector of Customs computed the average FOB price of all sisal line fibre exported by all sisal estates during the month through the Ports of Dar-es-Salaam and Tanga and that average was deemed to be the FOB price of the exports of the Appellants, for the particular month. Thereafter the price fixed by the Collector of Customs was compared with the Schedule of FOB prices attached to the above letters dated 30th September and 20th December, 1950. The first column contains a table of FOB prices

pp.13 & 17

increasing from £70 per ton or under to a price of £146 per ton or over, and the second column contains the amount per ton corresponding to the FOB price in the first column at which the instalment on the actual exports for the month was to be calculated. The monthly payments were to cease when 19,397 tons had been cut and exported or when the total amount of the monthly instalments amounted to £174,600.

(ix) Owing to a fortuitous rise in sisal prices the amounts of £94,326 and £80,274, totalling £174,600, were paid by the Appellants in 1951 and 1952 respectively after only 3,383 tons had been cut and exported, and were treated by the Appellants as revenue expenditure incurred in the production of their income for those years. The Respondent has refused to allow such expenditure and the assessments under appeal reflect his disallowance of these particular items of expenditure.

8. The Appellants claimed to deduct the said sums of £94,326 and £80,274 in computing the profits of their trade of sisal fibre producers for the years of income 1951 and 1952 respectively. This claim was refused by the Commissioner of Income Tax, Dar-es-Salaam, and the Appellants appealed to the High Court of Tanganyika on the grounds (inter alia) that: p.3

(a) the said payments constituted outgoings and expenses wholly and exclusively incurred in the production of income and should be allowed in accordance with the provisions of Section 14 of the East African Income Tax (Management) Act, 1952;

(b) the said payments were paid as royalty;

(c) the said payments represented part of the cost of the Stock-in-trade of the Appellants' trade.

9. On 30th March, 1957, the High Court of Tanganyika dismissed the appeals with costs. Crawshaw J., in delivering judgment rejected the submission of the Respondent that the Court was precluded from admitting evidence extrinsic to the Agreement contained in the letter of 20th December, 1950, and the acceptance of 30th December, 1950. He thought that the evidence of the surrounding circumstances pp.58 & 59

which theAppellants asked the Court to consider did not effect, alter or contradict the terms of the agreement, but merely sought to elucidate what in fact the nature of the payment of £174,600 was. By the letter of 20th December the Appellants had to pay precisely the same moneys and in precisely the same way as was provided for in the letter of 30th September, the difference being in the description of the moneys. Whereas in the letter of the 30th September, the term "royalty" was used in connection with the £174,600 (royalty having been related in earlier documents to "leaf potential"), in the letter of 20th December the word "royalty" was dropped, and the sum was described as the "balance of purchase moneys". The learned Judge found it difficult to believe that the letter of 20th December was intended to alter or modify the terms which had already been agreed between the parties. He supposed it was possible, although that was pure speculation, that the change of wording in the letter of 20th December might be explained by the Lands Department having consulted the Income Tax Authorities, which it would appear at some time it did.

In dealing with the Appellants' contention that the payment of £174,600 was a royalty, the
p.62 learned Judge agreed that even if the said payment was part of the purchase price of the Ralli Estates, it did not necessarily follow on the authorities that the payment must be looked upon in the character of principal. Consideration of purchase money might be in whole or in part capital in nature or income in nature. He went on to examine
p.63 the nature of the "leaf or sisal potential", for the use of which the Appellants said that the payment
p.65 was made. He thought that those expressions had been used rather loosely in the documents. In valuing the estates they had been used to include all the unexhausted improvements and assets which contributed to the production of sisal and for which a total price was to be assessed. In relation to actual payment reference was only to quantity of leaf which it was expected would be produced.
p.68 After reviewing the facts, and various authorities which provided "guides and signposts", he came to
p.70 the conclusion that the payment of £174,600 was based on a lump sum as part of capital valuation and had not, in his view, been calculated on true royalty.

In reference to the contention that the sum of £174,600 was paid for the acquisition of stock-in-trade, Crawshaw J. said that the Appellants argued p.72
that a right of occupancy gave a right to occupy but no title to the land itself. It was argued that what the Appellants bought, if purchase it was, was the mature and immature sisal plants and not the land, because the Appellants did not obtain, and could not obtain the freehold in the land, and in buying the
10 plants only they were buying stock-in-trade.
Crawshaw J., said that he could see no real distinction p.73
between a right of occupancy and a lease, and referred to the definition of a "right of occupancy" contained in section 2 of the Land Tenure Ordinance. He said that a thing, whether growing or otherwise, if p.73
attached to the land was part of the land irrespective of the tenure and whether situate in England or Tanganyika. He referred to various authorities, and concluded by holding that the £174,600 was not paid p.74
20 for the leaf as stock-in-trade but for part of the unexhausted improvements which constituted the sisal potential (including the plants from which the raw material could be produced) at the date of disposal.

10. The Appellants appealed to the Court of Appeal for Eastern Africa against the Judgment of the High Court of Tanganyika. The appeal came on for hearing (O'Connor, P. Briggs, V.P., and Forbes, J.A.) on 14th, 15th and 16th April, 1958, and on 22nd May, 1958, the Court delivered Judgment dismissing the p.137
30 appeal with costs.

11. O'Connor, P., in accepting the Respondent's p.161
contention that the sum of £174,600 was paid as part of the purchase price of a right of occupancy of the Ralli Estates and the unexhausted improvements thereon, and machinery, vehicles, etc., and not merely for the right to exploit the sisal potential, said that there was no suggestion in the documents in the p.162
case that all that was being sold was a right of user,
40 a licence to exploit the sisal potential. What a purchaser would pay for the estates would depend on what he expected to make out of the estates, but that did not mean he was buying only a right of user.
The "royalty" was related to the unexhausted improvements and was to be part of the purchase price of buildings, machinery and equipment which were clearly capital assets. The dropping of the expression p.163
"royalty" and the calling of the payment "balance of such purchase moneys" may have been, and probably was, done with an eye to the taxation position. But the

RECORD

p.164 Court was entitled to disregard the nomenclature and was not bound to accept whatever label was put upon the payment by the parties, but should try to ascertain what, according to the substance of the

pp.166 & 173 transaction between the parties, those payments were. In his Lordship's opinion those payments, according to the substance and the form of the transaction, were part of the purchase price of a right of occupancy of two sisal estates including land (with the mature and immature sisal thereon), buildings, machinery, effects, chattels and vehicles.

p.165 O'Connor P., referring to the nature of a right of occupancy, quoted sections 2, 7 and 18 of the Land Tenure Ordinance and said that for the purposes of the present case a certificate of occupancy was equivalent to a lease and amounted to much more than a mere revocable licence to occupy would amount to in England. He went on to refer to Section 10 of the same Ordinance and to sections 2, 5(1) (b) and 44(1)(b) of the Land Registry Ordinance and said that it was plain, he thought, that the grant in Tanganyika of a right of occupancy conferred an estate or interest in

p.173 land. Later in his judgment he said that he thought that the answer to the contention that the sum of £174,600 was paid in respect of growing sisal as stock-in-trade was that this amount was part of the purchase price of a right of occupancy of the land, buildings and permanent improvements as well as the growing sisal.

p.174 In the result he rejected the Appellants' contention that the sum of £174,600 was paid in respect of stock-in-trade, on the apparent ground that a right of occupancy conferred an interest in land.

p.175 Briggs, V.P., in a concurring judgment stated

p.176 that he was not impressed by the argument that the rights obtained under a right of occupancy in Tanganyika were only rights of user and were essentially different from a freehold or long leasehold title in England. He went on to say, however, that the circumstances in Tanganyika as regards dealings in public lands were peculiar, if not unique, and that the interest in land which the Appellants acquired was the largest interest which they could acquire or the Tanganyika Government could offer them.

Briggs, V.P., thought that substantially this was a sale of a "permanent" title to land so equipped, and in conjunction with such movables, as to constitute the whole a valuable profit-making business. p.176

Forbes, J.A., concurred. p.179

12. By an Order dated 27th August, 1958, the Court of Appeal for Eastern Africa granted conditional leave to the Appellants to appeal to Her Majesty in Council from the Judgment and Order of the Court and by further Order dated 2nd December, 1958, granted final leave to appeal. p.180 p.182

13. The Appellants respectfully submit that the Court of Appeal failed to give adequate weight to the peculiar incidents of a right of occupancy, although the unique nature of these incidents had obviously impressed Briggs, V.P. It is evident from a consideration of the relevant Tanganyika legislation that rights of occupancy are not merely a substitute for leases in the English sense, but co-exist with and materially differ from such leases. Having, it is submitted, erroneously equated rights of occupancy with English leases, the Court thereupon failed altogether to consider whether, even on that initial hypothesis, the contract contained in the formal offer of 20th December 1950, having to be read and construed with the provisions of the Land Tenure Ordinance in mind, did not require the consideration to be allocated between premium, rent, and payment for unexhausted improvements. From a consideration of the formal offer it is apparent that the premium of £317,000 was paid in respect of land, planted sisal areas, buildings, immovable machinery, fixtures and effects and that the further sum capable of varying between £174,600 and £19,397 was payable in respect of the estimated sisal line fibre potential on the Ralli Estate at the date of sale. The estimated quantity was 19,397 tons which could only be produced by the Appellants by continuing to work the estates as going concerns after 31st December, 1950, until the sisal leaf potential of the industrial crop of sisal plants at the date of sale had been cut and severed and converted into sisal line fibre. The whole of the sale proceeds derived by the Appellants by carrying on the sisal estates as a going concern after 31st December, 1950, were a receipt of their business and the monthly instalments to the Government fell to be paid thereout. This sisal line fibre

potential accordingly represented the commercial product to be obtained from the growing crop of sisal on the Ralli Estate at the date of sale and, therefore, the unexhausted improvements. It is of particular relevance that, while the actual certificate of occupancy only refers to rent, not only does the contract specifically refer to the calculated sisal line fibre tonnage of 19,397 tons, but the provisions of the Land Tenure Ordinance require that unexhausted improvements, the most important of which was the growing sisal plants, are to be separately paid for. This point may have been obscured by the fact that, in this particular transaction, the Government of Tanganyika was in the anomalous position of being in another capacity (under the Disposal Ordinance) the "previous occupier". If the "previous occupier" had been a third party other than the Tanganyika Government, payments of the premium and the rent would still, under the provisions of the Land Tenure Ordinance, have had to be made to the Tanganyika Government, but payment of the amount found to be payable under section 13(b) of the Land Tenure Ordinance in respect of unexhausted improvements would be made to the Tanganyika Government on behalf of the third party, and eventually be passed to such third party.

14. The Appellants further respectfully submit that the Court of Appeal failed to appreciate the nature of the Appellants' contention that the said sum of £174,600 was paid as royalty for the user of sisal potential. The Appellants did not suggest that the only thing which they acquired was a right of user; they admitted that they acquired a right of occupancy which was a capital asset, but they contended that they also acquired a right to exploit the sisal potential of the estate. The Court, in regarding the "royalty" as related to unexhausted improvements in general failed to take account of the words in the catalogue accompanying the press notice of 17th March, 1950, "the royalty will be .... related to the estimated leaf potential on the estate at the time of disposal".

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15. The Appellants humbly submit that the decisions of the High Court, and of the Court of Appeal are wrong and should be reversed, and that this appeal should be allowed with costs both here and below for the following amongst other

R E A S O N S

1. Because the said payment of £174,600 represented outgoings and expenses wholly and exclusively incurred in the production of income, as to £94,326 in the year of income 1951 and as to £80,274 in the year of income 1952.

2. Because the said payment was a payment made by the Appellants for acquisition of stock-in-trade of their business.

3. Because on a proper understanding of the relevant enactments the said payment was not a sum paid as part purchase price for a right of occupancy of the Ralli Estates.

4. Because on construction the relevant agreement provided separately for the payment of (i) a premium (ii) a rent and (iii) an amount in respect of unexhausted improvements, to wit, growing sisal.

5. Because under the relevant legislation unexhausted improvements on land are regarded as severable and distinct from an interest in the land itself.

6. Because the said payment was a payment by way of royalty in respect of user of the sisal potential of the Ralli Estates and as such constituted an expense wholly and exclusively incurred in the production of income.

7. Because the Judgments of the High Court of Tanganyika and of the Court of Appeal for Eastern Africa were wrong and ought to be reversed.

ROY BOURNEMAN.

K. BECHGAARD.

C. N. BEATTIE.

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Appellants

- and -

THE COMMISSIONER OF INCOME TAX,

Respondent

CASE FOR THE APPELLANTS

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