

Privy Council Appeal No. 24 of 2003

Carreras Group Limited

Appellant

v.

The Stamp Commissioner

Respondent

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 1st April 2004

Present at the hearing:-

Lord Nicholls of Birkenhead

Lord Hoffmann

Lord Rodger of Earlsferry

Lord Carswell

Lord Brown of Eaton-under-Heywood

[Delivered by Lord Hoffmann]

1. On 27 April 1999 Carreras Group Ltd (“Carreras”) entered into a written agreement to transfer all the issued ordinary share capital and most of the preference shares in Jamaica Biscuit Company Ltd (“Jamaica Biscuit”) to Caribbean Brands Ltd (“Caribbean”). The consideration was expressed to be a debenture to be issued by Caribbean in the sum of US\$37.7 million and in terms annexed to the agreement. The terms were that the debenture would not be either secured or transferable. The principal debt would carry no interest and be repayable by banker’s cheque on 7 May 1999.

2. In the event, the debenture was not redeemed until 11 May 1999, when Caribbean paid US\$19.9 million and J\$700,344.814 and Carreras accepted these payments in full settlement.

3. The question in this appeal is whether the transfer of shares is chargeable to transfer tax. Section 3 of the Transfer Tax Act imposes the tax on “the amount or

value of such money or money's worth as is ... the consideration for each transfer". "Transfer" includes "any legal or equitable transfer by way of sale ... exchange ... or other disposal". Prima facie, therefore, the transfer of the shares was a disposal which attracted tax on the amount or value of the consideration.

4. Part I of the First Schedule contains "special provisions with reference to shares and to debentures". Two of these are relevant: paragraphs 4 and 6. Paragraph 4 deals with "reorganization of share capital". The relevant words are:

"4.-(1) This paragraph shall apply in relation to any reorganization of a company's share capital; and for the purposes of this paragraph ...

(a) reference to reorganization of a company's share capital include ... (i) any case where persons are ... allotted ... debentures of the company in respect of and in proportion to (or as nearly as may be in proportion to) ... their holdings of shares in the company ...

(b) 'original shares' means shares held before and concerned in the reorganization ... of capital, and 'new holding' means, in relation to any original shares, the ... debentures of the company which, as a result of the reorganization ... represent the original shares ...

(2) ... a reorganization ... of a company's share capital shall not be treated as involving any disposal of the original shares."

5. Paragraph 4 thus deals with (among other things) an exchange of shares for debentures in the same company. Paragraph 6(1) extends this to an exchange of shares in one company for debentures in another:

"... where a company issues ... debentures to a person in exchange for shares in ... another company, paragraph 4 shall apply with any necessary adaptations as if the two companies were one company and the exchange were a reorganization of its share capital."

6. Carreras says that if one reads the agreement of 27 April 1999, it falls squarely within these exempting provisions. The issue of the debenture by Caribbean in exchange for the original shares held by Carreras in Jamaica Biscuit was required to be treated as if Caribbean and Jamaica Biscuit were the same company and the exchange was a reorganisation of its share capital. By virtue of paragraph 4(2), it was therefore not to be treated as involving any disposal of the Jamaica Biscuit shares.

7. Their Lordships agree that the question is whether the relevant transaction can be characterised as a reorganisation of share capital as defined in the Act, that is to

say, as an issue of a debenture in exchange for shares. They also accept that if the relevant transaction is confined to what happened on 27 April by virtue of the agreement executed on that date, there can be no doubt that it fell within that description. On the other hand, if one is allowed to take a wider view and to treat the terms of the debenture and its redemption two weeks later as part of the relevant transaction, it looks very different. From this perspective, the debenture is only a formal step, having no apparent commercial purpose or significance, in a transaction by which the shares in Jamaica Biscuit were exchanged for money.

8. Whether the statute is concerned with a single step or a broader view of the acts of the parties depends upon the construction of the language in its context. Sometimes the conclusion that the statute is concerned with the character of a particular act is inescapable: see *MacNiven (HM Inspector of Taxes) v Westmoreland Investments Ltd* [2003] 1 AC 311. But ever since *Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300 the courts have tended to assume that revenue statutes in particular are concerned with the characterisation of the entirety of transactions which have a commercial unity rather than the individual steps into which such transactions may be divided. This approach does not deny the existence or legality of the individual steps but may deprive them of significance for the purposes of the characterisation required by the statute. This has been said so often that citation of authority since *Ramsay's* case is unnecessary.

9. Are there any reasons why Parliament should have contemplated a narrower definition of the transaction which has to be considered in deciding whether it is an exchange of shares for debentures? Mr Goldberg QC said that such a reason can be found by examining the origins of paragraphs 4 and 6 of the First Schedule. They are clearly based upon paragraphs 4 and 6 of Schedule 7 to the (UK) Finance Act 1965, which introduced the capital gains tax in the United Kingdom. In fact, all the words which their Lordships have quoted from the Jamaican statute are to be found in the United Kingdom statute, although there are other words in the United Kingdom statute which have not been transposed.

10. As Anderson J pointed out, the differences mainly arise because the transfer tax is an ad valorem tax on the consideration for the property transferred, whereas the capital gains tax is a tax on capital gains, that is, the difference between the consideration paid on acquisition and the consideration received on disposal. A provision in the Transfer Tax Act which deems a transfer not to have been a disposal exempts it altogether from transfer tax whereas a provision to the same effect in the United Kingdom legislation merely postpones the charge until an actual disposal occurs. Thus paragraph 4(2) in the Jamaican schedule simply says (as quoted above) that the reorganisation “shall not be treated as involving any disposal of the original shares” whereas paragraph 4(2) of the United Kingdom schedule goes on to say “but the original shares (taken as a single asset) and the new holding

(taken as a single asset) shall be treated as the same asset acquired as the original shares were acquired". The charge to tax is therefore only postponed: when the new holding is sold, capital gains tax is chargeable on the difference between the acquisition cost of the original holding and the consideration received for the new holding.

11. In order to fit the issue and redemption of a debenture into this scheme of things, paragraph 11(2) of the United Kingdom schedule provides that "the satisfaction of a debt ... shall be treated as a disposal of the debt ... by the creditor made at the time when the debt ... is satisfied". So Mr Goldberg says that if the transaction now under consideration had happened in the United Kingdom, it would have been analysed for the purposes of capital gains tax in its constituent parts. The agreement of 27 April 1999 would have been an exchange of shares for a debenture and the debenture would be deemed to have been acquired for the acquisition cost of the shares. The redemption would have been treated as a disposal of the debenture under paragraph 11 (2) and capital gains tax (or rather, corporation tax) would have been chargeable on the difference between the acquisition cost to Carreras of the Jamaica Biscuit shares and the consideration received on redemption of the debenture. There would have been no question of treating the exchange and the redemption of the debenture as a single transaction.

12. On this basis, Mr Goldberg submits that the transaction with which paragraph 6(1) of the Jamaican schedule is concerned should be construed to mean the transaction with which paragraph 6(1) of the United Kingdom schedule would have been concerned, namely the exchange which happened on 27 April 1999 and nothing else. There is no equivalent of paragraph 11(2) in the Jamaica Statute.

13. Their Lordships do not accept that meanings can be transposed in this way from the legislation of one country to that of another. The United Kingdom statute requires the exchange and the redemption to be considered separately, under paragraphs 6(1) with 4(2) and paragraph 11 respectively, because that is in accordance with the scheme of the tax. Such treatment creates a rational system of taxation. The Jamaican legislation, although it uses much of the same language, is concerned with a different kind of tax. A restricted interpretation of the transaction contemplated by paragraph 6(1) would produce the result that exemption from tax could be obtained by a formal step inserted in the transaction for no purpose other than the avoidance of tax. This would not be a rational system of taxation and their Lordships do not accept that it was intended by the legislature. They agree with the majority of the Court of Appeal that the relevant transaction for the purposes of this legislation comprised both the issue and the redemption of the debenture and that such transaction, taken as a whole, could not be appropriately characterised as an exchange of shares for a debenture.

14. Their Lordships would however endorse the remarks of Anderson J in which he drew attention to the need for legislative consideration of the wisdom of using the United Kingdom capital gains tax provisions for the purposes of transfer tax. In the present case, the exchange and redemption of the debenture were plainly a single transaction and, as the Court of Appeal held, fell to be taxed as such. But there may well be cases in which the facts do not justify such a conclusion and transfer tax will be avoided without there being any ultimate charge (as there would be under paragraph 11(2) of the United Kingdom schedule) on the redemption of the debenture: compare *Craven v White* [1989] AC 398.

15. Mr Goldberg submitted that a factual inquiry into what constituted the relevant transaction for the purposes of paragraph 6(1) would give rise to uncertainty. He was disposed to accept that if the representative of Carrerras had handed the share certificates over the desk in exchange for the debenture and the representative of Caribbean had then handed it back in exchange for a cheque, it would be hard to say that the relevant transaction should not be characterised as an exchange of shares for money. But what if the debenture had been redeemed a year later? Why should a fortnight be insufficient to separate the exchange from the redemption?

16. One answer is that it is plain from the terms of the debenture and the timetable that the redemption was not merely contemplated (the redemption of any debenture may be said to be contemplated) but intended by the parties as an integral part of the transaction, separated from the exchange by as short a time as was thought to be decent in the circumstances. The absence of security and interest reinforces this inference. No other explanation has been offered. In any case, their Lordships think that it is inherent in the process of construction that one will have to decide as a question of fact whether a given act was or was not a part of the transaction contemplated by the statute. In practice, any uncertainty is likely to be confined to transactions into which steps have been inserted without any commercial purpose. Such uncertainty is something which the architects of such schemes have to accept.

17. Their Lordships will humbly advise Her Majesty that the appeal should be dismissed with costs.