Privy Council Appeal No. 14 of 1964

Rattan Singh s/o Nagina Singh – – – – – *Appellant*

v.

The Commissioner of Income Tax – – – – – *Respondent*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND FEBRUARY, 1967.

Present at the Hearing:

LORD GUEST
LORD UPJOHN
LORD PEARSON

[*Delivered by* LORD UPJOHN]

On 28th May 1958 the respondent, acting under the powers conferred upon him by section 72 of the East African Income Tax (Management) Act 1952 (1952 Act) which was then in force, made additional assessments upon the appellant for the years income 1946/1953 inclusive. The appellant challenges the correctness of those assessments.

Section 72 provided that where it appeared to the respondent that a taxpayer had been assessed at a less amount than that which ought to have been charged he might, within seven years after the expiration of the year of income, raise additional assessments upon him. But there was a proviso in these terms:

> "(*a*) where any fraud or wilful default has been committed by or on behalf of any person in connection with or in relation to tax for any year of income, the Commissioner may, for the purpose of making good to the revenue of the Territories any loss of tax attributable to the fraud or wilful default, assess that person at any time;"

Section 40 of the same Act provided that any person who omitted from his return for any year of income any amount which should have been included should be charged with an amount of tax equal to treble the difference between the tax as calculated in respect of the total income returned by him and the tax properly chargeable after including the amount omitted. Subsections (2) and (3) of section 40 were in these terms:

> "(2) If the Commissioner is satisfied that the default in rendering the return or any such omission was not due to any fraud, or gross or wilful neglect, he shall remit the whole of the said treble tax and in any other case may remit such part or all of the said treble tax as he may think fit.
>
> (3) The additional amounts of tax for which provision is made under this section shall be chargeable in cases where tax has been assessed by the Commissioner under the provisions of section 72 as well as in cases where such income or any part thereof is determined from returns furnished."

The respondent made the additional assessments upon the footing that for each of the relevant years 1946/1953 the appellant was guilty of fraud or gross or wilful neglect, and so he claimed treble tax in respect of each year. However exercising the discretion vested in him by subsection (2) of section 40 he remitted parts of such additional tax in each year. The rate of remission varied from year to year but it is material, for the reasons which will appear later in their Lordships judgment to note that

he never charged as much as twice the basic tax by way of additional tax; the overall average additional tax for the relevant years was 152 per cent of the basic tax.

The appellant under section 74 (2) of the 1952 Act, lodged notices of objection against these additional assessments but by a notice dated 4th December 1958 the respondent, acting under section 74 (4), refused to amend the assessments or any of them and from such refusal the appellant, by notice dated 31st December 1958, appealed to the Judge under section 78 (1). Subsection (6) of that section provided that the Judge might confirm, reduce, increase or annul the assessment.

The appeal came on for hearing before Mayers J. on 6th June 1960: it lasted nineteen days spread over many months and in a reserved judgment delivered on 31st July 1961 he reached the clear conclusion that the appellant had made fraudulent returns in respect of each of the relevant years of assessment and he dismissed the appeal. The appellant appealed to the Court of Appeal (Gould, A. P., Crawshaw, A.V.P. and Edmonds J.) who dismissed the appeal, with an immaterial variation in respect of some years of income. The learned trial Judge's finding of fraud was challenged in the Court of Appeal but the Acting President, who delivered the leading judgment of that Court, expressly upheld the Judge's finding of fraud in each and every relevant year, and this finding has not been challenged before their Lordships.

Had the matter rested there two points of construction of the 1952 Act would have arisen, neither of them, as their Lordships think, of great difficulty; to these points their Lordships will briefly return later. But the major difficulty has been created by the provisions contained in a new Income Tax Act entitled the East African Income Tax (Management) Act 1958 (the 1958 Act) and published in the *Gazette* on 30th December 1958. Their Lordships must refer to a number of sections and to the Fifth Schedule to that Act.

Section 101 (1) (*a*) provided that on default in making a return the taxpayer should be charged with double the normal tax. Section 101 (1) (*b*) corresponded with section 72 proviso (*a*) and was in these terms:

> " Any person who . . .
>
> (*b*) omits from his return of income for any year of income any amount which should have been included therein shall, where such omission was due to any fraud or to any gross neglect, be charged for such year of income with an amount of tax equal to double the difference between the normal tax chargeable in respect of the income returned by him and the normal tax chargeable in respect of his total income;"

Section 101 (5) is in these terms:

> " (5) Notwithstanding anything in Part XIII, where in any appeal against any assessment which includes additional tax one of the grounds of appeal relates to the charge of such additional tax, then the decision of the local committee or judge in relation to such ground of appeal shall be confined to the question as to whether or not the failure, default, or omission which gave rise to the charge under sub-section (1) was due to any fraud or to any gross neglect; and where it is decided that such failure, default or omission was not so due, then the whole of the additional tax so charged shall be remitted."

It is to be noted, and is the chief reason for this appeal, that while under the former section 78 (6) the Judge could, in effect, vary the remission by the respondent of the treble tax, no longer has he such power under this subsection, and that in that respect the decision of the respondent is final.

Section 151 of the 1958 Act is important:

> " (1) The transitional provisions contained in the Fifth Schedule shall, notwithstanding anything in this Act, have effect for the

purposes of the transition from the provisions of the enactments repealed by this Act to the provisions of this Act.

(2) If any difficulty should arise in bringing into operation any of the provisions of this Act or in giving effect to such provisions, the High Commission may by Order amend the Fifth Schedule in such respect as appears necessary or expedient for the purpose of removing such difficulty:

Provided that no Order under this section shall be made later than 31st December, 1959, and every such Order shall be laid before the Assembly at the next meeting after the publication of such Order."

By section 152 subject to the Fifth Schedule the 1952 Act (*inter alia*) was repealed.

This brings their Lordships to the provisions of the Fifth Schedule which gives rise to the great difficulty in this case.

"1. Subject to this Schedule, the repealed enactment shall, notwithstanding its repeal, continue to apply to income tax chargeable, leviable, and collectable, under such enactment in respect of the years of income up to and including the year of income 1957, as if such enactment had not been repealed:

Provided that, as from the date of the publication of this Act in the *Gazette*, the provisions contained in Parts X to XVII inclusive of this Act shall apply as if such provisions had been contained in the repealed enactment, so, however—

(*a*) that no party to any legal proceedings by or against the Commissioner which are pending on the date of such publication shall be prejudicially affected by this paragraph;

(*b*) that Part XIII of the repealed enactment shall, in relation to any act or omission which took place before the date of such publication, continue to have effect to the exclusion of Part XV, other than section 135, of this Act."

In the Courts below the major issue was that of fraud, which does not arise here, and before their Lordships the main arguments were addressed to the effect of paragraph 1 of the Fifth Schedule on the assessments made upon the appellant which were still outstanding when the 1958 Act was published on 30th December of that year.

Two distinct points arise:

(1) What is the effect of the proviso that the provisions contained in Parts X–XVII of the 1958 Act should apply "as if such provisions had been contained in the" 1952 Act?

(2) Can the appellant claim the benefit of sub-paragraph (*a*) on the footing that legal proceedings were pending on 30th December 1958?

As to the first point, it seems to have been assumed in the Courts below that the necessary consequence of the incorporation of the stated provisions of the 1958 Act into the 1952 Act was to override the provisions of the latter Act where there was any inconsistency and only the second point was seriously argued. Before their Lordships, however, it was strenuously argued that the 1952 code remained in existence and continued to run parallel to the 1958 code, and that the latter was a supplement only to fill in any gaps in the former code. Some examples were referred to, the first three by way of argument or illustration only for they do not arise for decision in this case, and the last being directly in point, to show that the Legislature cannot have intended retroactively to have affected the vested rights of the taxpayers under the Act in force during the relevant years of income. First, under the 1952 Act the taxpayer had 60 days within which to appeal from a refusal of the respondent to amend an assessment; under the 1958 Act he only had 45 days; secondly, there was no power under the 1958 Act corresponding to the provisions of Section 77 (5) of the 1952 Act which entitled the taxpayer, in cases where the tax involved was 200s. or under, to elect to treat the hearing before the local Committee as final. Thirdly, the

additional tax chargeable under the 1958 Act was double tax compared to treble tax under the 1952 Act (incidentally an alteration to the taxpayer's benefit). Finally, while under the 1952 Act the Judge was entitled to exercise his own discretion as to the remission of additional tax, it is perfectly clear that he has no such power under the 1958 Act. Minor inconsistences were also relied on which their Lordships do not think it necessary to mention. It was said that these inconsistencies and injustices to the taxpayer made it necessary to treat the provisions of the 1952 Act as remaining applicable to assessments made in respect of years of income up to 1957 inclusive.

Their Lordships cannot agree with this argument. In the first place, although the drafting may be inelegant, the Legislature in introducing by paragraph 1 of the Fifth Schedule certain parts of the 1958 Act into the 1952 Act thereby repealed, must have intended that they should supersede and where inconsistent, control and override the former provisions, for in that way only is it possible to give sensible effect to the scheme of legislation. Furthermore, it seems clear that the Legislature realised that such retroactive alterations to the 1952 Act in respect of past years of income might prejudice and act unfairly to taxpayers where their tax affairs remained unsettled on 30th December 1958. This is evident from the terms of section 151 of the 1958 Act and particularly sub-section (2) which has already been set out. This system of legislating is not new to Kenya for it copied the same procedure when the 1952 Act superseded the Kenya Ordinance Chapter 204 of 1940. This is further supported by the provisions of sub-paragraph (*a*) of paragraph 1 which clearly contemplated that the introduction of the 1958 Act provisions might prejudicially affect taxpayers retroactively where their tax affairs remained outstanding on 30th December 1958, for an exception was made to such prejudice if legal proceedings were then pending; finally, sub-paragraph (*b*) made it quite plain that the new scales of penalties were not to apply to offences committed during the pre-1958 years of income.

In their Lordships' judgment, therefore, in respect of pre-1958 assessments outstanding on 30th December 1958 the provisions of the 1958 Act introduced by paragraph 1 of the Fifth Schedule supersede override and control the corresponding provisions in the 1952 Act, unless the taxpayer can claim the protection of sub-paragraphs (*a*) or (*b*) of that paragraph. Accordingly, their Lordships agree that in the Courts below it was rightly held that there was no discretionary power of remission of additional tax any longer vested in the trial Judge.

However, before turning to consider the second point their Lordships would mention that (though it does not arise for decision now) as they are at present advised, the relevant provisions of the 1958 Act which are incorporated into the 1952 Act must act both in favour of and against the Crown; thus, had the respondent charged the appellant with additional tax of more than double tax for any of the relevant years of income, such charge could not have stood in respect of assessments outstanding on 31st December 1958. Their Lordships did not understand Counsel for the respondent to dissent from this general proposition.

As to the second point, the appellant appealed on 31st December 1958 against the refusal of the respondent to amend the relevant assessments. The question their Lordships have to consider is whether there were any legal proceedings by or against the Commissioners which were properly described as "pending" on 30th December 1958. Their Lordships have some sympathy with the appellant for had he appealed one day or at any rate two days earlier undoubtedly there would have been pending proceedings though they do not overlook the fact that Mayers J. would have had power had the 1952 Act remained operative not merely to remit but also to increase the additional tax. It was argued that for the purposes of this paragraph proceedings could properly be described as pending, either from the service by the appellant of Notice of Objection under section 74 (2) of the 1952 Act or, at latest, from the refusal by the Notice given on 4th December 1958 whereby the

respondent refused to amend his assessments. It was not seriously suggested that the negotiations and correspondence between the appellant's advisers and the respondent were technically legal proceedings for, clearly, they were not. As Gould A. P. pointed out in his judgment the respondent was then merely finalising the assessment. It was argued, however, that in a broader sense which should be adopted in justice to the taxpayer whose liabilities were being retroactively affected they were pending in the sense that legal proceedings were then imminent and that the next step would initiate legal proceedings, that is an appeal from the refusal of the respondent, and this was the inevitable consequence of the negotiations and correspondence down to date. A number of authorities were cited to their Lordships but they do not really touch on this short point.

Their Lordships have reached the clear conclusion that it cannot be said with any sense of legal accuracy that there were legal proceedings pending on 30th December. Upon this point they agree with the judgments given in both Courts below and do not think that they can usefully add anything thereto.

Though Counsel for the appellant did not dispute or challenge the finding of fraud in the Courts below, he raised one point where he said the trial Judge misdirected himself for he said that it was the duty of the Judge to make up his mind as a separate question in relation to each year of income what was a proper estimate of the appellant's income of that year and then to consider whether the discrepancy between the figures return by the appellant and the figures which the Judge thought to be a fair estimate of his income was sufficient to infer fraud, and the onus it was said, was upon the respondent to prove that in respect of each year. As the learned Judge did not do this therefore, the matter must go back for him to reconsider the whole matter. This argument seems to be based upon a fallacy. If the respondent wants to reopen an otherwise time barred year of income the onus is upon him to prove fraud or gross or wilful neglect (section 105 (1) of the 1958 Act). This question is not to be determined upon making estimates of income but upon the facts of each particular case which the Judge assesses as a jury question; was the taxpayer in respect of the relevant year fraudulent or not. The respondent discharged this onus in respect of each relevant year. Then that tax year being reopened for consideration the usual rule applies; the onus is upon the taxpayer to shew that respondent's assessment is excessive. This he signally failed to do in any year of income.

It only remains to notice two points argued before their Lordships arising under the provisions of the 1952 Act but which in fact are now academic as they do not arise under the incorporated provisions of the 1958 Act. First it was said that under section 72 of the 1952 Act tax lost could only be recovered once and not three times. Their Lordships think that this point is fully answered in the concise judgment of Mayers J. where he said that the argument was fully disposed of by the provisions of section 40 (3). Their Lordships do not desire to add anything to that. Then it was said that under section 72 an additional (post 6 year) assessment is confined to income fraudulently omitted, though it is conceded that this is not so under the relevant provision of the 1958 Act where the words upon which the argument was founded namely " for the purpose of making good any loss of tax attributable to the fraud or wilful default " do not occur.

But even if section 72 was still operative the onus would be upon the appellant to prove that some income was omitted innocently from his return and this he failed to do. Accordingly their Lordships do not have to consider had the facts been otherwise, whether upon the true construction of section 72 he would have escaped any assessment in respect of any sum innocently omitted.

For these reasons their Lordships will dismiss the appeal. The appellant must pay the cost of the appeal.

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In the Privy Council

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v.

THE COMMISSIONER OF INCOME TAX

DELIVERED BY
LORD UPJOHN

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