

1, 1971

IN THE PRIVY COUNCIL

No. 7 of 1969

ON APPEAL FROM THE COURT OF APPEAL
OF THE SUPREME COURT OF GUYANA

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
- 7 APR 1972
25 RUSSELL SQUARE
LONDON, W.C.1.

B E T W E E N:

GUYANA INDUSTRIAL & COMMERCIAL
INVESTMENTS LIMITED Appellant

- and -

THE COMMISSIONERS OF INLAND REVENUE
Respondent

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CASE FOR THE APPELLANT

Record

THE NATURE OF THE APPEAL

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1. This is an Appeal from an Order of the Court of Appeal of the Supreme Court of Judicature of Guyana (Stoby C., Luckhoo and Cummings, J.J.A.) dated 20th February, 1968, dismissing an Appeal against, but varying, an Order of the High Court of the said Supreme Court of Judicature (Persaud, J.) dated 19th July, 1966, which allowed an Appeal by The Commissioner of Inland Revenue (the Respondent before Your Lordship's Board) against a majority decision of the Board of Review dated 18th November 1965, which allowed an Appeal by Guyana Industrial and Commercial Investments Ltd. (the Appellant before your Lordships' Board) against an additional assessment to Income Tax dated 30th April, 1964, charging tax in the sum of \$30,827,66 in respect of the year of Assessment 1963 and upon the income of the Appellants for the twelve months ended 30th November, 1962.

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2. The Assessment in question relates to a dividend Received by the Appellant, declared and paid by Demerara Sugar Terminals Ltd. (hereinafter called "the Company")

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3. In the submission of the Appellant, the validity or otherwise of the Assessment depends primarily upon the extent to which the Company on paying that dividend was, by Section 29(1) of the Income Tax Ordinance (Cap.299) entitled to deduct tax therefrom. And further, in the submission of the Appellant, that ultimately depends upon the true construction of Section 29(1) of that Ordinance as so amended.

THE FACTS

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App.pp.
17/21

4. The relevant facts are conveniently to be found in a Statement of material Facts by the Respondent and the Annexures thereto. Those Facts may be thus summarised:

App.p.68

(1) The Appellant is a Company incorporated in Guyana (at the then time, British Guiana) as a Company Limited by Shares: it has at all relevant times been registered in Guyana and it carries on business as an Investment Company. One of its Investments is a Holding of 1,600 Ordinary Shares of \$5.00 each fully paid together with 78,400 Ordinary Shares of \$5.00 each, 5 cents paid in the Capital of the Company which holding at all times constituted 8% of the issued Share Capital of the Company.

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(2) The Company was in the year 1958 incorporated as a Company Limited by Shares in Guyana (then British Guiana) and has at all times been resident in Guyana.

(3) The Company on 1st August, 1960 commenced to carry on the trade or business of storing, handling, loading and shipping sugar, and prepared its own Accounts to 31st December in each year.

App.p.61

(4) In its Accounting Period for the five months ending on 31st December, 1960, the Gains or Profits of the Company's Trade as disclosed by its profit and loss Account, amounted to \$158,392 out of which was payable Debenture Interest, pension scheme contributions and audit fees totalling \$104,209, after providing \$28,322 for depreciation, \$25,861 of Gains or Profits was available for the payment of Dividends.

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(5) Those Accounts formed the basis of the Company's Assessment to Income Tax for the calendar year of Assessment 1961. The Company claimed and was granted Capital Allowances under the appropriate provisions of the Income Tax Ordinances of Guyana, which reduced the amount of Income Tax actually payable to nil.

App.p.62

10 (6) In its Accounting Period for the twelve months ending 31st December, 1961, the gains or profits of the Company's Trade or Business which were charged to Tax by Section 5(1)(A) of the Income Tax Ordinance (Cap.299) as amended, as disclosed by its Profit and Loss Account, amounted to \$1,998,754, out of which was payable Debenture Interest, Pension Scheme Contributions, Audit and Directors' fees, amounting to \$259,298, after provision of \$393,493 for Depreciation, \$1,345,963 gains or profits was available
20 for the payment of dividends.

(7) Those Accounts to 31st December, 1961 formed the basis for Assessment for the Calendar year of Assessment 1962. After adding back various Expenditure not allowable for Tax purposes and taking account of capital allowances for that year, the Company's chargeable Income for that calendar year of Assessment 1962 was before set-off for past losses \$1,384,328. By reason of the
30 Company's claim for set-off of such losses which had arisen from unabsorbed capital allowances, the Company's chargeable income was reduced by one-half to \$692,164 in accordance with Section 15 of Income Tax Ordinance (Cap.299) as amended. The Company was duly assessed to tax at the rate of 45 per cent on that sum amounting to \$311,474 and paid the said tax.

App.p.63

40 (8) On 9th December, 1961, the Directors passed a Resolution in the following terms, videlicet:

"The Board, being of the opinion that the profits justify payment of an Interim Dividend equivalent to 50 cents per share on each of the one Million issued shares

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of \$5.00 each. It was resolved that an Interim Dividend be hereby declared of \$16,7778 free of Income Tax on each of the 20,000 fully paid \$5.00 shares of the Company requiring a sum of \$335,556.00 and of \$.1678 per share free of Income Tax on each of the 980,000 shares partly paid (to the extent of 5 cents) shares of \$5.00 each requiring \$164,444.00, that is to say requiring a total sum of \$500,000 free of Income Tax and that such dividend be paid on the 16th day of December, 1961".

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Those Dividends were paid on 16th December. Grossed-up at 45% the Gross equivalent of the said dividends was \$909,090.

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(9) The Appellant's share of those dividends amounted to \$40,000 which grossed up at 45% was equivalent to \$72,727.

App.p.63

(10) On 8th June, 1962, by Ordinance No.11 of 1962, section 15 of Cap.299 was repealed and re-enacted with alterations, which permitted losses from previous years to be set-off against the whole income of a year in computing the chargeable income of that year; the effect of this alone would be to reduce the Company's chargeable Income for that calendar year of Assessment 1962 to Nil. But at the same time Section 14A of Income Tax Ordinance (Cap.299) was enacted making the Company liable to pay Tax on a minimum chargeable income equivalent to 2 per cent of its turnover in the year preceding the year of Assessment. In accordance with these provisions the Company was liable to tax in that Calendar year of Assessment 1962 on a chargeable income of \$52,767 so that the amount of tax charged thereon was \$23,745 and \$287,729 of the \$311,474 tax originally paid was refunded.

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74/75

(11) The Respondent being of the opinion that the Company had paid dividends totalling \$909,090 but was not entitled to deduct from those dividends any more tax than the sum of \$23,745 which was ultimately payable in respect of the figure of \$52,767 mentioned at sub-paragraph (10) above, contended that the

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relief to which the Appellant was entitled under section 30 of the Income Tax Ordinance (Cap.299) as amended was limited to its appropriate proportion of that amount, that is to say 8 per cent thereof, totalling \$1,899 and assessed the Appellant accordingly. It is against that Assessment that the Appeal is brought.

THE STATUTORY PROVISIONS

10 5 (1) At all material times the Income Tax Ordinance (Cap.299) as amended, so far as is relevant to the present matter reads, as follows :

20 "5(1) Income Tax, subject to the provisions of this Ordinance, shall be payable at the rate or rates herein specified for each year of Assessment upon the income of any person accruing in or derived from the Colony or elsewhere, and whether received in the Colony or not, in respect of -

(A) Gains or profits from any trade, business, profession, or vocation, for whatever period of time the trade, business, profession, or vocation, may have been carried on or exercised;

(B)

(C) dividends, interest or discounts;"

30 Section 27(1):

"The Tax upon the chargeable income of a Companyshall be charged at the rate of Forty-five per centum of the amount of the chargeable income"

Section 13(1):

"In ascertaining the chargeable Income of any person who carries on or exercises any trade, business,

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profession or vocation there may be allowed as a deduction such sum as the Commissioner may think just and reasonable as representing the amount by which the value of -

(A) any plant, machinery or equipment owned by him has been diminished by reason of wear and tear arising out of the use or employment of such plant, machinery or equipment in production of the income; and 10

(B) any building housing machinery owned by him has been diminished by reason of wear and tear arising out of the use or employment of the machinery in such building:"

Section 29 (1):

"Every Company registered in the Colony shall be entitled to deduct from the amount of any dividend paid to a shareholder tax at the rate paid or payable by the Company (double taxation relief being left out of account) on the income out of which the dividend is paid: 20

Provided that where Tax is not paid or payable by the Company on the whole income out of which the dividend is paid the deduction shall be restricted to that portion of the dividend which is paid out of Income on which tax is paid or payable by the Company. 30

(2) Every Company aforesaid shall upon payment of a dividend, whether tax is deducted therefrom or not, furnish to each shareholder a certificate setting forth the amount of the dividend paid to that shareholder and the amount of tax which the Company has deducted or is entitled to deduct in respect of that dividend...." 40

Section 30:

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10 "Any tax which a Company has deducted or is entitled to deduct under the last preceding Section from a dividend paid to a shareholder, and any tax applicable to the share to which anyone is entitled in the income of a body of persons assessed under this Ordinance, shall, when that dividend or share is included in the Chargeable income of the share-holder or person, be set-off for the purposes of collection against the tax charged on that chargeable income".

(2) Prior to 8th June, 1962, Section 15 of Cap.299 read as follows :-

20 "Where the amount of a loss incurred in the year preceding a year of assessment in any trade .. carried on by any person ... is such that it cannot be wholly set-off against his income from other sources for the same year, the amount of the loss to the extent that it cannot be so set-off against his income from other sources for the same year shall be carried forward and, subject as hereinafter
30 provided, shall be set-off against what would otherwise have been his chargeable income in the year or years following until it is completely recouped.

PROVIDED THAT --

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40 (D) In no case shall the set-off be allowed to an extent which will reduce the tax payable for any year of assessment to less than one-half of the amount which would have been payable had the set-off not been allowed".

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(3) Ordinance No. 11 of 1962 which received the Royal Assent on 8th June, 1962, provides (inter alia) as follows :-

Section 1(3):

"Save as otherwise provided in subsection (2) of this section, the provisions of this Ordinance shall be deemed to have come into operation with respect to and from the year of assessment commencing on the 1st January, 1962". 10

Section 2:

"Section 2 of the Principal Ordinance is hereby repealed and the following section substituted therefor -

2. In this Ordinance unless the context otherwise requires -

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"Chargeable Income" means the aggregate amount of the income of any person from the sources specified in Section 5 remaining after allowing the appropriate deductions and exemptions pertaining to each source separately, and such appropriate exemptions and deductions as pertain to his aggregate income:" 20

Section 10:

"The Principal Ordinance is hereby amended by the insertion after Section 14 of the following section - 30

14(A) Notwithstanding anything to the contrary contained in this Ordinance any person carrying on a manufacturing, mining or mercantile business shall be liable with respect to any year of assessment, to pay tax on a minimum chargeable income equivalent to two per centum 40

of his turnover in the year
preceding the year of
assessment"

Section 11:

Section 15 of the Principal Ordinance
is hereby repealed and the
following section substituted
therefor -

10 15. Where a loss is incurred in the
year preceding a year of assessment
in any trade, business, profession
or vocation carried on by any
person the amount of the
loss shall be carried forward and,
subject as hereinafter provided
shall be set-off against what would
otherwise have been his chargeable
income in the year or years following
until it is completely recouped".

20 6. The Income Tax (in aid of Industry)
Ordinance (Cap.300), in Part I thereof,
provides for the making of a Direction
exempting specific income from income tax
and in Parts II and III thereof provides a
system of initial allowances and annual
allowances in respect of the acquisition of
certain capital assets. In the hearing
before your Lordship's Board, it may be
30 necessary to refer briefly to those provisions,
but it is not thought helpful to reproduce
them.

THE COURSE OF THE PROCEEDINGS

7. The matter came before three members of the
Board of Review, who were divided in their
conclusions. The majority appear to have
reached three conclusions. First, that the
effect of the deductions and allowances given
to the Company in computing its chargeable
income was to make the money out of which
40 the dividend was paid immune to tax;
secondly, that as the money was immune to tax
in the hands of the Company, it must follow
that it was also immune to tax when passed
on to the members of that company; thirdly,

App. pp. 7/10

Record
1950/2
K.B.246
15 T.C.595

that on the Authority of Gimson v. C.I.R. a dividend from such a fund is not charged with Income Tax in the hands of its recipient. They therefore discharged the Assessment.

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1960
LRGB 178
1962
1 WLR897

8. The matter came before Persaud J. on the 19th, 26th, 28th, 29th and 31st March, 1966, Judgment being delivered on 19th July, 1966. The learned Judge held that the dividend received by the Appellant was chargeable with tax in its hands, subject only to the relief given by Section 30 of the Income Tax Ordinance (Cap.299) as amended, basing himself to a large extent on a judgment of Wyley J. in C.I.R. v. Davson, which was upheld by your Lordships' Board in Bieber Ltd. v. Commissioners of Income Tax. The Appellant will not seek to challenge before Your Lordships' Board the correctness of that part of the Learned Judge's Judgment. But the Learned Judge further held that the Company was not entitled by Section 29 of the Income Tax Ordinance (Cap.299) as amended to deduct Tax at 45% from the whole of a dividend of \$909,090, because in his view Tax was not paid or payable by the Company on the whole of the income out of which the Dividend was paid. The Learned Judge therefore allowed the Appeal, but reduced the amount of the Tax payable under the Assessment to \$12,726, being, it appears, 45% of the difference between \$32,727 (the sum which was in fact deducted by the Company from that part of the equivalent gross dividend payable to the Appellant) and the sum of \$1,899 (being the sum which, in the Learned Judge's Judgment was the maximum amount which might properly have been deducted).

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App.p.47/58

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9. The matter came before the Court of Appeal on 19th April, and 6th and 8th June, 1967, and on the 20th February, 1968; the Judgment of the Court was given by the Learned Chancellor. After stating the facts, the Chancellor summarised the rival basic contentions as they appeared before that Court. He stated that on the part of the Appellant it was now contended that Section 29 of the Income Tax Ordinance (Cap.299) is concerned with the Company's income out of which dividends are paid, whilst section 14 of that Ordinance as amended is

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concerned with chargeable income being the amount upon which Tax is payable. He also stated that on the part of the Respondent it was contended that a Taxpayer receiving a dividend is relieved from Taxation thereon only to the extent appearing in Section 29 of the Income Tax Ordinance (Cap.299) as amended, which depends on the Company paying the dividend being entitled by Section 29, Income Tax Ordinance (Cap.299) to deduct taxation therefrom and that such deduction cannot validly be made unless the sum so deducted is paid or is payable by the deducting Company to the Respondent. The Chancellor then considered and rejected various contentions by the Appellant (which contentions it is not proposed to advance before your Lordship's Board) that if a long enough view be taken such Tax would be paid or payable to the Respondent. The Chancellor then considered certain authorities on the United Kingdom Statutes which had been cited by the Respondent in an endeavour to show that, independently of the relieving provisions of Section 30 of the Income Tax Ordinance (Cap. 299) as amended. The Appellant was not chargeable with Tax in respect of the Dividend and, in reliance on the same consideration as moved Your Lordships' Board in Bieber v. C.I.R. held that under the Guyanan Statutes, the exemption depended solely on Section 30 of the Income Tax Ordinance (Cap.299). The Court of Appeal apparently accepted the contention of the Respondent that the amount of the Tax which might be deducted under Section 29 of the Income Tax Ordinance (Cap.299) as amended, was limited to the amount of tax paid or payable to the Respondent and accordingly held that the Company was not entitled to deduct any more than the amount of Tax which (as appears from paragraph 4(10) above) was \$23,745) it had paid on the notional income of \$52,767 attributed to it by Section 14A of the Income Tax Ordinance (Cap.299) as amended. And further held that the proportion of that \$23,745 attributable to the Appellant's 8% share holding was \$1,899. The Court confirmed the Assessment in the sum of \$30,827.

App.p.51

1962 1
W.L.R.397

App.p.58

THE POSITION IN THE UNITED KINGDOM

10. Although the Appellant has already submitted that the question must ultimately turn upon the true construction of Section 29 of the Income Tax Ordinance (Cap.299) as amended, yet, since the United Kingdom Authorities were relied on in the Courts below, it may be of assistance to indicate the comparable position.

11. The provision in United Kingdom Law authorising a company to deduct Income Tax when paying dividends was (until the matter was put on a wholly different footing by the Finance Act, 1965) the Income Tax Act, 1952, section 184, which reads as follows :- 10

"184. Deduction of Tax from United Kingdom Dividends.

(1) The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any share, right or title thereto, and the body of persons paying the dividend shall be entitled to deduct Tax at the standard rate for the year in which the amount payable becomes due. 20

(2) Sub-section (1) of this Section shall in relation to a dividend paid by anybody of persons, be construed as authorising the deduction of tax from the full amount paid out of profits and gains of the said body which have been charged to tax or which, under the provisions of this Act, would fall to be included in computing the liability of the said body to Assessment to Tax for any year if the said provisions required the computation to be made by reference to the profits and gains of that year and not by reference to those of any other year or period". 30 40

Section 185(1) which was also repealed in 1965 Provided:

10 "Subject as hereinafter provided, a dividend paid by a body of persons shall, to the extent to which it is paid out of such profits and gains as are mentioned in subsection (2) of the last preceding section, be deemed, for all the purposes of this Act, to represent Income of such an amount as would, after such deduction of tax as is authorised by subsection (1) of the last preceding section, be equal to the net amount received: . . ."

20 12. It is convenient to commence the examination of the United Kingdom Authorities with Fry v. Salisbury House Estates Ltd. There the Company had a source of Income - the Ownership of Real Property - which yielded profits and gains in excess of the net annual value for the purposes of Income Tax charged under Schedule A. The Crown sought to charge the excess with Income Tax under Schedule D, basically on the principle that only the amount of the annual value had been effectively brought into charge under Schedule A. It was held that the Schedule A assessment whatever its quantum, was the tax granted by the Act in respect of the profits or gains for that particular source and exhausted the taxable subject matter.

[1930] AC
432
15 TC266

30 13. The next relevant authority is Neumann v. C.I.R. in which the Appellant was a holder of shares in the capital of that same company - Salisbury House Estates Ltd. - which Company declared a dividend, which dividend, as very clearly appears from the speech of Lord Tomlin was paid out of that part of the profits and gains from the source in question, which was in excess of the net annual value for the purposes of income tax charged under Schedule A. It was held that that dividend was, within the
40 meaning of the Income Tax Act, 1952, Section 184 paid out of profits or gains brought into charge to tax because the amount charged under Schedule A was the amount of tax - albeit a conventional figure - properly granted in respect of the whole of the profits or gains realised from that source. It is not thought that the remainder of the decision in

[1934] AC
215
18 TC322

(AC) p.222
(TC)p. 358

Neumann v. C.I.R. is of any value in the present case and this for the reasons indicated in Bieber v. Commissioner of Income Tax: That is to say that, whilst under United Kingdom Tax Law a dividend paid out of profits or gains brought into charge to tax is of its own nature not charged with Income Tax in the hands of its recipient, under Guyanan income tax is so charged by Section 5(1)(c) of the Income Tax Ordinance (Cap.299) as amended, but relieved to the extent appearing in section 30 IBID.

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THE APPELLANT'S CONTENTIONS

14. The Appellant accepts, as indeed appears from the decision of Your Lordships' Board in Bieber v. C.I.R. that by Section 5 (1)(c) of the Income Tax Ordinance (Cap.299) as amended, the Recipient of a dividend is (unlike the position in the United Kingdom) Prima Facie charged with Income Tax thereon, Subject to the relief granted by section 30 Ibid.

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15. (1) THE Appellant primarily contends that when the Company declared and paid dividends totalling \$500,000 "free of income tax", the Company was effectively declaring and paying gross dividends of \$909,090, from which it was entitled by section 29 of the Income Tax Ordinance (Cap.299) as amended, to deduct tax at 45 per centum. If that be right it follows that the Appellant is entitled to set-off under section 30 that tax which was properly deductible from the share of the dividend payable to the Appellant.

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(2) The Appellant alternatively contends that if the Company was not entitled to deduct tax at 45 per centum because the "income out of which the dividend is paid" in section 29(1) refers to "chargeable income", then the Gross dividend equivalent to a dividend of \$500,000 "free of Income Tax" is to be found by reference to the amount of tax which might properly be deducted therefrom.

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(3) on that basis it is further contended

that "tax at the rate paid or payable" refers to the state of the Law at the time when the dividend was payable, at which time the Company's chargeable Income was \$692,164 on which figure Tax of \$311,474 was originally paid.

16. The Appellant contends that the Appeal should be allowed with costs for the following, among other

REASONS

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(1) Because the income out of which the dividend was paid is the income which is charged with Tax by Section 5(1)(a) of the Income Tax Ordinance (Cap.299) as amended

(2) Because no part of that income was exempted from Tax either by Part I of the Income Tax (in aid of Industry) Ordinance (Cap.300) or otherwise

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(3) Because income Tax was paid on the whole of that income albeit measured by the statutory yardstick of "chargeable income" as defined by section 2 of the Income Tax Ordinance (Cap.299) as amended

(4) Because no person is liable to tax on dividends under Section 5 (1) (c) in respect of a greater sum than that which he would have been entitled to receive if no tax was deducted or deductible therefrom.

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(5) Because, alternatively, the Tax which the Company was entitled to deduct under Section 29 (1) was "Tax at the rate paid or payable" at the time when the dividend was paid.

G. B. GRAHAM

THEODORE WALLACE

No. 7 of 1969

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CASE FOR THE APPELLANT

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628 2020