

~~G.H.E.D.~~

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In the Privy Council.

No. 41 of 1951.

ON AN APPEAL FROM THE SUPREME
COURT OF CEYLON

UNIVERSITY OF LONDON
W.C. 1.
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INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN
THE COMMISSIONER OF INCOME TAX, COLOMBO
AND

MRS. A. J. SUTHERLAND (Executrix of the Estate of
R. W. SUTHERLAND deceased), presently of England ... RESPONDENT.

CASE FOR THE APPELLANT

RECORD

1.—This is an Appeal from a Judgment and Decree of the Supreme Court of Ceylon dated the 27th April, 1951, allowing an appeal by way of a Case Stated from a decision of the Board of Review, Income Tax, dated the 17th October, 1949, whereby an appeal by the Respondent against a decision of the Deputy Commissioner of Income Tax was dismissed and the decision of the Deputy Commissioner was affirmed. p. 5, 1. 2 p. 1, 1. 3

2.—The matter arises out of an assessment to Income Tax made under Section 11 (9) Income Tax Ordinance upon the Respondent as executrix of her husband, the late R. W. Sutherland, who died on the 12th June, 1946.
10 The assessment relates to the period immediately prior to his death, 1st April, 1946, to 12th June, 1946. The point at issue in the appeal concerns the inclusion in the income showed by the assessment of a sum of Rs. 15,750 received by the Respondent after her husband's death from the Company by which he was employed prior to his death. That sum was so included as being part of the profits of his employment within Section 6 of the Ordinance. In the proceedings below the main question discussed has been whether the amount so received by the Respondent was an amount due to the deceased or his estate under the terms of his contract of employment received by her *qua executrix*, or whether it was a voluntary payment
20 by the Company by way of gift to her as his widow. An alternative point raised was whether, assuming the payment was a voluntary payment, it

was not still a profit arising from the employment. Another question raised in the Case Stated by the Board of Review was whether assuming the payment in question fell within the description of profits of the office it was exempted from tax under Section 7 (1) (k) of the Ordinance as being a sum received by way of death gratuity. A further question arises upon the Judgment of the Supreme Court whether the Board of Review was not entitled on the material before it to dismiss the appeal of the Respondent to them and whether their decision to do so was erroneous in law.

3.—The following are extracts from or references to some of the material provisions of the Income Tax Ordinance (No. 188) :— 10

“ 6. (1) For the purposes of this Ordinance, ‘ profits and income ’
“ or ‘ profits ’ or ‘ income ’ means—

* * * *

“ (b) the profits from any employment

“ (2) For the purpose of this section—

“ (a) ‘ Profits from any employment ’ includes—

“ (i) any wages, salary, leave pay, fee, pension, com-
“ mission, bonus, gratuity, or perquisite, whether derived
“ from the employer or others, except the value of any holiday
“ warrant, passage, or other form of free conveyance granted
“ by an employer to any employee, or any allowance for the
“ purchase of any such conveyance in so far as it is expended 20
“ for such purpose.

“ (ii)

“ (iii)

“ (iv)

“ (v) any other allowance granted in respect of employ-
“ ment whether in money or otherwise.

“ 11. (1) Save as provided in this section, the statutory income
“ of every person for each year of assessment from each source of his
“ profits and income in respect of which tax is charged by this Ordinance
“ shall be the full amount of the profits or income which was derived 30
“ by him or arose or accrued to his benefit from such source during the
“ year preceding the year of assessment, notwithstanding that he may
“ have ceased to possess such source or that such source may have
“ ceased to produce income.

* * * *

“ (9) Where any person dies on a day within a year of assessment,
“ his statutory income for such year shall be the amount of profits and
“ income of the period beginning on the first day of April in that year
“ and ending on that day.

“ 27. The executor of a deceased person shall be chargeable with the tax for all periods prior to the date of such person’s death with which the said person would be chargeable if he were alive, and shall be liable to do all such acts, matters and things as the deceased person if he were alive would be liable to do under this Ordinance.

10 “ 69. (1) Any person aggrieved by the amount of an assessment made under this Ordinance may within twenty-one days from the date of the notice of such assessment appeal to the Commissioner by notice of objection in writing to review and revise such assessment. Any person so appealing (hereinafter referred to as ‘ the appellant ’) shall state precisely in his notice the grounds of his objection and the notice shall not be valid unless it contains such grounds and is made within the period above mentioned

“ (6) In disposing of an appeal the Commissioner may confirm, reduce, increase, or annul the assessment, and shall record his determination in writing and announce it orally.”

Section 70 provides for Appeals to the Board of Review against the decision of the Commissioner and Section 73 provides for the regulation of such appeals.

20 Sub-sections 3, 4, and 7 of Section 73 are as follows :—

“ 73. (3) The Assessor who made the assessment appealed against or some other person authorised by the Commissioner shall attend such meeting of the Board in support of the assessment.

“ (4) The onus of proving that the assessment as determined by the Commissioner on appeal, or as referred by him under Section 72, as the case may be, is excessive shall be on the appellant.

30 “ (7) At the hearing of the appeal the Board may, subject to the provisions of Section 71 (4), admit or reject any evidence adduced, whether oral or documentary, and the provisions of the Evidence Ordinance relating to the admissibility of evidence shall not apply.

“ 74. (1) The decision of the Board shall be final :

40 “ Provided that either the Appellant or the Commissioner may make an application requiring the Board to state a case on a question of law for the opinion of the Supreme Court. Such application shall not be entertained unless it is made in writing and delivered to the Clerk to the Board, together with a fee of fifty rupees, within one month of the date of the Board’s decision. If the decision of the Board shall be notified to the Commissioner or to the appellant in writing, the date of the decision, for the purposes of determining the period within which either of such persons may require a case to be stated, shall be the date of the communication by which the decision is notified to him.

“ (5) Any two or more Judges of the Supreme Court shall hear and determine any question of law arising on the stated case and may

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“ in accordance with the decision of the Court upon such question
 “ confirm, reduce, increase, or annul the assessment determined by the
 “ Board, or may remit the case to the Board with the opinion of the
 “ Court thereon. Where a case is so remitted by the Court, the Board
 “ shall revise the assessment as the opinion of the Court may require.”

p. 2, l. 9

p. 3, l. 16

p. 3, l. 21

p. 1, l. 3

pp. 32 and 35

4.—The Respondent was assessed to income-tax as executrix of the deceased in respect of the period from 1st April, 1946, to his death and the above-mentioned amount of Rs. 15,750 was included in the profits charged by the assessment. She appealed to the Commissioner of Income Tax against the assessment, but her appeal was dismissed by the Deputy Commissioner who heard the appeal and the assessment was confirmed on the ground that the amount in question was a profit from the deceased's employment. The Respondent thereupon appealed to the Board of Review against the decision of the Deputy Commissioner. 10

5.—The facts before the Board of Review are to be found in the Case Stated by the Board of Review and in the correspondence and other documents exhibited thereto and are summarised below. The decision of the Board of Review (consisting of three members) was given by a majority and separate findings of the two members constituting the majority and of the dissentient member are respectively exhibited to the Case. 20

6.—The deceased was employed by the Company as Managing Director from December, 1939, until his death which occurred on the 12th June, 1946. There was no written agreement between the deceased and the Company and no contemporary evidence whether oral or in correspondence as to the terms of his engagement was before the Board of Review. It is found to be common ground that his contract of service was for the normal 4-year period with 6 months' full pay leave and the cost of passages to the United Kingdom for himself and his wife.

It is further found that at the date of his death the deceased had not taken the leave referred to in this finding, and it is also found that the Company had annually placed to reserve in its accounts amounts computed on the basis of 1½ months' salary for every year of service of the deceased. This reserve amounted to Rs. 15,750 at the date of his death upon the assumption that his service had amounted to seven years. As shown by the Directors' Minute below the object of the reserve was to meet the contingent liability of the deceased's leave pay. A cheque including this amount of Rs. 15,750 was sent by the Company on or about the 11th November, 1946, to Messrs. Julius & Creasy the agents acting for the deceased's widow in the matter of his estate. 30

p. 3, l. 6

A minute of the meeting of the Directors of the Company held on the 17th July, 1946, is as follows :— 40

“ The Directors having taken note that a sum of Rs. 15,750 had
 “ been placed to reserve to meet the contingent liability to pay for
 “ Mr. Sutherland's leave pay which, he would have been entitled to,

“ if he had survived, it was decided to pay Mrs. Sutherland’s passage
 “ to England, namely, Rs. 1502, and to authorise a payment to her
 “ of Rs. 15,750.

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“ (Sgd.) ROSSLYN KOCH,
 “ Chairman and Managing Director.”

7.—A number of letters written by or on behalf of the Company after
 the deceased’s death are exhibited to the Case and particular letters were
 relied on at the hearing before the Board of Review to support the different
 contentions, the statements in such letters of the nature of and ground
 10 for the payment of the said sum of Rs. 15,750 not being consistent.

8.—Thus, in letters written on behalf of the Company by its secretary
 of the 18th February, 1948, and the 1st June, 1948, to the agents in the
 matter of the estate of the deceased it is stated that the leave pay lapsed
 at the death of the deceased ; that his estate was not entitled and was not
 paid the sum ; that it was paid to his widow as an ex gratia payment,
 and the aforesaid Resolution of the Directors of the 17th July, 1946, is
 quoted in support of that view.

p. 25, l. 2
 p. 26, l. 16

9.—On the other hand in a letter of the 19th July, 1946, the payment
 is mentioned by the Company as having been paid in respect of
 20 “ Mr. Sutherland’s overdue leave pay.” In a further letter of the
 17th December, 1948, addressed to the Assessor of Income Tax, Mr. Rosslyn
 Koch the Managing Director of the Company (who had signed the minutes
 of the Company’s meeting of 17th July, 1946), writing on behalf of the
 Company stated that the late Mr. Sutherland was due to leave Ceylon
 on retirement about September or October, 1946, and that the amount of
 leave paid “ earned by him would have been paid before his departure.”
 In a previous letter of the 15th March, 1947, from the Company to the
 Income Tax Assessor enclosing a return by the Company of the deceased’s
 30 1946, to the date of his death it is stated that there had also accrued to the
 deceased’s account a sum of Rs. 15,750 being “ overdue leave pay ” which
 was sent to the Administrators of the Estate. And against the item
 “ other remuneration, if any ” in the form of Return there is returned
 “ Overdue leave pay Rs. 15,750 paid to Messrs. Julius and Creasy the
 “ administrators of the Estate.” Also, on the 23rd February, 1949, a firm
 of Chartered Accountants writing on behalf of the Company stated that the
 payment in question was not an ex gratia payment but was in respect of
 accumulated furlough pay, and the Resolution of the Board of Directors
 of the 17th July, 1946, set out in paragraph 6 above is quoted in
 40 confirmation of this statement.

p. 20, l. 2

p. 27, l. 33

p. 22, l. 30

p. 24, l. 26

p. 29, l. 3

10.—Reference is made in this connection to the whole of the
 correspondence exhibited to the Case.

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p. 32, l. 10

11.—In the findings of the majority of the Board of Review (which it is submitted forms part of the Case, by virtue of paragraph 11 thereof) it is stated that the reason for the payment of leave pay to an employee who did not take his leave with full pay was quite apparent and also reasonable. By his not going on leave the Company had his services and was not put to the expense of paying another, which would happen if he had gone on leave. In consideration of this saving and also as some compensation to the employee for not going on full pay leave he is paid leave pay without leave. This practice of paying leave pay was fairly common in mercantile firms. The leave pay became due when the employee 10 who was entitled to leave on full pay did not go on leave though it was generally paid when he eventually did go on leave or retired.

The majority of the Board of Review held after considering the documents and contentions that the leave pay was earned by the deceased and had accumulated, and only the payment was deferred. The fact that he died before he was paid it would not alter the situation. After quoting Section 6 (2) (a) of the Income Tax Ordinance the majority proceeded to find that even if it were doubted that the deceased had a legal title to the leave pay they would still hold that this payment was paid as profits from his employment, even if it were paid as a moral obligation. It was 20 a payment arising from and connected only with his employment and it was impossible to come to any other decision. As against the evidence in support of the contention that this payment was in respect of overdue leave pay or accumulated furlough pay and therefore profit from employment there was no evidence at all to justify an inference that the payment was an *ex gratia* payment.

p. 35, l. 20

12.—The dissentient member of the Board considered that leave pay meant pay during the period of leave taken and did not mean additional pay if and when the employee did not take his leave. He considered that the meaning of the Directors' resolution on the 17th July, 1946, was that if 30 Mr. Sutherland had not died there was a certain sum which would have been available to pay him leave pay, but that owing to his death he could not get this, and the Directors would therefore pay that sum to his widow though the deceased was not entitled to it. This in the opinion of the dissentient member represented the correct position and the payment was an *ex gratia* payment. It would not be profits from employments within the purview of the Ordinance though no doubt it was the fact of the deceased's past employment coupled with the misfortune of his death which prevented his getting leave pay, that afforded the motive for the *ex gratia* payment. 40

p. 1, l. 3

13.—The Board of Review having dismissed the Respondent's appeal pursuant to the views of the majority stated a Case for the Opinion of the Supreme Court upon the application of the Respondent. The questions of law arising in the Appeal are set out in the Case as follows :—

p. 4, l. 20

“ The questions of law which arise in this appeal are :—

“ (A) Is the said sum of Rs. 15,750 a profit from the deceased’s employment within the meaning of Section 6 (1) and Section 6, (2) (a) (i) and (v) of the Income Tax Ordinance ? ”

“ (B) If the answer to the above question (A) is in the affirmative, is the said sum exempt from taxation on the ground that it is a death gratuity under Section 7 (1) (k) ? ”

“ (C) If the said sum is a profit from employment and not exempt from taxation as aforesaid, is it a part of the deceased’s income under Section 11 (9) of the Income Tax Ordinance ? ”

10 14.—The Case so stated by the Board of Review came on for hearing p. 5, l. 3 before the Supreme Court (Jayetileke, C.J., and Gunasekara, J.) on the 22nd January, 1951. On the 27th April, 1951, the Court gave Judgment allowing the appeal of the Respondent.

In the Judgment delivered by Mr. Justice Gunasekara (in which the Chief Justice concurred) there is a detailed review of the findings of the Board of Review and the various documents exhibited to the Case. Upon that review the learned Judge held that there was no evidence that under his contract the deceased was entitled at any given time to demand in addition to his salary “ leave pay ” in respect of any period of leave which he was entitled to take but had not taken. The learned Judge further considered that there was no evidence that the sum of Rs. 15,750 was paid to the estate of the deceased, the circumstances that it was paid to the widow who happened to be executrix being insufficient to make it a payment to the estate. The only proper conclusion from the facts set out in the Case in the opinion of the learned Judge was that the payment in question was a gift to Mrs. Sutherland personally of a sum of money to which the deceased was not entitled, that it was not a payment made to her in her capacity of executrix, and was therefor not a profit from the deceased’s employment within the meaning of Section 6 (1).

30 15.—The Appellant submits that the decision of the Supreme Court is wrong and should be reversed. The Appellant has agreed that he shall not in any event be entitled to the costs of this Appeal, but subject thereto the Appellant further submits that this Appeal should be allowed for the following amongst other

REASONS.

40 1. BECAUSE the amount of Rs. 15,750 received by the Respondent from the Company was not a personal gift to her but was in fact paid to and received by her as executrix of the estate of her deceased husband, and an assessment including that amount as being profits from his employment under the Company was rightly made upon her in pursuance of Section 27 of the Income Tax Ordinance.

2. BECAUSE the amount of Rs. 15,750 was remuneration earned by the Respondent's deceased husband during his life-time being pay in lieu of leave which he was entitled to take but did not take.
3. BECAUSE 6 months' pay in lieu of leave (namely Rs. 9,000) had already become owing to the Respondent's deceased husband before his death, and, to the extent of Rs. 9,000 at least therefore, the assessment was valid.
4. BECAUSE even if the payment of the whole or any part of the Rs. 15,750 had not become an obligation of the Company upon or before the death of the Respondent's husband the receipt of that sum by the Respondent after his death constituted a profit arising from the husband's employment under the Company. 10
5. BECAUSE there was evidence upon which the Board of Review could come to the conclusion that the amount of Rs. 15,750 was a profit arising from the employment of the Respondent's husband.
6. BECAUSE there was no evidence that the said sum or any part thereof was a capital sum paid to and received by the Respondent by way of a death gratuity within the meaning of Section 7 (1) (k) of the Income Tax Ordinance. 20
7. BECAUSE by Section 73 (4) of the Income Tax Ordinance the onus was on the Respondent as Appellant before the Board of Review to prove that the assessment was excessive in amount, and the Respondent did not discharge that onus.
8. BECAUSE the decision of the Board of Review was not erroneous in law.
9. BECAUSE the reasoning of the Judgment of the Supreme Court is not well-founded. 30

J. MILLARD TUCKER.
REGINALD HILLS.

In the Privy Council.

No. 41 of 1951.

ON APPEAL FROM THE SUPREME COURT OF
CEYLON.

BETWEEN

THE COMMISSIONER OF INCOME
TAX, COLOMBO ... *Appellant*

AND

MRS. A. J. SUTHERLAND, (Executrix
of the Estate of R. W. SUTHERLAND
deceased), presently of England
Respondent.

CASE FOR THE APPELLANT

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