JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 33/81

BEFORE: The Honourable Mr. Justice Carberry, J.A. - Presiding
The Honourable Mr. Justice Rowe, J.A.
The Honourable Mr. Justice Campbell, J.A. (Ag.)

BETWEEN: ANTILLES CHEMICAL COMPANY LIMITED - APPELLANT/RESPONDENT

A N D : COMMISSIONER OF INCOME TAX - RESPONDENT/APPELLANT

Mr. Enos Grant and Mr. John Vassel instructed by Dunn Cox and Orrett for the Appellant/Respondent

Mr. H. Hamilton instructed by Mr. Philpotts-Brown for the Revenue Board

July 12, 13, 14, 15, 16 and 30, 1982

CAMPBELL, J.A. (Ag.):

Antilles Chemical Company Limited (hereafter called the Company) was incorporated and registered in the State of Delaware of the United States of America as a manufacturer and distributor of fertiliser. It carries on similar business in Jamaica. Fertiliser when manufactured in Jamaica is an "approved product" by virtue of an order made by the Minister responsible for industrial development under Section 3 of the Industrial Incentives Act (hereafter called the Act). The Company having satisfied the conditions prescribed by the Act for declaration as an "approved enterprise" was so declared by the Minister under Section 4 of the Act with a "date for production" as in the Act defined prescribed as 1st September, 1966.

As an approved enterprise the Company became entitled to certain benefits under the Act which so far as material I will limit to income tax benefits which are prescribed in Sections 3(4), 9,10 and 12 which must be read together:

The said Sections so far as relevant are as hereunder:

> "Section 3(4): When approving a product for the purposes of this Act, the Minister may, by the same order, declare that all approved enterprises manufacturing the approved product shall be entitled either to one hundred per centum or to fifty per centum of the benefits of this Act, that is to say, in regard

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"to relief from income tax, relief in respect of the whole of the chargeable income of the company or of one half of the chargeable income of the company (as the case may be) which, but for the provisions of this Act, would be chargeable with income tax."

"Section 9: In this Part, (which covers sections 9 to 14 inclusive and is captioned "Income Tax Benefits") unless the context otherwise requires, income tax means the tax payable by companies under the law for the time being relating to income tax.

"Section 10(1): Subject to the provisions of this Part, an approved enterprise shall at its option, be entitled to either one or other of the reliefs from income tax defined in sections 11 and 12 as the first and second options respectively for the periods therein respectively stated.

"Section 10(3): Nothing in this Act shall affect any liability to income tax incurred by an approved enterprise in respect of profits, made prior to the commencement of the period of relief defined in section 11 or section 12 or section 29 as the case may be.

(4): Notwithstanding anything in the law relating to income tax an approved enterprise shall not, after it has become an approved enterprise, be entitled to initial allowances in respect of assets acquired prior to, or during, the period of relief defined in section 11 or section 12 or section 29 as the case may be."

"Section 12: The second option referred to in section 10 shall subject to the conditions specified in section 10 and in this section and to the terms of any order made under subsection 4 of section 3 comprise the relief from income tax following that is to say -

(a) relief from income tax in respect of profits or gains earned from the manufacture of the approved products for the first four years of a period of six years from such date as the approved enterprise may select not being more than three years from the date of production, income tax being payable in respect of the remaining two years of the said period of six years as follows -

(i) if the relief from income tax is total relief - In respect of the fifth year on 33 1/3% of the chargeable income, before deduction of annual allowances.
In respect of the sixth year on 66 2/3% of the chargeable income, before deduction of annual allowances;

(b) prior to the commencement of the period of six years referred to in paragraph (a) annual allowances may be made but such allowances shall cease to be made during the first four years of the said period of six years.

(c) after the expiration of the first four years of the said period of six years, annual allowances may be made on the original cost

"of the assets less any annual allowances made in accordance with paragraph (b).

(d) after the expiration of the said period of six years, an approved enterprise may, for the purpose of assessment of income tax, carry forward in respect of the next succeeding six years of assessment losses which have not been written off incurred in the period during which the company was an approved enterprise taking into account any annual allowances made pursuant to paragraphs (b) and (c)."

The Company opted for the benefits conferred by Section 12 of the Act and accordingly selected 1st September, 1969 as the date from which it was to enjoy for the period of six years the aforesaid benefits.

In due course the Company submitted to the Commissioner of Income Tax (hereafter called the Commissioner) adjusted profits for each of the years of assessment 1970 to 1976 with computations consistent with its view of the nature of the benefits conferred by Section 12. The income tax liability for each of the aforesaid years was, consequent on such computations nil, with a total loss of $318,298.00 derived from years of assessment 1972, 1973 and 1976 available to be carried forward to the 1977 year of assessment.

The Commissioner accepted for each of the years 1970 to 1976 the adjusted profits of the Company. However after making his own computations based on his view of the benefits conferred by the said Section 12 he concluded that the Company was liable to pay income tax for the years of assessment 1974 and 1975; further that the benefits ended in 1974 and also that there was no loss to be carried forward to 1975 year of assessment much less to any subsequent year.

The Company was assessed to tax for the years of assessment 1974 and 1975 and the assessments were confirmed by the Commissioner. The Company lodged an appeal against these assessments before the Revenue Court and sought to vindicate its computations and resultant non-liability to tax on the ground inter alia that the Commissioner had misdirected himself on the interpretation of the Act and the Income Tax Act. Such misdirections in particular related to:

"(a) The income relieved from income tax; and/or

(b) The treatment of losses in relation to the years of assessment and/or the "omitted year."

At the hearing before Marsh, J. in the Revenue Court Mr. Hamilton for the Commissioner stated as the basis of his submissions that three issues were involved in the appeal namely:

(1) What income was relieved under the Act? Was it chargeable income or income per se? That is to say was it chargeable income under Section 13 of the Income Tax Act or the income mentioned in Section 5 of the said Act?

(2) Whether the word "years" in Section 12 of the Act means "years of assessment" or "accounting years"?

(3) How are losses to be treated under the Act?

It will be seen that (1) and (3) of the bases of Mr. Hamilton's submissions cover the grounds on which the Company primarily rested its appeal.

As regards these grounds the learned judge found that chargeable income mentioned in the Act has the same meaning as in Section 2 of the Income Tax Act and that it was in respect of this chargeable income of the Company as an approved enterprise that it was relieved from income tax. It was not in respect of the whole income mentioned in Section 5 of the Income Tax Act that it was being relieved from income tax. The learned judge further concluded that since it was income tax of which the Company was being relieved, it was necessary for its chargeable income to be computed in accordance with the Income Tax Act for the time being in force modified only in so far as the Industrial Incentives Act expressly provided.

With regard to the second issue which Mr. Hamilton said was raised by the appeal namely the "meaning" of the word "years" in Section 12 of the Act the learned judge concluded that six years meant six years of 365 days each from 1st September, 1969 that is to say, ending on 31st August 1975 during which income accrues to the Company from the manufacture of the approved product on which tax would but for the Act be payable.

The learned judge accordingly allowed the Company's appeal in part and ordered that the matter be referred back to the Commissioner for him to make the necessary amendments or adjustments of the assessments in accordance with the judgment. The Commissioner was ordered to pay the costs

of the appeal.

Both parties have now appealed against this judgment. The Company's grounds of appeal before us are substantially the same as those argued before Marsh, J. Thus Mr. Grant for the Company stated that the issues raised in the appeal before us are issues 1 and 3 as formulated by Mr. Hamilton in the Revenue Court. The Commissioner by a respondent's notice appeals against the order allowing the Company's appeal with costs and sought an order:

> "(1) That the decision of the Revenue Court made on the 8th day of May be set aside.
>
> (2) That the Respondent's decisions made on the 22nd day of March 1979 for the years of assessment 1974 and 1975 respectively be restored.
>
> (3) That the Appellant do pay the costs of and incident to the hearing of the appeal to this Honourable Court and the Court below."

The main ground on which the Commissioner relies is that:

> "The learned judge of the Revenue Court erred and/or misdirected himself in law in holding that the word "Years" in section 12 of the Industrial Incentives Act means Years of income and not Years of Assessment. Accordingly that the Appellant was entitled to have his profits relieved for a period of seven Years of Assessment commencing with 1969."

Dealing with the Company's appeal what can be extracted from the submissions of Mr. Grant on its behalf made in alternative ways is that the real issue raised is whether the "profits and gains" mentioned in Section 12 of the Act is exempted from income tax or on the contrary the Company is merely relieved from the payment of the income tax thereon to the percentage extent mentioned in Section 3(4).

I am of the view that the answer is to be found in the clear words used in Sections 9, 10 and 12 which must be read together.

Section 10 states expressly that the relief is given to the approved enterprise and is from income tax on the profits or gains mentioned in Section 12. Income tax is defined in Section 9 as "the tax payable by companies under the Law for the time being relating to income tax." Under Section 32 of the Income Tax Act when read with Section 30(b) of the said

Act, the tax payable by a Company is on its chargeable income at the rates prescribed. If therefore the relief to the approved enterprise is from "income tax" as defined, the profits and gains mentioned in Section 12 must be computed in accordance with the Law for the time being relating to income tax so to extract therefrom its chargeable income component. In other words the chargeable income deducible from the profits and gains from the manufacture of the approved product for each year of assessment must be ascertained so to determine the tax otherwise payable which is the relief being granted. This exercise necessarily involves a computation under Section 13 of the Income Tax Act read with Acts 29 of 1969 and 30 of 1970 with such modifications in the computation of chargeable income as are expressly specified in Section 10(4) and Section 12(b) and (c) of the Industrial Incentives Act.

Much confusion to my mind has been occasioned by over-emphasising "chargeable income" defined in Section 2 of the Income Tax Act as necessarily always characterising the concept of an aggregate. True enough the concept of chargeable income as an aggregate is manifest when one is dealing with a person who has income from more than one source, as for example, rent income, profits or gains from a trade, dividends or interests. All these incomes from the different sources have to be aggregated and reduced by the permitted appropriate deductions under Section 13 of the said Act so to arrive at the chargeable income. However where there is only one source of income e.g. profits and gains from the manufacture of fertiliser, the amount remaining after the permitted appropriate deductions under Section 13 is as much the chargeable income of the manufacturer as in the earlier case and also comes within the definition of chargeable income in Section 2 of the Income Tax Act.

Thus there is really no inconsistency between Section 2 of the Industrial Incentives Act which incorporates the definition of chargeable income given in Section 2 of the Income Tax Act and:

(a) Section 3(4) of the Act which speaks of benefit under the Act to the approved enterprise being relief from income tax in respect of the whole of the chargeable income of the Company or of

one-half of the chargeable income of the Company (as the case may be) which but for the provisions of this Act would be chargeable with income tax, and

(b) Section 12 of the Act which speaks of relief to the approved enterprise from income tax in respect of profits or gain earned from the manufacture of the approved products.

What in my view Section 12 of the Act does is to make explicit the fact that the "chargeable income" mentioned in Section 3(4) of the Act is to be ascertained from one source of income only namely the profits or gains from the manufacture of the approved product. Once it is recognised that chargeable income can exist where there is only one source of income in like manner as where there are two or more sources of income, then the legislative intent becomes clear namely that the benefit of the Act is to be considered only in relation to the source of income mentioned in Section 12. The income from this source when adjusted under Section 13 of the Income Tax Act becomes chargeable income on which at the appropriate rate of tax the approved enterprise would but for the income tax relief accorded it by Section 3(4) be liable to pay income tax.

Mr. Grant submitted in the alternative that even if the gains or profits are not exempted but to the contrary the Company is merely relieved of income tax on the chargeable income extracted therefrom, losses including omitted year loss incurred during the period when the income tax relief is operative ought not to be set off against profits or gains earned in a subsequent year of the said period because on a true construction of Section 12(d) an express additional benefit was conferred namely that of carrying forward for a further six years the losses so incurred in the earlier six years that is to say losses incurred during the incentive period. He submitted that the words "written off" mentioned in the sub-paragraph do not necessarily mean written off against the profits or gains in respect to which income tax relief is being granted. It can mean written off against profits or gains of the approved enterprise otherwise than in the manufacture of the approved product which profits or gains would not fall within the purview of Section 12, or alternatively written off against such part of profits or gains which even though

derived from the manufacture of the approved product is liable to income tax because the order made under Section 3(4) of the Act may have limited the relief in favour of the approved enterprise to only 50% of the chargeable income from the said profits or gains.

This submission though attractive would have been persuasive if the Act had not contained express provisions prohibiting deductions from the profits or gains which normally would be done in the computation of the chargeable income therefrom during the incentive period.

In cases where the Act intended that a particular item was not to be deducted, or if deducted it should be only done in particular years, it has stated this expressly. Thus deductions of capital allowances in the form of initial allowances are expressly prohibited in Section 10(4) and the deduction of annual allowances are expressly prohibited or otherwise expressly dealt with in Section 12(b) and (c). In the absence of any express provision prohibiting the deduction of losses incurred in a previous year of assessment from the profits or gains from a subsequent year of assessment derived from the manufacture of the approved product, the reasonable inference to be drawn is that such losses are to be written off to the extent that there are profits or gains to absorb them subject of course to the special conditions regulating the writing off of omitted year loss.

The conclusions of the learned judge on this aspect as to whether the profits or gains were exempted or to the contrary whether the Company was relieved from income tax on its chargeable income is stated thus:

> "Intrinsically, since the Act speaks of a 'relief from income tax' then, as a matter of logic and common sense, it would seem that in every case a computation has to be made, subject only to the modification required by the Industrial Incentives Act as to annual allowance, etc. and that in every case the chargeable income must be determined, whether or not it consists solely of profits earned during the incentive period. ..... I am encouraged in that view by a number of provisions in the Industrial Incentives Act, e.g. section 10 sub-section (4), section 11 sub-sections (b) and (c), section 12 sub-

> "sections (a) (i), (a) (ii), (b), (c), (d), section 13 sub-sections (2), (4), section 20, section 22 and section 24.
>
> The result therefore is that in respect of the computation of losses, these are to be computed under the general law relating to income tax except as modified by the Industrial Incentives Act. As a result omitted year losses are to be treated as required by the Industrial Incentives Act as amended by Act 29/69 and 30/69, which will mean that they will only be available as a deduction if all other losses have been exhausted and then only for the five-year period commencing in 1969 and ending in 1973."

With this conclusion I am in entire agreement and would accordingly dismiss the appeal of the Company.

With regard to the appeal of the Commissioner, it is contended that the word "years" used in Section 12 of the Act is to be interpreted as years of assessment and not "years of income."

Mr. Grant for the Company supports the conclusion of the learned judge that the word "years" means years of twelve months each calculated from the selected date and not years of assessment. This conclusion of the learned judge is clearly in conflict with his earlier decision in West Indies Manufacturing Co. of Jamaica v. Commissioner of Income Tax (Appeal No. 3/78) decided on 3rd November, 1978). The learned judge however sought to distinguish that case from the present in these words:

> "Before disposing of this matter, it is necessary to say something about the decision of this Court in the case of WEST INDIES MANUFACTURING - LIMITED cited by Mr. Hamilton. In my judgment, that case is clearly distinguishable from the instant, because there the production date was 1st January and so the production year coincided with the year of assessment. Accordingly, in that case, it was unnecessary for the Court to decide whether the expression "years" in Sections 11 and 12 of the Industrial Incentive Act meant "calendar years" or "years of assessment" for the sufficient reason that on either basis the result would have been the same."

In supporting the learned judge's construction of the word "years" Mr. Grant prays in aid Section 3 of the Interpretation Act which provides that "year" means a year reckoned according to the British Calendar. By the Calendar (New Style Act) 1750, 24 Geo. 2 Cap. 23 (U.K. Legislation) the beginning of the year was fixed as 1st January. Thus a calendar year runs from January 1 to the following December 31 and this period coincides with the year of assessment under the Income Tax Act.

The Income Tax (Amendment) Act 1969 (29/69) paragraph 2(b) of the Second Schedule itself defines "year" as meaning either a calendar year commencing January 1 and ending on December 31 or the accounting year terminating in the calendar year. This interpretation though limited to the transitional provisions relating to the statutory income or the loss for years 1967, 1968, and 1969 would tend to show that in so far as the six years relief begins in 1969, then this latter year would begin on 1st January in the absence of any accounting year terminating therein.

Thus, this section of the Interpretation Act provides little solace if any to Mr. Grant. However, the real thrust of Mr. Grant's submission is that by standard recognised interpretation where a period of time be it months or years is stated to be from a given date, then the months or years must be calculated as commencing on the date next following on the reference date. On this interpretation, the "six years from such date as the approved enterprise may select" must, where the approved enterprise selected 1st September, 1969, be for a period ending 31st August 1975.

Mr. Hamilton on the other hand submits that year of assessment must irresistibly be the meaning of "year" because, what is being given with reference to which the expression is used is "relief from income tax." Income tax is payable by reference to a year of assessment and not by reference to a year of income. The fact that the income on which the tax is payable may have accrued either in the year of assessment or in a period different from the year of assessment is totally irrelevant. It is the fact of assessment to income tax or liability to assessment to income tax in any year of assessment which alone gives relevance to relief from income tax. Thus, when section 12 speaks of "relief from income tax in respect of profits or gains earned for the first four years of a period of six years from such date as the approved enterprise may select " - all that it means is that inasmuch as the approved enterprise, if it had commenced its business on 1st September, 1969, would be liable to income tax for the 1969 year of

assessment with respect to its income from 1st September, 1969 to 31st December, so also it is relieved from income tax for that year of assessment and thereafter for a further five years of assessment ending with the 1974 year of assessment.

In my view Mr. Hamilton's interpretation is correct. Section 5 of the Income Tax Act reads thus:

> "5 - Income tax shall, subject to the provisions of this Act be payable by every person at the rate or rates specified hereafter for each year of assessment in respect of all income, profits or gains respectively described hereunder -
>
> ....."

It is thus crystal clear that:

(1) the obligation to pay income tax is imposed on persons who alone are eligible for relief;

(2) the income tax is imposed for a year of assessment and for no other period, relief from income tax can therefore be only in relation to a year of assessment;

(3) the income on which in any year of assessment a person may be liable to pay income tax is not necessarily the income for a period coincident with the year of assessment, though in general it is.

Thus, the use of the expression "relief from income tax" can have no meaning except in relation to a year of assessment in which alone income tax is imposed. To grant income tax relief to a person for six years must necessarily mean for six years of assessment. It is however necessary to determine the year of assessment with which the income tax relief commences. Also since the tax relief is in respect of income from a particular source it is also necessary to prescribe a date from which the person is deemed to have commenced earning income from that source on which he will in the appropriate year of assessment be liable to the charge to income tax.

Section 12 thus specifies the date from and after which the

income from that source is to be ascertained and to the extent that the income so ascertained becomes the subject of assessment in accordance with the Income Tax Act, the approved enterprise is relieved wholly or partially from the income tax payable thereon for the space of six years of assessment commencing with the year of assessment wherein the said income first came into the charge to tax.

In my view, the earlier judgment of Marsh, J. was well reasoned and soundly based. His present divergent interpretation of the word "years" in section 12 is premised on the erroneous view that it is the profits and gains which is being relieved from tax for the space of six years from 1st September, 1969. To the contrary, it is the approved enterprise which is being relieved from income tax and this can only be in relation to a year of assessment. Secondly, even if in popular language it can be said to be the profits or gains and not the person in receipt thereof that is relieved from income tax, the clear language of section 5 of the Income Tax Act shows that the income tax payable is not on the profits or gains "in gross" but is, by virtue of the words "subject to the provisions of this Act" payable on "chargeable income" which expression is itself inextricably entwined with year of assessment and not with year of income. Thus "year" must mean "year of assessment" to which the chargeable income relates.

For the above reasons I would allow the appeal of the Commissioner and order that the judgment and order of Marsh, J. be varied by vacating the order "allowing the appeal in part of the Company" and substituting an order of dismissal, also by vacating the order remitting the matter to the Commissioner for revision of his assessment. The Commissioner will have his costs both here and in the Court below.