Privy Council Appeal No. 7 of 1969

Guiana Industrial & Commercial Investments Limited – *Appellant*

v.

The Commissioner for Inland Revenue - – – – *Respondent*

FROM

THE COURT OF APPEAL OF THE SUPREME COURT OF GUYANA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH JANUARY, 1971

Present at the Hearing:

LORD MORRIS OF BORTH-Y-GEST
LORD DONOVAN
LORD AVONSIDE

[*Delivered by* LORD DONOVAN]

This is an appeal of the Guiana Industrial and Commercial Investments Company (" the appellant company ") against an additional assessment to Income Tax made upon it by the Commissioner of Inland Revenue (" the Commissioner ") for the year of assessment 1963.

The subject matter of the assessment was a dividend received by the company on its holding of shares in Demarara Sugar Terminals Ltd. (" D.S.T."). The appellant company contended before the High Court in Guyana and before the Court of Appeal there that the assessment was excessive, but failed in both Courts. It now appeals to the Board.

Dividends received in Guyana are a separate subject matter for the purpose of the charge to income tax. Section 5 (1) (*c*) of the Income Tax Ordinance (Cap. 299) (" the Ordinance ") charges specifically " dividends, interest or discounts ". The company received a dividend from D.S.T. on 16th December 1961. D.S.T. declared the dividend to be an interim dividend of $16·7778 free of income tax on each of the 20,000 fully paid $5·00 shares of D.S.T. and $·1678 per share free of income tax on each of the 980,000 partly paid shares of $5·00 each in D.S.T. This dividend required a total sum of $500,000 free of income tax, which sum " grossed up " at 45% (the rate of income tax) gives a figure of $909,090.

The appellant company's 8% shareholding in D.S.T. entitled it to receive in respect of this total dividend the gross sum of $72,727. From this sum D.S.T. deducted tax at source at the rate of 45%. The certificate furnished by D.S.T. to the appellant company at the time of payment pursuant to section 29 (2) of the Ordinance showed that D.S.T. had deducted from this gross sum tax of $32,727 leaving $40,000 net dividend in the hands of the appellant company.

Dividends being a separate subject matter for tax, the appellant company was liable under section 5 (1) of the Ordinance for income tax upon this dividend. But by virtue of section 30 of the Ordinance it was

entitled to a set-off of the income tax which D.S.T. had deducted or was entitled to deduct from the dividend. In their Lordships' view this must mean income tax which D.S.T. was lawfully entitled to deduct. The appellant company claimed such a set-off in the sum of $32,727, and on this footing contended that its liability to income tax on the dividend was thus extinguished.

The Commissioner conceded that this would have been so had D.S.T. in fact paid the $32,727 to him as tax. But the profits out of which the dividend was paid ultimately bore a total tax of $23,745 only : and the proportion of this applicable to the appellant company's share of the dividend was $1,899 only. That, therefore, claimed the Commissioner, was the total set-off due to the appellant company and the additional assessment was made to recover the balance of tax due on this basis in respect of the dividend, namely $30,827.

It will be seen that dividends are treated quite differently for income tax purposes in Guyana as compared with the United Kingdom. Before 1966 dividends in the United Kingdom received from a company resident in the United Kingdom were not treated as a separate subject matter for income tax (as distinct from surtax) in the hands of the recipient shareholder. They were treated simply as the division of profit which had borne its income tax, if any, in the hands of the company, and the company was entitled to deduct income tax at the standard rate when paying the dividend out of funds in the nature of income and to keep it. It mattered not, in fact, whether the company had paid as much income tax on its income as it had deducted from the dividend or indeed whether it had paid any at all. And the recipient shareholder could get back tax from the Revenue in respect of reliefs to which he might be entitled, even though the Revenue had never received the tax it repaid. This oddity was ended by the Finance Act 1965 in which the pendulum was swung decidedly the opposite way. Now since 1966 a company pays corporation tax on its profits. When it pays a dividend it deducts income tax and hands it over to the Crown (subject to certain set-offs not here material). The dividend is, in other words treated as a separate subject matter for tax in the hands of the recipient shareholder and is taxed at source. Thus a company making £100 of trading profit and paying (say) 45% Corporation Tax, has £55 left. If it declares that £55 as dividend the Revenue gets a further 8s. 3d. in the £ on it, *i.e.*, £22 odd. This leaves the shareholder with some £32 net. If he has to pay surtax, his liability in that respect is calculated on the gross amount of the dividend, representing a further accrual to the Revenue, so that in the end the State get the lion's share of the original £100.

In Guyana trading profits are taxed in the hands of a company, and dividends are taxed in the hands of the shareholder. But the income tax paid by the company on the profits out of which the dividend is paid may be set-off against the tax charged on the dividend. Each shareholder will set-off his appropriate proportion. Thus the Commissioner gets tax on the company's profits once only either by assessment upon the company or by assessment on the shareholder in respect of any dividend he receives.

That being so, and seeing that the tax paid by D.S.T. applicable to the dividend received as aforesaid by the appellant company was $1,899 only, the question arises why the company claims a set-off under section 30 of the Ordinance of the very much larger sum of $32,727.

Certain further facts must therefore be stated.

D.S.T.'s chargeable income for the year of assessment 1962 was based on the results shewn in that company's accounts for the calendar year 1961 and amounted to $1,384,328. But this was reduced by a carry-forward of losses being unabsorbed capital allowances to $692,164. This

is one-half of the larger sum and at the time of the assessment was the maximum set-off allowed in any one year. See section 15 of the Ordinance. The income tax on $692,164 was $311,474 and this was duly paid by D.S.T.

On 8th June 1962, however, *i.e.*, some six months after D.S.T. had paid the appellant company its dividend of $72,727 and deducted tax of $32,727, section 15 of the Ordinance was repealed and re-enacted with alterations. These now permitted, as from 1st January 1962, all unabsorbed capital allowances to be carried forward and used as a set-off in any one year for income tax purposes. But by section 14A of the Ordinance companies were liable to pay a minimum income tax of 2% of their turnover in the year preceding the year of assessment.

This alteration in the law reduced D.S.T.'s liability to income tax for the year of assessment 1962 to the sum of $23,745 instead of the sum of $311,474 previously paid. The difference of $287,729 was duly refunded by the Commissioner to D.S.T. Then on 10th April 1964 he made an additional assessment on the appellant company in respect of the aforesaid dividend of $72,727. Instead of the set-off of $32,727 the company had claimed under section 30 the Commissioner allowed a set-off of $1,899 only, being the tax paid by D.S.T. applicable to the dividend. The difference—$30,827 (in round figures)—is the tax now in dispute.

The appellant company claims that it is entitled to a set-off of $32,727 on the following grounds.

(*a*) The income of D.S.T. out of which the dividend was paid was charged to income tax under section 5 (1) (*a*) of the Ordinance.

(*b*) That every part of that income was so charged notwithstanding that the measure applied yielded tax less in amount than would have been yielded by applying the rate of income tax (45%) to the whole of such income.

(*c*) Accordingly D.S.T. was entitled under section 29 (1) of the Ordinance to deduct tax at the "rate paid or payable by the company . . . on the income out of which the dividend was paid"; and that *rate* was 45%.

(*d*) This yields the figure of $32,727 available as a set-off to the appellant company under section 30 of the Ordinance.

The Commissioner admits propositions (*a*) and (*b*). It is unnecessary therefore for their Lordships to canvass the English authorities by which it was supported. The Commissioner, however, denies proposition (*c*): and bases his case on the proviso to section 29 (1) of the Ordinance which reads as follows:

> "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."

It is contended that this proviso exactly fits the present case and restricts the right of D.S.T. to deduct from the dividend in question more than the tax it had paid which was finally determined in the aforesaid figure of $23,745.

The appellant company replies that this proviso is inapplicable. It refers to profit not within the charge to tax either because it is a capital gain or because it is the subject of an express exemption. Furthermore it remains true that "tax was payable on the whole income" notwithstanding that the measure applied yielded less than 45% (the applicable rate of tax) on the whole income.

English authorities were again cited in support of this last contention: but the system adopted in the relevant United Kingdom legislation, on which those authorities were based, for dealing with dividends, is so different from the Guyana system that in their Lordships opinion English authorities do not assist.

The problem is purely one of construction of the proviso to section 29 (1). Read literally it clearly supports the Commissioner's contention. Furthermore it is plain that the whole design of section 29 and section 30 of the Ordinance is to match tax against tax. The recipient of the dividend is to be allowed to set-off against tax due thereon such tax as has already been paid out on the income which provided it—no more and no less. There is, in their Lordships' opinion, no warrant for applying to the proviso some unnatural interpretation which would enable the appellant company to set-off against its liability for tax on the dividend a far greater sum than had been paid by D.S.T. on the income out of which it had been paid.

Alternatively the appellant company contends that at least D.S.T. was entitled to deduct from the total dividend the sum of $311,474 tax which it had originally paid in respect of the relevant profits as above narrated. For that was the sum of tax legally payable or paid by D.S.T. at the time it paid the dividend. How was it to know that some months later its tax bill would be reduced by retrospective legislation to $23,745?

This argument has obvious attractions. It must be remembered however that the alteration in the law which so drastically reduced the income bill of D.S.T. was introduced in the year of assessment 1962, the year with which this case is concerned in relation to D.S.T. Furthermore the excess tax originally paid for this year by D.S.T. namely $287,729 was refunded to that company. When the Commissioner came finally to deal with the appellant company's liability to income tax on its dividend he knew these facts. He also knew that D.S.T. had deducted from the dividend payable to the company the sum of $32,727 which he considered to be excessive and which their Lordships have now decided was excessive. Taking the view he did, which has ultimately turned out to be right, why should the Commissioner treat D.S.T. as having paid $311,474 tax on its profits when he knew that due to the refund of $287,729 it had paid only $23,745? It seems to their Lordships that in this particular case at any rate, the Commissioner was fully entitled to prefer fact to fiction: to recognise that D.S.T. had paid only $23,745 tax on its profits: and to accord to the appellant company the proper proportion only of that sum as available for set-off. It is, of course, true that D.S.T. having deducted from the dividend more tax than it was entitled to, questions may arise hereafter as between D.S.T. and its shareholders. With those questions this Board has nothing to do.

Their Lordships will accordingly humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

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In the Privy Council

GUIANA INDUSTRIAL & COMMERCIAL INVESTMENTS LIMITED

v.

THE COMMISSIONERS FOR INLAND REVENUE

DELIVERED BY
LORD DONOVAN

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