

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 20/77

BEFORE: The Hon. Mr. Justice Zaeca, J.A.
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Carey, J.A. (Ag.)

BETWEEN ESTABLISHMENT INTERFIBRE APPELLANT
A N D THE COMMISSIONER OF INCOME TAX RESPONDENT

R.N.A. Henriques & Mrs. Angella Hudson-Phillips for Appellant

H. Hamilton Esq., for Respondent

8th & 9th October, 1980

& 28th November, 1980

CAREY J.A. (AG.)

On October 9, we allowed this appeal against a judgment of Marsh J. dated 4th May, 1971 in the Revenue Court, and remitted the matter for a hearing on its merits. We undertook then to put our reasons in writing.

With all respect to that judge's learning on the subject, I am constrained in pursuit of substantial justice to arrive at a conclusion altogether different from his.

This appellant, it was acknowledged, received a Notice of Assessment for the year ending 31st December, 1975 which related to a payment to it by the Sugar Industry Authority in respect of "technical services" rendered. The payment amounted to some \$94 million (J.) [U.S. \$10 million] and attracted tax of \$2,281,250 (J). The affair has been popularly referred to as the "Iran Sugar deal" The notice was addressed as follows:

"The Secretary,
Sugar Industry Authority for
Establishment (sic) Interfibre (KMI)
29 Barbican Road,
Kingston 6."

Endorsed on this notice was a note "Objections to Assessments"

"If you object to the above assessment or any part thereof you may give Notice of Objection in writing to the Commissioner of Income Tax within thirty days from the date of the service of this Notice. Such Notice must take precisely the grounds of your objection to the assessment. The Commissioner of Income Tax may, notwithstanding the lapse of the above period of thirty days, allow an objection to the assessment if it is shown to his satisfaction that owing to absence from the Island, sickness or other reasonable cause you were prevented from making the objection within thirty days."

The appellants wrote to the Revenue objecting to the assessment of the tax specified in the notice of assessment. They were duly advised that "this assessment was raised by virtue of Section 5 (1) (a) (iii) and Section (40) of the Income Tax Act." The letter actually referred to Section 22 of the Income Tax Law which also was the notation on the notice of assessment; Section 40 is the former Section 22. In that letter, the appellants were invited to make submissions on "your objection". They complied: there was even a conference between all the parties concerned with the matter. The Commissioner of Income Tax intimated in a letter to the appellant that, having considered the matter, he was satisfied that there was liability for withholding tax and in the circumstance, a decision would be made to enable the appellant to test it before the Revenue Court. In the event, the Commissioner of Income Tax confirmed his assessment.

The burden of the arguments before that court, was that the assessment was raised on the Sugar Industry Authority, who were the only persons therefore entitled to object to the assessment and they had not done so and consequently the appeal was not properly constituted as these appellants had no 'locus standi'. The learned judge, although not insensitive to the result, which he clearly appreciated would ensue, concluded that in strict law, these arguments were valid. He found himself, he indicated in his judgment, quite unable to pray in aid any notion of equity to relieve against this harsh result.

It was quite plain that the Sugar Industry Authority raised no objection to the assessment. Indeed it was unrealistic and should excite no surprise that the Sugar Industry Authority did not raise any objection. But it is also equally plain that the Commissioner of Income Tax dealt with what the Commissioner of Income Tax expressly stated was the appellant's 'objection'. It was as plain as anything can be that the appellant must have been contending that it was not liable to pay any tax whatsoever and the Revenue was saying that tax was payable and should be withheld by the Sugar Industry Authority. That this is so, is clear from the terms of the letter of the Commissioner of Income Tax where he said:

"Having considered the oral arguments put forward and studied the written opinion of counsel left for my benefit I am satisfied that there is a liability to withholding tax as raised in assessment.

In the circumstances a decision would be made in the matter to enable you to appeal to the Revenue Court, if you so desired." [Emphasis mine.]

He could not there be understood as saying that the pronoun 'you' applied to the Sugar Industry Authority. Moreover, the Commissioner in a letter to the appellants, advised it that "the assessment" was raised under Section 5 (1) (a) (iii) and Section [40] of the Act. The only inference that can be drawn for this definitive assertion was that the appellant was being assessed for tax under the former provisions while the Sugar Industry Authority as the resident payee were being assessed under the latter provision. So on the facts the appellant had been assessed, had objected and could therefore appeal.

Section 5 (1) (a) (iii) of the Income Tax Act provides as follows:

"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-

- (a) the annual profits or gains arising or accruing-
 - (i) to any person residing in the Island from any kind of property whatever, whether situated in the Island or elsewhere; and
 - (ii) to any person residing in the Island from any trade, business, profession, employment or vocation whether carried on in the Island or elsewhere; and
 - (iii) to any person, whether a Commonwealth citizen or not, although not resident in the Island, from any property whatever in the Island, or from any trade, business, profession, employment or vocation exercised within the Island, or (as from 1st January, 1970) from the provision to any person residing in the Island of industrial or commercial information or advice, or management or technical services, or similar services, or facilities, or plant or equipment on hire (otherwise than under a bona fide hire-purchase agreement as defined in subsection (1) of Section 2 of the Hire-Purchase Act);

This section obliges a person falling within this category to pay income tax. Before tax can be withheld under Section 40 (1), which provides as follows:

"Subject to the provisions of this Section, where payment is made to a person who is not resident in the Island by a person resident in the Island in respect of any interest of money, royalty, annuity or other annual payment, or in respect of rent accruing from property situated in the Island, or in respect of the provision of industrial or commercial information or advice, or management or technical services, or similar services or facilities, or/hire of plant or equipment (otherwise than under a bona fide hire-purchase agreement as defined in subsection (1) of Section 2 of the Hire-Purchase Act), the person making such payment shall deduct thereout a sum on account of income tax thereon at the rate of 12.5 cents in the dollar, so, however, that in the case of a payment in respect of such information, advice, services, facilities or hire as aforesaid, any such deduction shall be at the following rate namely:

- (a) where the payment is made to a person who is not liable to pay on it any tax corresponding to income tax, the rate of twenty-five per centum; or

(b) where the payment is made to any other person, such rate (if any) as the Minister has by order specified in relation to the territory in which that person is resident and to transactions of the description in question.

and shall forthwith deliver to the Commissioner an account of the payment and of such tax deducted out of the payment and the Commissioner shall assess and charge the payment for which an account is so deliver on that person."

there must be a prior obligation on a taxpayer to pay tax. Accordingly Section 40 is really the mechanism for collecting tax from persons, who not being resident, might present difficulty in the collection of tax by the Revenue. The Commissioner is authorised by Section 40 (2) to make an assessment in cases of default by the resident payer. In order to assess pursuant to Section 40 (2) the Commissioner must necessarily first determine a tax liability on the part of a tax payer. Both sections are thus inter linked. I have already demonstrated that the Commissioner did regard this as the true position and acted in the light of that understanding. It is pertinent to call attention to Section 76 (1): it provides as follows:

"Any person (hereafter in this Act referred to as the 'objector') who has disputed his assessment by notice of objection under Section 75, and who is dissatisfied with the decision of the Commissioner therein, may appeal to the Revenue Court within thirty days of the date of receiving the Commissioner's decision referred to in sub-section (6) of Section 75 or within such longer period as may be permitted by or pursuant to rules of court."

The appellant had disputed his assessment by Notice of objection. It was dissatisfied with the decision of the Commissioner. It appealed to the Revenue Court. Its status as an objector and therefore as an appellant was never questioned until the hearing of the appeal.

Accordingly neither on the facts nor in law can the order in the court below be supported despite the pertinacity and spirited arguments of learned counsel for the Revenue. The appellant should, in my judgment, be permitted to argue its appeal on its merits. It was for these reasons that I agreed that this appeal should be allowed.

KERR J.A.

I have read the reasons for judgment of Carey, J.A. (Ag.) and I am in agreement.

Speaking for myself I find the arguments of the Attorney for the Respondent in support of his contention that the appellant company was not assessed, not competent to be an objector and therefore had no right of appeal under the law, not only unmindful of the legislative intent of the relevant sections of the Income Tax Act but filled with pedantic refinements. As Slesser L.J. in Youssouppoff v. Metro-Goldwyn Mayer Pictures Ltd. (1934) 50 T.L.R. 581 at p. 587 so succinctly put it:-

"It is to shut one's eye to the realities to make these nice distinctions".

In my view the appellant company in substance and in fact was duly assessed as taxable under Section 5 (1)(a)(iii) of the Income Tax Act, made objections to that assessment, was considered and treated as an objector by the Commissioner of Income Tax and had a right of appeal as provided in the Income Tax Act.

Zacca J.A.

I have read the reasons for judgment of Carey J.A. (Ag.) and I am in agreement.