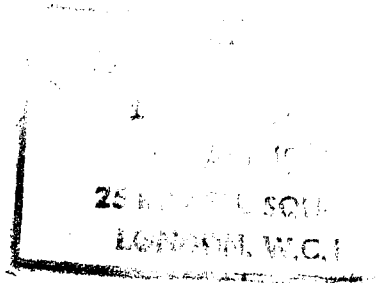


No. 7 of 1969.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF THE SUPREME COURT  
OF JUDICATURE OF GUYANA



BETWEEN

GUYANA INDUSTRIAL & COMMERCIAL  
INVESTMENTS LIMITED Appellant

AND

10 THE COMMISSIONER OF INLAND REVENUE Respondent

CASE FOR THE RESPONDENT

Record

1. This is an appeal brought by leave from the Judgment and Order of the Court of Appeal of the Supreme Court of Judicature of Guyana (hereinafter referred to as "the Court of Appeal") dated 20th February 1968 dismissing the Appellant's appeal against the Judgment and Order of the High Court of the Supreme Court of Judicature of Guyana dated 19th July 1966

20 allowing the Respondent's appeal against the decision of the Board of Review in which the Board set aside an additional assessment raised by the Respondent against the Appellant in respect of the Year of Assessment 1963 upon the income of the year ended 30th November, 1962.

p 47,59  
p 32,40  
p 7  
p 72

2. Subject to the provisions of the Income Tax

Ordinance Cap. 299 (hereinafter referred to as "the Ordinance") income tax is payable on dividends under Section 5(c) of the Ordinance. A company is entitled to deduct from the amount of any dividend paid to a shareholder tax at the rate paid or payable by the company on the income out of which the dividend is paid under Section 29(1) of the Ordinance. When such a dividend is included in the chargeable income of the shareholder, any tax which the company deducted is set-off for the purposes of collection against the tax charged on that chargeable income under Section 30 of the Ordinance. The chargeable income of the Appellant in the year ended 30th November, 1962, included a dividend from Demerara Sugar Terminals Limited (hereinafter referred to as "D.S.T."). 10

3. The primary question for determination on this appeal is whether tax was paid or payable by D.S.T. on the income out of which the dividend was paid to the Appellant in the year ended 30th November, 1962. 20

4. The relevant statutory provisions of the Ordinance are as follows:-

Charge of  
income tax  
6 of 1947  
s.2.  
18 of 1951  
s.2.  
42 of 1952  
s.3.

5. 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 - 30

(c) dividends, interest or discounts;

14A. 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 of his turnover in the year preceding the year of assessment: 40  
Provided that -

(a) the provisions of this section shall

not apply to a manufacturing business for the first five years of assessment commencing with the year of assessment in the basis period of which commercial production of such business commenced;

10 (b) where such person actually incurs a loss in the year preceding the year of assessment, the loss to be carried forward in accordance with the provisions of section 15 of this Ordinance shall equal the sum of the minimum chargeable income and the loss;

(c) where such person makes a gain or profit in the year preceding the year of assessment which is less than two per centum of his turnover, the difference may be carried forward in the same manner as if it were a loss.

20 Section 14A of the Principal Ordinance was amended -

Amendment  
of Section  
14A of Cap  
299.

(a) by the deletion of the colon at the end of the sixth line;

(b) by the insertion after the word "assessment" at the end of the aforesaid line of the following words "less any deductions to which he is entitled under the provisions of section 16, section 17, section 18, section 19 and section 20 of this Ordinance";

30 (c) by the deletion of paragraph (b) of the proviso and the substitution therefor of the following paragraph -

40 "(b) where such person actually incurs a loss in the year preceding the year of assessment, the loss to be carried forward in accordance with the provisions of section 15 of this Ordinance shall, where he actually pays tax, equal the sum of the aforesaid minimum chargeable income on which tax is actually paid and the loss, and where no tax is paid,

equal the loss incurred;"; and

(d) by the deletion of paragraph (c) of the proviso and the substitution therefor of the following paragraph -

"(c) where the actual chargeable income of such person in the year preceding the year of assessment is less than the aforesaid minimum chargeable income and he actually pays tax, then the difference between the actual chargeable income and the aforesaid minimum chargeable income on which tax is actually paid may be carried forward in the same manner as if it were a loss". 10

Deduction  
of tax  
from  
dividends  
of  
companies.  
6 of 1947,  
s.3.

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.

6 of 1947,  
s.3.

(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, and also, where the tax paid or payable by the company is affected by double taxation relief, the rate (hereinafter in this Ordinance referred to as "the net Colonial rate") of the tax paid or payable by the company after taking double taxation relief into account. 30 40

10 30. 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 shareholder or person, be set-off for the purposes of collection against the tax charged on that chargeable income.

Tax deducted from dividend to be set off against tax on income of shareholder

5. The facts of the case are set out in the statement of facts and so far as material may be summarised as follows:

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(i) The Appellant carries on business as an investment company and owned 8% of the shares in D.S.T.

20 (ii) On the 16th December, 1961, D.S.T. declared and paid a gross dividend of £ 909,090.90; the dividend warrant in respect of the Appellant's 8% shareholding showed:

Gross dividends	£ 72,727.27
Income tax deducted	£ 32,727.27
Net dividend	<u>£ 40,000</u>

(iii) From the date of its incorporation to the 31st December, 1961, the chargeable income of D.S.T. was only £52,767, income tax on which at the rate of 45% amounted to £23,745.15.

30 (iv) Under an additional assessment dated 30th April, 1964, tax in the sum of £30,827.66 was assessed on the Appellant in respect of the year of assessment 1963.

6. By Notice of Appeal dated 16th July, 1964, the Appellant appealed to the Board of Review. By a majority decision dated 18th November, 1965, the appeal was allowed and the assessment

p1  
p7

discharged. The majority of the Board took the view that the sole question for decision was from what source was the amount paid to the Appellant derived. As the dividend was paid out of money in the hands of D.S.T. which, owing to deductions and allowances granted under the Income Tax (In Aid of Industry) Ordinance Cap 300, was "immune to tax" it followed logically, in the view of the majority of the Board, that it was also immune to tax when passed on to the members of D.S.T. Accordingly, the Appellant was not liable to tax in respect of the dividend. 10

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7. By a Notice of Appeal dated 16th December, 1965, the Respondent appealed against the decision of the Board of Review to Mr. Justice Persaud in Chambers. The Judge allowed the appeal.

8. Mr. Justice Persaud pointed out that as a result of certain initial and annual allowances under the Income Tax (In Aid of Industry) Ordinance, D.S.T. showed a loss in its income tax return for the year of assessment 1961. For the year of assessment 1962, after the appropriate deductions had been made, no income remained on which tax was payable, but by Section 14(a) of the Ordinance income tax became payable on a minimum chargeable income of 2% on D.S.T.'s turnover which amounted to \$52,767. Tax on this amounted to \$23,745.15 and was paid. 20

In December, 1961, D.S.T. declared a gross dividend and, of the \$900,909.9 divisible among its shareholders, \$72,727.27 gross was paid to the Appellant. 45% of this amount was deducted by D.S.T. as income tax and retained, and the balance of \$40,000 was paid over to the Appellant and a certificate to that effect was issued by D.S.T. in accordance with the provisions in Section 29(2) of the Ordinance. 30

The learned Judge referred in particular to the Judgment of Mr. Justice Wylie in I.R.C. v. Davson, (1960) L.R.B.G. 178; and he concluded that if a company was not liable to tax on certain profits out of which a dividend was paid to a shareholder, that company must pay over to 40

the shareholder the full dividend the effect of which is to render the shareholder liable to tax on that dividend.

9. By a Notice of Appeal dated 26th August, 1966, as amended in March, 1967, the Appellant appealed against the decision of the learned Judge on the grounds therein set out. The appeal came on for hearing in the Court of Appeal on the 19th April, and 6th and 8th June, 1967, before Sir Kenneth Stoby, Chancellor, Mr. Justice Luckhoo, Justice of Appeal and Mr. Justice Cummings, Justice of Appeal and on 20th February, 1968, the Court unanimously dismissed the appeal.

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10. In his Judgment the learned Chancellor dealt with a number of arguments advanced on behalf of the Appellant and then turned to the position in the United Kingdom in respect of dividends under the provisions of Section 184 of the Income Tax Act, 1952. The question he said, was whether the law of Guyana was different.

The Chancellor stated that Davson's case settled the point that even when a dividend was paid from a capital profit and not taxable in the hands of the company it was still taxable in the shareholder's hands. Section 29(1) specifically authorised a company to deduct tax from dividends but it was the law that where tax was not paid or payable by the company on the whole income out of which the dividend was paid, the deduction should be restricted to that portion of the dividend which was paid out of income on which tax was paid or payable by the company. The consequence of the proviso to Section 29(1) was that while a company could pay dividends out of profits which were not taxable, it could not deduct tax from such dividends.

11. The Respondent humbly submits that the decision of the Court of Appeal and the decision in the High Court of the Supreme Court are right and should be affirmed and that this appeal should be dismissed with costs both here and below for the following among other

R E A S O N S

- (1) BECAUSE the deduction from the gross dividend of \$72,727.27 paid by D.S.T. to the Appellant should be restricted to that portion of the dividend paid out of income on which tax was paid or payable by D.S.T.
- (2) BECAUSE the income on which tax was paid or payable by D.S.T. in the relevant period was \$52,767 and the deduction from the gross dividend paid to the Appellant in respect of its 8% shareholding in D.S.T. should be restricted to 8% of \$52,767. 10
- (3) BECAUSE the set-off to which the Appellant is entitled under Section 30 of the Ordinance is tax on 8% of \$52,767.
- (4) BECAUSE the Judgments in the High Court of the Supreme Court and in the Court of Appeal were correct and ought to be affirmed.



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IN THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL

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

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BETWEEN

GUYANA INDUSTRIAL & COMMERCIAL  
INVESTMENTS LIMITED Appellant

and

THE COMMISSIONER OF INLAND  
REVENUE Respondent

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CASE FOR THE RESPONDENT

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