No.1 of 1974

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

BETWEEN:

GERARD PARKES HEYWOOD — Appellant

- and -

THE COMPTROLLER-GENERAL OF INLAND REVENUE — Respondent

CASE FOR THE RESPONDENT

Record

10 1. This is an Appeal from the Judgment of the Federal Court of Malaysia (Azmi, Lord President Malaysia; Suffian and Ong FJJ) dismissing an appeal by the Appellant against the Judgment of Gill F.J. dismissing an appeal by way of Case Stated from an Order of the Special Commissioners of Income Tax that the sum of $32,000 be paid to the Appellant on termination of his employment by Sime Darby Malaysia Berhad on 31st August 1968 was not "compensation for
20 loss of employment" under section 13(1)(e) of the Income Tax Act 1967 but a gratuity in respect of having or exercising employment and therefore assessable to tax under section 13(1)(a) of the said Act.

2. The facts are not in dispute. On 24th April 1951 the Appellant entered into a written agreement with his employers, the Oriental Estates Agencies Limited, whereby the parties
30 agreed that the Appellant be engaged by the company as an assistant manager for a term of four years commencing on 26th May 1951. On 25th June 1955 the Appellant proceeded on leave for eight months. The Appellant was then re-engaged on contract for a term of three years commencing 26th February 1956 until he went on leave for six months on 21st February 1959. The Appellant was then re-engaged on contract for a further term of three years p. 24

commencing 21st August 1959 until he went on six months leave on 28th September 1962. The Appellant was then re-engaged on contract for a further term of three years commencing
p. 58 27th March 1963 until he went on six months leave on 27th April 1966. The Appellant was finally re-engaged on contract for a term of two years commencing on 26th October 1966
p. 52 and expiring on 26th October 1968. By letter dated 31st July 1968 the Appellant was given three months' notice terminating his service in accordance with his contract of service. By the same letter the company accorded to the Appellant a sum of $32,000 ex gratia "as compensation for loss of employment", and said that the Appellant was not being re-engaged owing to reorganisation making it necessary for two estates of the company (of one of which the Appellant was manager) to be put under one manager. The ex gratia payment of $32,000 was
p. 56 under a scheme of "Proposed compensation" in case of "possible amalgamations" drawn up by the company ex parte. According to that scheme the Appellant was eligible for 100% compensation because he was aged 41 and had served about 17½ years.

3. The issues which arise upon this Appeal are as follows:-

(i) Whether the sum of $32,000 paid to the Appellant was income upon which tax is chargeable within the meaning of section 4(b) of the Income Tax Act 1967, i.e. whether it was "income in respect of gains or profits from an employment"; or whether it was merely a voluntary payment not paid to the Appellant by virtue of his employment.

(ii) Whether the said sum of $32,000 was a "gratuity . . . in respect of having or exercising the employment" within section 13(1)(a) of the Act; or was an "amount received by the employee, whether before or after his employment ceases, by way of compensation for loss of employment . . ." under section 13(1)(e) of the Act.

4. The statutory provisions which have been considered relevant in the Court below are as follows:-

Income Tax Act, 1967

Section 3

Subject to and in accordance with this Act, a tax to be known as income tax shall be charged for each year of assessment -

(a) In the case of a person ordinarily resident for the basis year for the year of assessment, upon his income from wherever derived; and

(b) In the case of every other person, upon his income derived from Malaysia.

Section 4

Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of:-

(a) Gains or profits from a business, for whatever period of time carried on;

(b) Gains or profits from an employment;

(c) Dividends, interest or discounts;

(d) Rents, royalties or premiums;

(e) Pensions, annuities or other periodical payments not falling under any of the following paragraphs;

(f) Gains or profits not falling under any of the foregoing paragraphs.

Section 13(1)

Gross income of an employee in respect of gains or profits from an employment includes -

(a) Any wages, salary, remuneration, leave pay, fee, commission, bonus, gratuity, perquisite or allowance (whether in money or otherwise) in respect of having or exercising the employment; . . .

(e) Any amount received by the employee, whether before or after his employment ceases, by way of compensation for loss of the employment, . . ."

Record

It is common ground between the parties that if the payment falls under sub-section 13(1)(e) it is exempt from taxation by virtue of paragraph 15 of Schedule 6 of the Act.

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5. Gill F.J. held:-

That the Appellant had been re-engaged on a fresh contract on the expiry of each of the previous contracts and was not a permanent employee as in the case of a general hiring for an indefinite time. The Appellant's contract of employment did not provide for continuous employment and the case was distinguishable both from the case of Chibbett v. Joseph Robinson & Sons 9 T.C. 48 and from the case of Comptroller-General of Inland Revenue v. T (1970) 2 M.L.J. 35, 39. (Knight's case). Furthermore, in Knight's case the money was paid under a fresh agreement abrogating the contract of service whereas in the present case it was money gratuitously granted or paid, i.e. a gratuity. The learned Judge therefore rejected the argument that the amount paid to the Appellant in this case is not chargeable under any section of the 1967 Act other than section 13(1)(e) as compensation for loss of employment. He further rejected the contention that the sum of $32,000 was a payment not made in respect of his employment but a voluntary payment. Having regard to the clear evidence that the payment was made ex gratia on the termination of his employment and related to the period of that employment it was in the nature of a reward for services as defined in Hochstrasser v. Mayes 1960 A.C. 376 at 387 and constituted a gratuity "in respect of having or exercising the employment" within the meaning of section 13(1)(a) of the 1967 Act. It was not in any way related to the period for which the Appellant could have gone on working and therefore, whatever the employers chose to call it, was not properly describable as compensation for loss of employment.

6. Upon appeal by the Appellant to the Federal

Court of Malaysia Suffian F.J. delivering the unanimous judgment of the Court held that the true test as to whether the $32,000 was or was not compensation for loss of employment was that laid down by Romer J. in Henry v. Foster 16 P.C. 605 at 634. - ". . . As I understand it, it means a payment to the holder of an office as compensation for being deprived of profits to which as between himself and his employer he would, but for an act of deprivation by the employer . . . have been entitled"; and conversely that the test was not whether the employment was "likely to continue" as laid down by Rowlatt J. in Chibbetts' case 9 T.C. 48. The Federal Court further held, approving the judgment of Gill F.J., that the payment was a gratuity in respect of having or exercising employment within the meaning of section 13(1) (a) of the Act since there was clear evidence that the payment, though not of a contractual nature to which the tax payer was entitled, was made in reference to and by virtue of his employment especially bearing in mind that the quantum was related to the employee's age and years of service. p.59

7. The Respondent first submits that the sum of $32,000 was not compensation for loss of employment under section 13(1)(e) of the Act. What the company calls the payment cannot be conclusive. The Appellant had been engaged under five separate contracts for fixed periods. His contract of service was not a general hiring for an indefinite time. His final contract of service was lawfully determined on three months' notice. Alternatively the letter of 31st July 1968 notified him that the Company did not propose to re-engage him on a further contract. In any event he had no right or entitlement to re-engagement thereafter. Henry v. Foster 16 T.C. 605, 634. Alternatively, even if the true test is that laid down in Chibbett's case 9 T.C.48, there was no "likelihood" of his employment continuing.

8. The Respondent further submits that the learned Judge and the Federal Court correctly held that the said sum of $32,000 could not properly be described as a mere voluntary payment not made in respect of his employment but was a gratuity "in respect of having or exercising the employment" under section 13(1) (a) of the Act. The payment was made on

termination of the employment. It expressly related to and was calculated in accordance with the period of that employment and constituted a reward for services as defined in Hochstrasser v. Mayes 1960 A.C.376, a gratuity in respect of services rendered. The present case should be distinguished from Knight's case 1973 A.C. 428. First, in Knight's case there was a general hiring for an indefinite period so that the employment could be said to be "likely to continue" as laid down in Chibbett's case. Secondly, it was held that there was a fresh agreement abrogating the contract of service pursuant to which the payment was made. Thirdly, as stated above, the sum of $32,000 in the present case is specifically related to and calculated in accordance with the period of employment and is not connected with the period for which he might have continued in employment. Fourthly, Knight's case is concerned with the Income Tax Ordinance 1947 and not the Income Tax Act 1967.

9. The Respondent therefore submits that the Order of the Federal Court of Malaysia was right and should be affirmed for the following among other

R E A S O N S

(1) BECAUSE the payment of $32,000 was rightly held to be a gratuity in respect of having or exercising the employment under section 13(1)(a) of the Income Tax Act 1967.

(2) BECAUSE the said payment was rightly held not to be compensation for loss of employment under section 13(1)(e) of the said Act.

(3) BECAUSE the said payment was rightly held not to be a mere voluntary payment not made in respect of the Appellant's employment but income upon which tax is chargeable under section 4(b) of the Income Tax Act 1967.

(4) BECAUSE the Judgments of the High Court of Malaya and the Federal Court of Malaysia (Appellate Division) were correct.

NICHOLAS LYELL

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CASE FOR THE RESPONDENT

STEPHENSON HARWOOD & TATHAM,
Saddlers Hall,
Gutter Lane,
Cheapside,
London, EC2V 6BS

Solicitors for the Respondent