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REVENUE COURT APPEAL No. 32/76

ESTABLISHMENT INTERFIBRE (KMI) V. C.I.T.

ORAL JUDGMENT ON PRELIMINARY OBJECTION

MARSH J. - 4th MAY, 1977

This matter first came before me on 21st April, 1977 by way of a summons in Chambers, for an Order for the Respondent to file certain documents, when I decided to treat that Summons as a Summons for Directions and ruled, inter alia, that paragraph (4) sub-paragraphs (1) and (2) of the Respondent's Statement of Case headed "Reasons" were in fact in the nature of a plea to the jurisdiction of this Court and should therefore be dealt with as a Preliminary Objection. As a result of that, I ordered that that point and that point only, should be set down for trial in the week set for the hearing of the substantive issues of the Appeal.

So said so done, and I have had the opportunity of hearing the fullest arguments of counsel on the point.

For the Record, sub-paragraphs (1) and (2) of paragraph 4 of the Respondent's Statement of Case read as follows:

> "4. AND FURTHER TAKE NOTICE that the Respondent will contend at the hearing of this Appeal that the aforesaid Decision has been validly made and should be confirmed by this Honourable Court for the following, inter alia, reasons:-
>
> REASONS
>
> (i) the SIA and not KMI is the proper appellant, for the reason that the Notice of Assessment was raised and served on the SIA and it is made assessable, chargeable and liable for the payment of the tax by virtue of the provisions of Sections 54, 55, 56 and 57 of the Income Tax;

(ii)/.....

(ii) further, the SIA did not lodge a valid objection against the assessment raised on it by the Respondent. The assessment is therefore final and conclusive as regards the amount of such chargeable income in accordance with Section 75(7) of the Income Tax Act.

The Court is therefore not competent to hear this Appeal."

Counsel for the Respondent in dealing with the matter, sought an amendment to certain important aspects of sub-paragraphs (1) and (2). They were as follows:

(a) As regards sub-paragraph (1), Counsel stated that he was no longer contending that the assessment had been raised under SS 54-57. He stated that this was an incorrect statement of the matter and that the assessment was in fact raided under S.40. To be more accurate, he said s. 40(1). The amendment was approved and the matter thereafter proceeded on that basis.

(b) As regards sub-paragraph (2), it is less clear, but I understood counsel for the Respondent to say that he was no longer contending that the SIA had not made a valid objection to the Assessment.

The effect of the foregoing was, that the Respondent's case proceeded on the following basis:

(1) The assessment was raised on the SIA under S.40 of the Act and not on the present Appellants, KMI. The result therefore is that KMI is not a person who has been assessed.

in/...

in accordance with the Act. KMI is not a person who has filed a valid objection to any such assessment, and KMI is not therefore, a person in respect of whom the Respondent has made a Decision upon an Objection to an assessment raised upon him, and in such circumstances can have no locus standi before this Court. This is so, Counsel contended, because upon a review of the statutory language, it is clear that the right of appeal to this Court is only achieved in the following circumstances:

(i) There must be an assessment upon the Appellant;

(ii) There must be a valid objection to that Assessment by the Appellant, and

(iii) There must be a decision by the Respondent upon that Objection:

It is then, and only then, counsel submitted, that a taxpayer achieves a right of appeal to this Court. Since therefore the present Appellants KMI are not in that position, they are not properly before the Court.

For the Appellants it was argued that the assessment had in fact been made on them nand not on the SIA; they were the persons who had objected to that assessment, they were also the persons who had been dealt with by the Respondent as the Objector, and in this second regard they referred to certain correspondence passing between themselves and the Respondent. Finally, they contended that on that sequence of events they were the persons whose objection had been the subject of a Decision by the Commissioner, and that they were therefore properly before this Court as Appellants.

That/.....

That then, stated in fairly brief terms, represents the relative contentions except what in effect became a subsidiary point raised by the Appellants to the effect that even if they were wrong in the sense that the assessment had not in fact been raised on them, the Respondent was by his conduct, in particular by treating with them as Objectors, denied from now contending that they were not the Appellants - in effect that he was estopped. These were the relevant contentions of the parties, and although the arguments in the case have ranged over an extremely wide area, it seems to me that the real issue in this case is of a very narrow compass. That issue is - was the present Appellant the person assessed; has there been a decision of the Respondent on that assessment?

In that regard I turn to some of the correspondence that has been put in in this case. I refer in particular to a letter addressed to the Appellants dated 5th January, 1976 and signed by Lloyd E. Perkins (who, the Court was informed, is the legal advisor to the SIA) and attached to that letter is a copy of the original assessment made by the Respondent. I propose to mark that letter and the assessment attached thereto as Exhibits 1 and 2. That correspondence discloses that the Notice of Assessment dated 22nd December, 1975 was addressed to (and here I quote)

> "The Secretary,
> S.I.A.
> for Establishment
> Interfibre (KMI)
> 29 Barbican Road,
> Kingston 6."

That Notice of Assessment also bears a notation thereon which reads as follows:

> "Assessment under S. 22 (1) of Law 59 of 1954"

I pause there to point out that S. 22 (1) is the progenitor of the present S. 40 (1), so nothing turns on this. There is also a notation on that Notice of Assessment to the following effect:

> "Take Notice that the CIT has assessed your liability in respect of a payment to N/R"

Counsel informed the Court that "N/R" meant "non-resident". There is also a notation indicating that if the recipient objects he may give notice to the Commissioner within 30 days of the date of service of the Assessment. There is also another notation indicating that if if the recipient is dissatisfied with the Decision he may appeal therefrom. (Actually the Notice refers to an appeal to the Appeal Board but that is now to be read as a reference to the Revenue Court.) That then represents the background and relevant circumstances so far as the present matter is concerned.

Against that background, I now ask myself the question - on whom was this assessment made? Was it made on the present Appellants or was it on the SIA? I say that because it seems to me that the answer to that question will provide the answer to the present dispute, since I accept the view of the statutory language put forward by Respondent's Counsel.

For the Appellants it has been argued, one may even say with the greatest respect, strenuously argued, that there is nothing equivocal about that Notice of Assessment (i.e. Exh. 2) and that it is clearly an Assessment upon KMI. It was submitted that the words "for Establishment Interfibre (KMI)" which followed after the words "The Secretary SIA" placed othe argument beyond doubt and that those words mean, and can onlym that it was an Assessment on KMI. It was the income of KMI and it is KMI who has been assessed in respect thereof, so the argument ran.

I have considered that submission against the background of the various notations which are on the face of the Notice of Assessment and to some of whichI have already referred; and the statement by Counsel for the Respondent that the Assessment was made by the Respondent under powers conferred upon him by S. 40 of the Act. Having done so, I find it impossible to accept the submission of counsel for KMI that this Notice of Assessment clearly and unequivocally represents an assessment made upon that organisation.

In the first place the Notice of Assessment clearly states on its face that it was made under what is now S. 40 of the Act and it is common ground that the Respondent has no power to assess a non-resident under S. 40. (I shall return to this.)

The Appellants, KMI, admit that they are non-resident. The address at Barbican Road stated in the Notice, is that of SIA not KMI - KMI is located at Linchenstein in Europe. Faced with this combination of circumstances viz, that they are non-resident, and the agreed position that the Respondent had no Statutory power under S. 40 to assess non-resident, Counsel for KMI contended that S. 40 was only one of several powers granted to the Respondent to assess taxpayers, and that therefore, even if a non-resident could not be assessed under S. 40, he could be assessed under what was described as "the Respondent's general powers of assessment". I do not see how that would advance the matter and I shall deal with it later, but to return to the Assessment (Exh. 2), and the collocation of words "The Secretary SIA etc"; it seems to me that the Appellant's case rests entirely on the words "for Establishment Interfibre KMI", which occur in that particular grouping, since there is no other reference to KMI in the Notice. I do not accept that those words have the effect contended for by the Appellants. I say this because although the Respondent, when exercising his powers under S. 40 has to assess the resident person, that assessment, nebertheless relates to income which is intrinsically that of a non-resident; because of this, common sense and ordinary administrative convenience would seem to require that there be some indication on the face of the Notice itself to show who is the inon-resident in respect of whom the resident person is being charged. If not, then the resident so charged would be totally unaware of the identity of the non-resident payee in respect of whom the tax is to be deducted and would be unable to comply with his statutory duty to deduct the tax. I therefore hold that the words "for Establishment Interfibre KMI" which were so heavily relied on by Counsel for KMI - do not have the effect contended for, and were inserted in the Notice

non-resident payee. In other words, they were inserted in the Notice merely as an indication to the resident person assessed, of the identity of the non-resident in respect of whom the tax is to be deducted, but they do not, and cannot, alter the fact that the assessment remains an assessment upon the resident person. In short, it is a "tax at source" assessment.

For these reasons, I hold that Exh. 2 constitutes an assessment upon the SIA by the Respondent under powers conferred on him by S. 40 of the Act and does not constitute an assessment on KMI. If, therefore, KMI was not the person assessed then it must necessarily follow that there is no assessment upon them in existence to which they could have filed a valid objection. It also follows from this that any Decision Notice issued by the Respondent in this case could not have been issued in respect of an assessment made upon KMI.

I turn to the other arugments addressed to the Court. I do not propose to go into these in details in view of the finding which I have made on Exh. 2.

Counsel for the Appellants concedes that the Respondent has no power to assess non-residents under S. 40. That then being the state of the Law, a state with which the Court agrees, it seems to me that even if I am wrong as to the view I have taken on the meaning and effect of the words "for Establishment Interfibre KMI" in Exh. 2, the result, so far as the present Appellants are concerned, must be the same. I say this because if in fact, contrary to my finding, KMI was indeed the person assessed, then such an assessment would have been void, ad initio, since the Respondent would have been purporting to act under a statutory provision (i.e.) S. 40) which conferred no power on him to assess non-residents; and any such purported assessment would therefore be a nullity.

Once/.....

Once it is agreed that S.40 gives no power to assess a non-resident and once I come to the colclusion, as I have, that the Assessment was made under S. 40 that must be an end of the case so far as the present Appellants are concerned.

Counsel for the Appellants correctly pointed our that in the circumstances of the present case, since no deduction had been made from the payment made by SIA to KMI, the Assessment could not have been made under S. 40 (1) and must therefore have been made under S. 40 (2). Even if that be so, it does not in my judgment affect the ultimate result, because whether the assessment was made under subsection (1) or (2) of S. 40 is not so much to the point as the fact that it was made under S. 40. As I have indicated in the course of the argument, I accept that the Respondent has no power to assess a non-resident under S. 40. I make no comment on the further submissions of Counsel for the Appellants as to whether the power under S. 40 to assess residents exclusively, is in derogation of the powers of the Respondent to assess a non-resident under other provisions of the Act. A number of authorities were cited to the Court which, prima facie, suggest that those powers (i.e. under S. 40) are not in derogation of the Respondent's powers to assess a non-resident under other provisions of the Act, but it is not necessary for me to come to a conclusion on this in view of the finding I have made <u>that the assessment in the instant case was in fact made under S. 40</u>. Having so found, it is idle to speculate what might have been the position had it been made under some other section of the Act.

One other matter caused me concern. A review of the correspondence shows that the admitted dealings between the Respondent and representatives of the present Appellants, though clouded in mist and obfuscation, might possibly have lulled the present Appellants into a false sense of security, in that it might have led them to believe that they had been properly accepted by the Respondent as Objectors in their own right, with a

concomitant right of appeal to this Court. However, since estoppel does not apply to the Revenue, those circumstances avail us nought. It has been said often enough by others more learned in the law than I am, that a Court is not entitled to invoke notions of equity in dealing with Income Tax Appeals, and although I bear that admonition in mind, I cannot leave this case without commenting that it would seem from the way this matter has proceeded so far, that a great deal of the "equity" in this case lies with the present Appellants Messrs. K.M.I. The Respondent, by appearing to treat with them as Objectors seems to me. with the greatest respect, particularly ill-placed to now contest their right to be in this Court.

Regrettably though it may be, however, I cannot ignore the statutory language, and upon my interpretation of that language, the present Appeallants have failed to persuade me that they are the proper Appellants in this Court. They can have no right of appeal unless the same was conferred by statute and I can find nothing in the Act to support their claim.

Nevertheless, I invited counsel to make submissions as to whether the Court could now make an order which would somehow attempt to retrieve the situation by substituting the SIA as Appellant. However, counsel on both sides have submitted that I have no such power and since I am not sufficiently satisfied that they are wrong I press that matter no further.

For these reasons it is my opinion, and I so hold, that the present Appeal must be struck out on the Ground that Messrs. K.M.I. have failed to show that this Court has the jurisdiction to hear them in the instant matter.

The normal rule is that costs follow the event; but since

I am satisfied that the Appellants may have been misled by the Respondent into believing that they had a right of Appeal to this Court, I was minded to award costs against the Respondent pursuant to Rule 36 (1) of the Revenue Court Rules 1972. However, having listened to submissions on the point from Counsel, I am now satisfied that Justice would be sufficiently served if there be no order as to costs.

Appeal struck out.

No order as to costs.

(Dermot Marsh)
Puisne Judge
Revenue Court