JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 34 of 1982

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Campbell, J.A.

BETWEEN: THE COMMISSIONER OF INCOME TAX APPELLANT

A N D CHELSEA RENT-A-CAR LIMITED RESPONDENT

Messrs. F.A. Hamilton & W. Alder for Appellant

Mr. Enos Grant for the Respondent

July 9, 10, 11, 1984 and February 28, 1985

CAMPBELL, J.A.

The respondent was incorporated with a detailed and elaborate objects clause containing objects, some repetitive, spanning almost the entire spectrum of economic activities. These objects included inter alia the following which have relevance to this appeal, namely:

"3A (1) To carry on all or any of the business of ..... carriers of goods and passengers by road.

(2) To own, use and licence others to use a plan or system for conducting the business of renting passenger motor vehicles with or without drivers.

(3) To carry on the business of renting passenger vehicles with or without drivers.

4. To carry on the business of taxicab, omnibus, motor car, lorry and other public and private conveyance proprietors."

The above objects clause concluded with an express declaration that each object was to be construed independently of the others and was not to be deemed subsidiary to any other

object. The respondent however admitted that despite the wide range of its objects, it was at the time material to this appeal, pursuing only the business of "renting passenger vehicles with or without drivers." It was asserted by the respondent and conceded by the appellant that in the course of and for purposes of this business it had acquired 67 motor vehicles. Thus far, both parties are in agreement.

The respondent was assessed to tax in the 1975 year of assessment on a chargeable income of $60,053.00 without the grant of capital allowance described as initial allowance on the motor vehicles. In denying the respondent the capital allowance, the view of the appellant was that the motor vehicles did not qualify for this capital allowance because they did not fall within the meaning and intendment of the term "trade vehicle" as used in paragraph 6 (2) (b) of Part III of the First Schedule to the Income Tax Act. Part III of the First Schedule to the Income Tax Act is so far as is relevant as hereunder:

> "Part III
>
> 1. Where a person carrying on a trade incurs capital expenditure on the purchase .... of machinery or plant for the purposes of the trade then subject to subparagraph 2 of paragraph 6 there shall be made to him for the year of assessment in the basis period for which such expenditure is incurred an allowance (in this Part referred to as 'an initial allowance') equal to 20 per centum of such expenditure.
>
> 6 (1) Where the machinery mentioned in this Part comprises or includes a motor vehicle, this Part shall apply subject to the following provisions of this paragraph.
>
> 6 (2) Paragraph I shall not apply to expenditure incurred in respect of a motor vehicle unless it is a vehicle (in this paragraph referred to as 'trade vehicle') which falls within any of the following heads -

> "(a) a vehicle of a type not commonly used as a private vehicle and which is unsuitable to be so used;
>
> (b) a vehicle which is used wholly or mainly for the carriage of members of the public at large in the ordinary course of trade .....
>
> (c) a vehicle of a construction primarily suited for the conveyance of goods or burdens of any description
>
> (d) a vehicle fitted with dual controls and used by the person claiming the allowance for instruction purposes in the course of his business as a driving instructor
>
> and paragraph I shall apply to trade vehicles with the substitution of '12½' for '20'."

The respondent being dissatisfied with the appellant's view of the matter, appealed to the Revenue Court and contended before the learned judge as it has done before us, that inasmuch as the motor vehicles were "hired by the respondent wholly for the carriage of members of the public" they constituted "trade vehicles" as defined in the aforesaid paragraph. The submission of the respondent in this regard as paraphrased was as follows:

> "The appellant conducts a car rental business. On any view of the matter, such a trade involves the use of the vehicles for the carriage of the public. The vehicles when rented were used by the members of the public at large. This use of the cars was more than an essential part of the business - it was the whole rationale from which the appellant derives its profits."

Thus the respondent's argument is that its case comes fairly and squarely within paragraph 6 (2) (b). The learned judge was persuaded by this submission, thus he concluded as follows:

> "It is a general rule of construction that words be given their ordinary meaning unless there is something in the context which suggests otherwise. For this reason, I am inclined to agree with Mr. Grant when he states that anyone looking at the wording of paragraph 6 (2) (b) and understanding the true nature of the appellant's business would find no difficulty in agreeing that the appellant was carrying on a trade in which its vehicles were being used by members of the public at large."

Further in his judgment the learned judge states thus:

> "I certainly do not agree with Mr. Hamilton when he suggests that the position is exclusively analogous to the concept of a 'common carrier.' Whatever may be the position under the U. K. legislation, the Jamaican statute does not, in my opinion, make any distinction between contracts of hire and contracts for carriage .... One meaning of the word 'carriage' is 'the action of conveying' and that is precisely what happens in this case - the vehicles owned by the appellant are used by it for the carriage or conveyance of the public at large in the ordinary course of its trade. It is true that in order to carry out its business, the appellant does so under a rental or hireage system; but that is merely a question of methodology. The cars are not being rented to be put in a showroom, or for use other than on a public highway; they are rented for the purpose of conveying those members of the public who rent them, from one place in Jamaica to another. As such I am inclined to the view and I so hold, that these vehicles are used by the appellant wholly or mainly for the carriage of members of the public at large in the ordinary course of its trade, and are therefore 'trade vehicles' within the paragraph."

The appellant appeals this judgment on the undermentioned grounds namely:

"1. That the learned trial judge erred and/or misdirected himself in law in holding that the real business of the respondent/appellant was the carriage of members of the public at large and not merely the rental of cars.

2. That the learned trial judge erred and/or misdirected himself in law in holding that the vehicles were used by the Respondent/Appellant in its ordinary course of trade for the carriage of members of the public at large.

3. That the learned trial judge erred and/or misdirected himself in law in holding that a contract of carriage included a contract of hireage and accordingly there was no necessity for an express provision in respect of hireage as was to be found in the proviso to section 16 of the Finance Act 1954 (U.K.)

The essence of Mr. Hamilton's submission before us as it was before the Revenue Court was that the business of hiring or renting of cars was outside the purview of paragraph 6 (2) (b) of Part III of the First Schedule to the Income Tax Act. This paragraph he submits contemplates the granting of capital allowance on motor vehicles only where -

(a) the trade or business wholly or in part is the carrying of members of the public at large as for example omnibus or taxicab operators, and

(b) the vehicles are used wholly or mainly for such carriage in that trade.

The business of car rental he says is fundamentally different from the business of carrying members of the public that is to say operating a transport service for the benefit of the public at large.

In support of his submission, the appellant relied on the difference in wording of paragraph 6 (2) (b) of our Act and the proviso to section 16 (3) of the Finance Act 1954 U.K.

Legislation which deals with matters similar to the matter in question. The relevant provisions of this legislation are as hereunder:

> "Section 16 (3) An investment allowance equal to three-tenths of the expenditure (on new assets acquired after April 6, 1954) shall be made in addition to an initial allowance under Chapter II of the said Part X (which was a reference to the Income Tax Act 1952) in respect of expenditure on the provision of new machinery or plant, and any provision of the Income Tax Acts applicable to initial allowances under that Chapter so far as it is applicable in relation to allowances for new assets, shall apply also to investment allowance under this section.
>
> Provided that no investment allowance shall be made under this subsection in respect of expenditure incurred on the provision of road vehicles unless they are of a type not commonly used as private vehicles and unsuitable to be so used or are provided wholly or mainly for hire to or for the carriage of members of the public in the ordinary course of trade."

To the contrary, Mr. Grant for the respondent submitted that, notwithstanding the facts admitted, namely, that the business then being carried on by the respondent was that of "renting passenger vehicles with or without drivers" and that the vehicles were acquired for purposes of that business, nevertheless the vehicles came within paragraph 6 (2) (b) because:

(i) The hirers of the motor vehicles comprised members of the public at large;

(ii) These hirers in self-driving the motor vehicles were using them for conveying members of the public at large to wit themselves;

(iii) since the words of paragraph 6 (2) (b) do not expressly or impliedly require or mandate use of the motor vehicle by the respondent itself in the actual carriage of members of the public the use by the hirers of the motor vehicles is sufficient. The hirers being members of the public at large, paragraph 6 (2) (b) of the Act was satisfied.

For the proposition, that the hirers of the motor vehicles comprised members of the public at large, Mr. Grant relied on the statement of Swinfen Eady, J. as to what was meant by "the public" in In Re South of England National Gas and Petroleum Company Limited (1911) 1 Ch. D. p. 573. In that case the question was whether an earlier prospectus which had been marked "For private circulation only" and had been sent to a limited number of persons only, and had not been publicly advertised, had been issued to the public within the meaning of section 81 (i) (e) of the Companies (Consolidation) Act 1908. The particular facts of that case however included a further statement in the prospectus that "this prospectus has been filed with the Registrar of Joint Stock Companies" as also a subsequent statutory declaration by the managing director with reference to this earlier prospectus that "the prospectus fixing £50 as the minimum subscription had been issued to the public." On those facts Swinfen Eady, J. said at p. 576:

> "I am satisfied that the first prospectus did offer shares to the public and nonetheless because copies were sent only to shareholders in gas companies who were the most likely subscribers."

This decision may be correct on its own facts, but we find it of little assistance. Of greater assistance is the definition of "the public" essayed by Viscount Sumner in Nash v. Lynde (1929) A.C. p. 158. This case also involved the issue of a prospectus under section 81 (i) (e) of the Companies (Consolidation) Act 1908. That section did not expressly state that the issue of the prospectus must be to the public but this was implied because "prospectus" was defined by reference to the public. Section 285 of the Companies (Consolidation) Act, 1908, defined "prospectus" as "any prospectus, notice, circular, advertisement or other invitation offering to the public for subscription or purchase any shares or debentures of the company." Essaying a

definition of the words "the public" in this section, Viscount Sumner at page 169 said thus:

> " 'The public' in the definition s. 285 is of course a general word. No particular numbers are prescribed. Anything from two to infinity may serve: perhaps even one, if he is intended to be the first of a series of subscribers, but makes further proceedings needless by himself subscribing the whole. The point is that the offer is such as to be open to anyone who brings the money and applies in due form. A private communication is not thus open."

This definition has a special significance when considered in relation to the persons to whom the offer of hire by the respondent is addressed.

By clause 10 of the respondent's "Agreement of Hire," the offer of hire of its vehicles is limited to firstly, either a hirer or driver who is the holder of a valid licence which must be at least one year old, and in addition must be free from endorsement, or secondly, a person who must be the holder of a valid International Driving Permit. The hiring by the respondent is plainly not to the public at large within the definition of Viscount Sumner in that it is not available to "anyone who brings his money and applies in due form." Thus the foundation on which Mr. Grant sought to build his ingenious argument collapses, and it becomes unnecessary to consider the other cases which he cited to buttress his further submissions.

The learned judge though he considered this restriction on the category of hirers, was of the view that the restriction was not sufficient to "place the matter outside the statute." With respect, this view is not consonant with the definition of "the public" authoritatively stated by Viscount Sumner in a situation which is analogous to the issue raised in this case.

Grounds 1 and 2 of the appeal together complain that the judge erred and or misdirected himself in law in holding that:

(1) the respondent's real business was the carriage of members of the public at large instead of a rental business; and

(2) That the respondent's vehicles were used for the carriage of members of the public at large.

Having regard to what has earlier been said in connection with the restriction which the respondent imposed on the persons who alone were eligible as hirers and the definition of "the public" by Viscount Sumner in Nash v. Lynde (supra), which we respectfully adopt, it certainly cannot be said that the respondent's vehicles were being used by members of the public at large. Thus ground 2 of the appeal succeeds.

As regards ground I, it was, with respect, not open to the learned judge to find that the real business of the respondent was anything other than the rental of cars. The respondent in the light of clause 3A (1) clause 3A (3) and clause 4 of its objects was fully aware of the distinction between the business of carriers of goods and transport of persons by road using its taxicabs, omnibus and lorries, and the business of "renting passenger vehicles." This distinction was fortified by the expressed declaration in the Memorandum of Association that each object was to be deemed independent of and not subsidiary to any other object. The respondent also expressly admitted that in the relevant years it was only carrying on the business of renting passenger vehicles.

Thus, there was no evidence before the learned judge on which he could find that the appellant was engaged in the business of carriage of members of the public at large as distinct from operating a car rental business. This ground of appeal also succeeds.

The third ground of appeal complains that the learned judge was in error in holding that a contract of carriage included a contract of hireage. This ground must be understood within the context of the learned judge's conclusion that as the wording of paragraph 6 (2) (b) of Part III of the First Schedule to the Income Tax Act did not make any distinction between contracts of hire and contracts of carriage as is made in the proviso to section 16 (3) of the U. K. Finance Act 1954, which deals with a similar subject matter, the reasonable inference was that our legislators intended to include contract of hire within the scope of contract of carriage.

Paragraph 6 (2) (a) of our statutory provision is identical in wording with the first part of the proviso to section 16 (3) of the U. K. Act, whereas paragraph 6 (2) (b) is different from the second part by the omission therefrom of the words "for hire to." The U. K. Act was on the Statute Book from 1954 whereas our statutory provisions came into existence only in 1973, by amendment to the Income Tax Act. It is reasonable to infer that the origin of our statutory provision is the proviso to section 16 (3) of the U. K. Act. The specific inclusion in paragraph 6 (2) (d) of our statutory provisions of vehicles fitted with dual control as being "trade vehicle" indicates knowledge by our legislators of such cases as Bourne v. Auto School of Motoring (Norwich), Ltd. and Coghlin v. Tobin (trading as Thanet School of Motoring (Tax cases vol. 42). These cases involved an interpretation of that limb of the proviso to section 16 (3) of the U. K. Act which corresponds to paragraph 6 (2) (a) of our statutory provision insofar as the issue was whether motor vehicles used in schools of motoring were to be denied investment allowance. To avoid similar difficulties of interpretation arising here, our legislators specifically mentioned

that such vehicles having dual control were "trade vehicle ."

In Frazer v. Trebilcock (Tax cases) vol. 42 the words "for hire to or for the carriage of members of the public" were clearly shown as having been used disjunctively to describe two distinct trades or businesses in which if motor vehicles are used the said vehicles would qualify as road vehicle . In the said case Buckley, J. in very graphic language expressed himself thus:

> "It is conceded that cars would rank as machinery or plant within the meaning of the opening part of section 16 (3). A purchaser of a new car, therefore gets through the first doorway so to speak, but is then confronted with another locked door in front of him which is the proviso which says that no investment allowance shall be made in respect of the expenditure on the provision of road vehicles, and that door can only be opened so as to allow the taxpayers to gain the benefit of an investment allowance in respect of the purchase of a motor car if he can show certain things. If he can show that the car is of a type not commonly used as a private vehicle and unsuitable to be used as a private vehicle, then he has in his hand a key which will open the door which says 'No road vehicle.' If he can show that the car which he has bought as provided wholly or mainly for hire to members of the public he will have a key which will open the door marked 'No road vehicles.' If he can show that the car is provided for the carriage of members of the public in the ordinary course of a trade, he has a key in his hand for opening the door marked 'No road vehicles.' "

Our legislators would undoubtedly have been aware of the reasoning and conclusion in Frazer v. Trebilcock (supra). Equally, they would have been aware of the legal distinction between a "contract of hire" and a "contract of carriage." Thus the omission of the words "or hire to" from paragraph 6 (2) (b) of our statutory provision in our view undoubtedly manifests a deliberate act of policy intended to exclude motor vehicles used for hiring to the public. The design under paragraph 6 (2) (b)

of our statutory provision was to limit the grant of the capital allowance described as "initial allowance" to only those persons who were conveyance proprietors as distinct from persons who acquire motor vehicles solely for the purpose of hiring the same to others, that is to say, car rental proprietors.

The learned judge in further justifying his view that it must have been the intention of the legislature to accommodate a contract of hire within a contract of carriage, said thus:

> "It is a notorious fact that proprietors of car rental companies suffer a high incidence of wear and tear on their machinery and, for that reason would be appropriate subjects for receipt of an accelerated depreciation allowance. If therefore Parliament had intended to deprive them of the benefit of such an allowance, then I would have expected it to do so in language which leaves no room for doubt."

With respect to the learned judge paragraph 6 (2) (b) of our statutory provision when read in the context of paragraphs 6 (1) and 6 (2) does not lend itself to the rule of construction prayed in aid by him.

Paragraph 6 (1) and (2) commence by declaring in clear and unambiguous words that rights to capital allowance in the form of initial allowance which prior to 1973 had been enjoyed by tax-payers who incurred capital expenditure on the purchase of motor vehicles for the purposes of the trade being carried on by them was abrogated. A new regime was established which clearly limited the scope of persons who from and after 1973 would be entitled to this initial allowance. The regime was established by the technique of an exemption from the wide sweep of paragraph 6 (1) and (2) which swept away the allowance on all motor vehicles. Accordingly, the rule of construction of paragraph 6 (2) which was apposite was that governing the construction of exemptions. The learned judge was undoubtedly right in the view that express and unambiguous language was necessary but in this case it would be to show that the

respondent was among the persons who were exempted from the general abrogation of the aforesaid capital allowance. As Buckley, J. said in Frazer v. Trebilcock (supra), the respondent must show that he has a key to open the door on which, in the present case, was affixed the words "no initial allowance unless." In the words of Lord Adam in Maugham v. Free Church of Scotland Tax cases vol. 111 p. 210:

> "... if you claim exemption you must fall clearly within the words of the statute."

The third ground of the appeal also succeeds.

It was for the above reasons that we allowed the appeal on 11 July, 1984, and promised then to put our reasons in writing which is now done.

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