

Aluminium Enterprises Limited and  
Others

Appellant

v.

The Commissioner of Income Tax

Respondent

FROM  
THE SUPREME COURT OF MAURITIUS

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 3RD JULY 1985

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*Present at the Hearing:*

LORD FRASER OF TULLYBELTON  
LORD KEITH OF KINKEL  
LORD ROSKILL  
LORD TEMPLEMAN  
SIR JOHN MEGAW

*[Delivered by Lord Keith of Kinkel]*

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This appeal from the Supreme Court of Mauritius raises questions as to the proper construction of certain provisions of the Income Tax Act 1974.

The first appellant Aluminium Enterprises Limited ("the appellant company") was incorporated in Mauritius on 10th September 1969 with three shareholders, who are the second, third and fourth appellants ("the appellant shareholders"). The principal object of the appellant company was the manufacture of aluminium ware and stainless steelware.

Since about 1961 it has been governmental policy in Mauritius to encourage industrial development in the country by means of tax reliefs to concerns undertaking such development. Such reliefs were introduced by the Income Tax (Amendment) Ordinance No. 49 of 1961 which amended the Income Tax Ordinance No. 84 of 1950 *inter alia* by adding a new Part VIII, headed "Industrial Development Tax Relief". This made provision for eligible concerns to apply to the appropriate Minister for a development certificate. A company holding such a certificate became entitled,

under section 36H(1), to a tax relief period of five years commencing on the production date of the company. By virtue of section 36H(2), the tax relief period of five years was extended by a further three years where the company, by application duly made, elected not to claim the initial allowances for tax purposes available under certain provisions of the principal Ordinance. The machinery by which the tax relief was to be obtained consisted in the issue by the Commissioner of Income Tax of a statement showing the amount of the development company's income for each accounting period, in relation to which section 36o(1) provided that the amount of the income shown by such statement should not form part of the assessable income, total income or chargeable income of the development company for any year of assessment, and should be exempt from tax under the Ordinance.

It should be mentioned at this stage that section 55 of the 1950 Ordinance made provision for the making by the Commissioner of a determination that a company had not distributed a reasonable part of its income for any particular period, with resultant assessments to tax on the shareholders on the basis of a deemed distribution. Section 36P, as introduced by the amending Ordinance of 1961, excluded from the ambit of section 55 income of a development company exempted under section 36o.

By section 3 of the Income Tax (Amendment) Ordinance No. 15 of 1966, provision was made for the relief from income tax to be extended to dividends paid to shareholders of a development company out of its profits, but this relief was to apply only during the basic five year relief period, not to the additional three year period to which the company might become entitled by electing not to claim initial allowances. In the meantime, it is to be noted, the Income Tax (Amendment) Ordinance No. 20 of 1964 had repealed section 55 of the 1950 Ordinance, and consequentially, the exempting provision of section 36P. The independence of Mauritius came into force on 12th March 1968, and thenceforth Acts of Parliament succeeded Ordinances as the manner of legislation. The Income Tax (Amendment) Act No. 32 of 1969 reintroduced section 55 of the 1950 Ordinance, and the Income Tax (Amendment) (No. 2) Act No. 48 of 1969 reinstated the exempting provision of section 36P.

That was the state of the law when, on 9th October 1969, the Minister issued to the appellant company a development certificate for a period of five years from a production date to be determined by the Commissioner of Income Tax, which the latter subsequently certified as being 1st April 1971. The appellant company had incurred substantial capital

expenditure qualifying for initial allowances, and on 13th December 1971 notified an election not to claim initial allowances and applied under section 36H(2) of the 1950 Ordinance for extension of its tax relief period for a further three years. This claim was allowed by the Commissioner on 17th January 1972. This had the effect that the appellant company's tax relief period continued until 31st March 1979.

In each of the five years of assessment from 1972-73 to 1976-77 the appellant company made substantial profits and distributed dividends to the appellant shareholders. The Commissioner issued statements under section 36N(2) in relation to these profits and both they and the relative dividends were exempted from income tax. In each of the years of assessment 1977-78 and 1978-79 the appellant company also made substantial profits, which were similarly the subject of a statement by the Commissioner, but did not declare or distribute to shareholders any dividends.

The Income Tax Act 1974, which with the exception of provisions not relevant for present purposes came into force on 1st July 1974, consolidated with amendments the law relating to income tax in Mauritius, repealing in the process the Ordinance of 1950 and the various amendments of it. About the same time there came into force the Development Incentives Act 1974, which set out provisions governing the issue of development certificates such as had previously been contained in the Income Tax Ordinance 1950 as amended. Section 11 of this Act provided transitionally that any development certificate issued under the 1950 Ordinance should be deemed to have been issued under the Act. The Income Tax Act 1974 was amended in certain respects by the Income Tax (Amendment) Act 1976.

Section 40(1) of the Income Tax Act 1974 provides:-

"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."

Section 40(8) of the Act, as amended by the 1976 Act with effect retrospective to 1st July 1974, provides:-

"For the purposes of this section 'distributable income' means the difference between -

- (a) the sum of -
- (i) the chargeable 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 amount of the income tax in respect of the chargeable income derived by the company in that income year."

Section 55(1) provides:-

"Subject to subsections (3) and (4), 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."

By letter dated 9th March 1979 the respondent Commissioner notified to the appellants a determination under the powers conferred upon him by section 40(1), whereby the following amounts should be deemed to have been distributed among the appellant shareholders, and they should be assessable to tax accordingly:

<u>Year of account to</u>	<u>Year of assessment</u>	<u>Amount deemed to have been distributed as dividend</u>
30.6.77	1977-78	Rs.898,921
30.6.78	1978-79	Rs.899,331

On 22nd April 1980 the appellant company appealed to the Supreme Court of Mauritius against the respondent's determination. On 1st June 1982 the respondent served on the appellant shareholders additional assessments to income tax for the years 1977-78 and 1978-79 in respect of the deemed distributions of dividends. These appellants also appealed to the Supreme Court against the assessment, and all the appeals were consolidated. By an interlocutory judgment dated 2nd December 1982 and a final judgment dated 15th July 1983 the Supreme Court (Glover C.J., and Ahmed J.) dismissed the consolidated appeals. The appellants now appeal, with leave of the Supreme Court, to Her Majesty in Council.

The primary argument for the appellants, which if upheld is sufficient to dispose of the appeal in their favour, is essentially a very simple one. It

is to the effect that in computing the amount of a development company's chargeable income for purposes of section 40(8) no account falls to be taken of income of the company which is the subject of a statement issued by the Commissioner. The applicable provisions about such statements and consequent tax relief, which superseded those of Part VIII of the 1950 Ordinance, are to be found in section 33 of the Income Tax Act 1974 and so far as relevant are as follows:-

" (1) The tax relief period of a development company shall commence on its production day and shall, subject to the Development Incentives Act, 1974, continue for the period specified in its development certificate.

(2) The Commissioner shall issue to every development company, in respect of each year of assessment relating to its tax relief period, a statement showing the amount of income or loss for that year from the production or provision of the development products specified in its development certificate.

.....

(4) Subject to subsections (5) and (6), 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 tax;

(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) any dividend paid by an investment trust company out of dividends from a development company received under subparagraph (i),

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).

.....

(7) Every development company shall, during its tax relief period, be assessable to income tax in respect of any income it derives which is not exempt from income tax under subsection (4).

(8)(a) Subject to paragraph (b) 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) not so elect, in which case it shall be deemed for the purposes of sections 28(1) and 29(4) to have incurred, on the day following the end of its tax relief period, the capital expenditure previously incurred by it on any industrial premises, machinery or plant owned by it on that day.

(b) An election not to claim an initial allowance under section 28(1) or 29(4) shall apply only in respect of industrial premises erected, improved or extended, or machinery or plant acquired, during the whole of the tax relief period as extended under paragraph (a)(i)."

The respondent issued to the appellant company, under section 33(2), statements covering the whole of its profits for the assessment years 1977-78 and 1978-79 in respect of which the deemed distributions were determined to have been made, on 19th April 1978 and 9th March 1979 respectively.

The appellants found on the provision of section 33(4)(a) to the effect that the amount of income shown in such a statement in respect of any income year during the tax relief period shall not form part of the gross income of the development company. There is no doubt that the years 1977-78 and 1978-79 were income years that fell within the appellant company's tax relief period.

The term "chargeable income" in section 40(8) as amended is defined in section 2(1) of the Act as meaning, for present purposes:-

"In the case of a taxpayer referred to in Part VI, the amount of income -

- (i) determined in accordance with that part; or
- (ii) deemed to be chargeable income under that part."

Section 55, which is in Part VI of the Act, has already been quoted. It provides that the starting point for the computation of the chargeable income of a resident company (such as the appellant company) is to be the gross income of the company. Since by section 33(4)(a) income of a development company which is the subject of a section 33(2) statement is to form no part of the gross income of that company, it cannot, so the argument runs, be capable of being taken into account in doing the section 55 computation, therefore it cannot enter in any way into the chargeable income, nor into the "distributable income" as defined by section 40(8). It is accordingly irrelevant in considering for purposes of section 40(1) whether a reasonable part of the distributable income of the company has been distributed by way of dividend. Thus the respondent should have entirely ignored such income, and had fallen into error in failing to do so.

In answer to this argument counsel for the respondent founded strongly on the circumstance that section 36P of the 1950 Ordinance, exempting development companies from those provisions of section 55 of that Ordinance which corresponded with section 40 of the 1974 Act, had been repealed by the latter and not re-enacted in any form. It was therefore to be inferred, so it was maintained, that Parliament had intended to remove the pre-existing immunity for undistributed profits of development companies during the three year extension of the tax relief period gained by an election not to claim initial allowances. But it is to be observed that the 1974 Act contained a comprehensive code to deal with the whole income tax law, employing modern drafting techniques and introducing definitions of "gross income", "net income" and "chargeable income" which did not appear in the earlier legislation. The result contended for by the appellants was undoubtedly capable of being brought about in the manner indicated in their argument, and if it were so brought about then a provision corresponding to section 36P of the 1950 Ordinance would be unnecessary.

In considering the intention of Parliament in this respect as manifested by the 1950 Act their Lordships think it relevant to keep in mind that Parliament must be taken to have known that there were a number of development companies in the situation in which the appellant company found itself at the time. That

situation was that the company, in reliance on the tax relief rules for the time being in force, had elected not to claim initial allowances in the expectation and upon the faith that a three year extension of the relief period would be secured during which not only would qualifying profits of the company be exempt from income tax, but also undistributed profits of the company would not be liable to be treated as having been distributed so as to become taxable in the hands of the shareholders.

While it is always open to a sovereign Parliament to change tax rules for the future, and even to do so retrospectively provided that the requisite intention is made clear, one intention not readily to be attributed to the legislature is that of disturbing legitimate expectations upon the faith of which development companies had earlier made irrevocable elections not to claim initial allowances. If there were any ambiguity to be found in the relevant enactment, this consideration would be a powerful factor compelling the ambiguity to be resolved in favour of the taxpayer. But as it is, their Lordships have been unable to find any such ambiguity. In their opinion the intention to be gathered from the express enactment of section 33(4)(a), and the necessary incorporation into the definition of "distributable income" in section 40(8) of the definition of "chargeable income" in section 2(1) and section 55 is entirely plain. It is that no part of any income of a development company which is the subject of a statement issued by the Commissioner under section 33(2) should enter into the computation of that company's distributable income for purposes of section 40.

It was further argued for the respondent that, if the appellant's argument were well founded, the latter part of section 33(4)(a), providing not only that income of a development company shown in a Commissioner's statement should not form part of that company's gross income but also that such income should be exempt from income tax, would be tautologous and unnecessary. It seems to their Lordships that there is a degree of tautology in the subsection on any view of the appellant's argument, which accordingly remains unshaken.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed, and the additional assessments to income tax made by the respondent on the appellant shareholders discharged. The respondent must pay the appellants' costs before the Board and in the Supreme Court.





