

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL
ON APPEAL FROM THE
SUPREME COURT OF MAURITIUS

B E T W E E N:

ALUMINIUM ENTERPRISES LIMITED	<u>First Appellant</u>
LIM KWET CHOW LAN PO TANG	<u>Second Appellant</u>
GARY LAM PO TANG	<u>Third Appellant</u>
LIMBERG LAM PO TANG	<u>Fourth Appellant</u>
and	
THE COMMISSIONER OF INCOME TAX	<u>Respondent</u>

CASE FOR THE RESPONDENT

Record

1. This is a consolidated Appeal from two	
Judgments of the Supreme Court of Mauritius dated	19/31
2nd December 1982 and 13th July 1983 (Glover Ag.	and
CJ and Ahmed J.) which Judgments respectively	32/35
(i) dismissed appeals by the Second, Third and	
Fourth Appellants against assessments upon each of	
them for the years ending 30th June 1978 and 30th	109/114
June 1979 as shareholders in the First Appellant	
(Aluminium Enterprises Limited) in respect of	
excessive undistributed profits retained by the	
First Appellant and (ii) dismissed the Appeal of	
the First Appellant against a Determination by the	32/34
Respondent that the First Appellant should have	

distributed Rs 898,921 and Rs 899,331 to the Second, Third and Fourth Appellant's during the two years of assessment above mentioned viz 1977/78 and 1977/79.

2. The substantive question in this Appeal is whether the shareholders of a Development Company (certified pursuant to the Development Incentive Act 1974 and the relevant income of which is subject of a statement under Section 33 (2) of the Income Tax Act 1974 ("the 1974 Act")) are liable to income tax on undistributed/^{profi} during the last three years of a "tax relief period" when such "tax relief period" has been extended from five years to eight years pursuant to an election by the Development Company. Put in terms of the 1974 Act, the question is whether Section 40 (1) can apply to excessive undistributed profits of a Development Company by reason of Section 33 (5).

3.(i) There may also be raised by the First Appellant (in appeal against the Judgment of 13th July 1983) the question whether the

Supreme Court of Mauritius has jurisdiction to hear an appeal against a Determination, by the Respondent, pursuant to his powers under Section 40 of the 1974 Act.

(ii) The learned judges held that the Supreme Court did not have jurisdiction to entertain such an appeal. They held that a determination under Section 40 is specifically excluded from the ambit of right of objection by Section 96 (2) (c) (i) of the 1974 Act and that such determinations can only be questioned on appeal in the course of an appeal against an assessment. The Respondent respectfully adopts the reasoning of the learned judges.

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(iii) Further, in the submission of the Respondent, the draftsman of the 1974 Act expressly excluded any such right. Such a right had existed under the immediately preceding relevant legislation (see: Section 55 (8) of the Income Tax Ordinance 1950).

4. As to the substantive issue (and the judgment of 2nd December 1982), the

First Appellant obtained a Development Certificate on 9th October 1969 in respect of the manufacture of aluminium ware and stainless steel ware (hereinafter called the "development products"). Pursuant to Section 33 (2) of the 1974 Act the First Appellant each year obtained an appropriate Statement in respect of its income from development products so that in the first five years next following its Production Day (1st July 1971 when production commenced) the following exemptions from income tax resulted: (i) and income of the First Appellant from Development Products was exempt from income tax and (ii) any dividends paid out of any income from development products was exempt from income tax. The First Appellant elected pursuant to Section 36H(2) of the Income Tax Ordinance 1950 (now Section 33 (8) (a) (i) of the 1974 Act) ^{not to claim "initial allowances"} and thus be entitled to extend the "tax free period" from five years to eight years. It is common ground that the income of the First Appellant from development products during the extra three years of the

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extended "tax relief period" is exempt from income tax. On 9th March 1979 the Respondent determined (pursuant to his powers under Section 40 (1) of the 1974 Act) that the following amounts were deemed to have been distributed as dividend: for the year to 30th June 1977 (year of assessment 1977/78) Rs 898,921 and for the year to 30th June 1978 (year of assessment 1978/79) Rs 899,331. In due course on 1st June 1982 the Respondent assessed the Second, Third and Fourth Appellant's to income tax as if they had received in the said years of assessment the said sums by way of dividend.

5. The dividend policy of the First Appellant since its Production Day (and incorporation) has been as follows:-

<u>Year of Assessment</u>	<u>Net Profits Per Accts.</u>	<u>Dividends</u>
1972/73	Rs 90,183	Rs 60,000
1973/74	Rs 375,074	Rs 360,000
1974/75	Rs 788,536	Rs 800,000
1975/76	Rs 831,755	Rs 800,000
1976/77	Rs 1,285,334	Rs 960,000
1977/78	Rs 1,501,556	NIL
1978/79	Rs 1,501,615	NIL

The following assessments were raised on 1st June 1982 against the Second, Third and Fourth Appellants in the following amounts for the following years of assessment:

<u>Year of Assessment</u>	<u>Appellant</u>	<u>Rs</u>	
1977/78	2nd Appellant	286,246	
1978/79	2nd Appellant	286,661	
1977/78	3rd Appellant	70,986	
1978/79	3rd Appellant	78,334	109/114
1977/78	4th Appellant	303,386	
1978/79	4th Appellant	303,524	

6.(i) The First Appellant appealed against the said Determination and the appeal was dismissed for the reasons given in paragraph 3 above.

(ii) The Second, Third and Fourth Appellants appealed against the said assessments and their appeals were dismissed. It was held by the Supreme Court (i) that Section 44 of the 1974 Act (a provision which makes certain tax avoidance arrangements void) was not in point as the assessments were not raised pursuant to that Section and (ii) Section 40 of the 1974 Act entitled the Respondent to raise assessments for years of assessment after 1973/74 and Section 55

of the Ordinance (which taxed undistributed profits as dividends in certain circumstances) was not in point and thus the assessments for 1976/77 and 1977/78 were valid and (iii) Section 17 (3) (c) of the Interpretation and General Clauses Act 1974 gave no protection in terms of fiscal matters and (iv) that on a proper construction of either Section 36 (p) and Section 55 of the Ordinance or Section 40 and Section 33 (5) of the 1974 Act the undistributed profits of the First Appellant were assessable on the Second, Third and Fourth Appellant's for the relevant years of assessment.

7. The relevant statutory provisions are found, in the Respondent's submission, in the 1974 Act and are as follows:

Section 40 (1)

40. (1) Subject to the other provisions of this Section , where the Commissioner is of opinion that a company has not

distributed to its shareholders by way of dividend during an income year a reasonable part of the distributable income of the Company for that income year, he may determine that the amount of the insufficient distribution shall be deemed to have been distributed as a dividend amongst the shareholders in that income year and they shall be assessable accordingly.

Subsection (8) of Section 40

40 (8) ... For the purposes of this Section "distributable income" means the difference between -

(a) the sum of

(i) the net income derived by the Company in the income year; and

(ii) any dividends deductible by the Company under Section 55 in that income year and

(b) the sum of

(i) the amount of the income tax
in respect of the chargeable
income derived by the Company
in that income year
and

(ii)

Section 55 (1)

55 (1) ... The chargeable income of a resident
company, in any income year, shall be the
amount remaining after deducting from the
gross income of the Company derived in that
income year

(a) all allowable deductions; and

(b) any dividend paid in that income
year in cash out of the funds not
being capital or capital profits of
the Company

Section 33 (4)

33 (4) Subject to subsection (5)... where a statement issued under subsection (2) has become final and conclusive

(a) the amount of the income shown in the statement in respect of any income year during the tax relief period shall not form part of the gross income of the development company for any year of assessment and shall be exempt from income;

(b)(i) any dividends paid before the end of its tax relief period out of any income of the development company which is exempt from income tax under paragraph (a); and

(ii) ...

shall not form part of the gross income of the shareholder and shall be exempt from income tax.

(5) Subsection (4) (b) shall not apply in relation to a period during which the tax relief period is extended under subsection (8).

(8)(a) ... Every development company may

(i) elect, by notice given to the Commissioner within twelve months from its production day, never to claim an initial allowance under Section 28 (1) or 29 (4) in which case its tax relief period shall be extended by three years; or

(ii) ...

8. It is common ground that dividends paid by a development company out of income from development products are after the first five years of a tax relief period, whether extended or not, liable to income tax in the hands of its shareholders. It is the Appellants' submission that if dividends are not paid during the

last three years of an extended tax relief period then the retained profits are not chargeable to income tax, in the hands of the shareholders, pursuant to Section 40 (1) of the 1974 Act even if they are excessive undistributed profits and would otherwise be liable to a Determination by the Commissioner in accordance with that provision. Thus the Appellants' argument rests upon justifying an anomaly: dividends paid during the last three years of an extended tax relief period are chargeable to income tax in the hands of the shareholders because Section 33 (5) so provides. But if the income from development products is retained, however great that income may be, the provisions of Section 40 (1) cannot operate and no deemed distribution of that income can be determined by the Commissioner. This result in the Respondent's submission is not justified on a true reading of the statute.

9. In the Respondent's submission, the interaction of Section 33 (5) and Section 40 (1) of the 1974 Act entitle the Commissioner to render liable to income tax excessive undistributed profits

of a development company (which profits arise out of its income from development products) during the last three years of an extended tax relief period. Section 40 (1) of the 1974 Act deems, after a relevant Determination, dividends to have been "distributed". Section 33 (5) is concerned with dividends which are "paid". In the Respondent's submission the deeming provision found in Section 40 (1) must be carried through and applied to Section 33 (4) and (5). In Commissioners of Inland Revenue v. Metrolands (1981) 54 Tax Cas. 679 Nourse J. considered the authorities upon the application of such a deeming provision and in his judgment said (at page 697, D):

"When considering the extent to which a deeming provision should be applied, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. It will not always be clear what those purposes are. If the application of the provision would lead to an unjust, anomalous or absurd result then, unless its application would clearly be within the purposes of the fiction, it should not be applied. If, on the other hand, its application would not lead to any such result then, unless that would clearly be outside the purposes of the fiction, it should be applied".

In the Respondent's submission the clear purpose and unambiguous language of the statute indicates that Section 40 (1) of the 1974 Act may be applied to excessive undistributed profits in the last three years of an extended tax relief period.

10. The Respondent anticipates that the Appellants will contend that there is no "distributable income" of the First Appellant during the relevant years of assessment. In the Respondent's submission this is incorrect. The 1974 Act distinguishes between income which is per se exempt (primarily found in Section 7 of the 1974 Act) and income which may become exempt. The income of a development company from development products is such income but it becomes exempt only if and when a Statement is provided by the Commissioner pursuant to Section 33 (2) of the 1974 Act. The income of a development company from development products is "gross income" as it arises.

Once a Statement has been issued in accordance with Section 33 (2) of the 1974 Act then it becomes exempt from income tax. But in terms of Section 40 (1) of the 1974 Act the Respondent is entitled to find that the development company, the First Appellant, had "distributable income" in that year. Thus the shareholders of the First Appellant are liable to income tax upon such retained profits. The logic of this approach is demonstrated by the result if the Respondent made a Determination in terms of Section 40 (1) of the 1974 Act during the first five years of an extended tax relief period, Section 33 (4) of the 1974 Act protects such deemed dividends from income tax by expressly saying that dividends as such are exempt. The scheme of the legislation is demonstrated by reference to provisions found in the Ordinance (the Income Tax Ordinance 1950) which preceded the 1974 Act. By the Ordinance Section 36 (P) expressly exempted a development company from the

provisions of Section 55 of the Ordinance (which provision was the equivalent of Section 40 of the 1974 Act) throughout the tax relief period whether extended or not. Thus the anomaly referred to in paragraph 8 above then existed. This was, in the Respondent's submission, recognised by the legislature when the 1974 Act was drafted and Section 36 P of the Ordinance was excised. The draftsman further cured the anomaly by inserting a definition of "distributable income" which had not previously existed. Thus, in the Respondent's submission, the 1974 Act provides a logical and unambiguous code governing distributions by development companies.

11. In the Supreme Court the Appellants contended that they had an accrued right pursuant to Section 17 (3) (c) of the Interpretation and general Clauses Act 1974. The relevant provision reads as follows:-

17-(1)...

(2) ...

(3) ... The repeal of an enactment shall not -

(a) ...

(b) ...

(c) Affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed enactment.

....

In the Respondent's submission there is no such acquired right in the instant matter. The Appellants contention appears to be that the election made pursuant to Section 36H (2) of the Ordinance provided the First Appellant and the Second, Third and Fourth Appellants to tax-exempt income for the extended tax relief period whatever changes in fiscal legislation may

occur in that period. This contention is put even though the relevant income arose after the 1974 Act was enacted. Further, the election (made pursuant to Section 36H (2) of the Ordinance) was made by the Company only and cannot in the Respondent's submission confer any right or privilege upon the Second, Third or Fourth Appellants. That said, the election only gave to the First Appellant the right to a "tax relief period". That right is unaffected by subsequent legislation. Further, it may have given to the First Appellant the right to have its income from development products exempt from income tax during the tax relief period, however long that might be. The election did not confer any right upon the Second, Third or Fourth Appellants to have their dividend income from a development company exempt from income tax. The 1974 Act is not retrospective in this respect: The Commissioner of Income Tax v. Esperance Company Limited [1983] STC 789 (at page 792). The fact that, as from a future date, tax is charged upon a

source of income which has been arranged or provided or has been exempt before that date does not mean that the tax is retrospectively imposed. Further, it cannot be contended, in the Respondent's submission, that the 1974 Act impaired any right obtained by the Appellants: Weu Bon Teu v. Kenderaan Bas Mara [1983] 1 AC 553. The Weu Bon Teu case concerned Section 30 of the Interpretation Act 1967 of Malaysia which is in mutatis mutandis identical terms to Section 17 (3) (c) of the Interpretation and General Clauses Act 1974 (formerly Section 11 of the Interpretation and General Clauses Act 1957). In addition, the Respondent adopts the reasoning of the Supreme Court.

12. The Respondent accordingly respectfully submits that the Appeal should be dismissed for the following among other

REASONS

1. BECAUSE the assessments for 1977/78 and 1978/79 upon the Second, Third and Fourth Appellants are correct.

2. BECAUSE the Supreme Court came to the correct conclusion in terms of Section 33 (4) of the 1974 Act.

3. BECAUSE the election pursuant to 36H (2) of the Ordinance does not confer any right or privilege upon the Second, Third or Fourth Appellants.

4. BECAUSE Section 33 (5) of the 1974 Act renders excessive undistributed profits of a development company subject to Section 40 (1) of the 1974 Act.

5. BECAUSE the Supreme Court of Mauritius was right and ought to be upheld.

ROBIN MATHEW

