

~~G.H. 62.~~

16, 1952

31476

In the Privy Council.

No. 41 of 1951.

ON APPEAL

FROM THE SUPREME COURT OF CEYLON.

BETWEEN—

THE COMMISSIONER OF INCOME TAX, COLOMBO

UNIVERSITY OF LONDON  
W.C.1.  
21 JUL 1953  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

*Appellant*

— AND —

MRS. A. J. SUTHERLAND (Executrix of the Estate of  
R. W. SUTHERLAND deceased)

*Respondent*

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CASE FOR THE RESPONDENT.

1. This is an appeal from a judgment of the Supreme Court of Ceylon (Jayatileke, C. J. and Gunasekara, J.) dated the 27th April, 1951, on a Case Stated by the Board of Review, Income Tax, for the opinion of the Supreme Court under section 74 of the Income Tax Ordinance, Ceylon (Chapter 188) upon the application of the Respondent, whereby the decision of the Board of Review dismissing the Respondent's appeal to the Commissioner of Income Tax and the Deputy Commissioner of Income Tax was reversed, and the questions of law raised by the case stated were answered in favour of the Respondent. Pt. I, p. 5.  
Pt. I, p. 1.

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2. The question arising in this appeal stated shortly is whether a sum of Rs. 15,750 paid by the Colombo Apothecaries Company Limited (hereinafter called "the Company") to the Respondent is assessable to income tax in the hands of the Respondent as executrix of the estate of her late husband (hereinafter called "the Deceased") as a profit from the Deceased's employment within the meaning of section 6(1)(b) and section 6(2)(a)(i) and (v) of the Income Tax Ordinance (Cap. 188) as amended by section 3 of the Income Tax Amendment Ordinance, No. 25 of 1939. If the Respondent's contention on this point is not accepted, a further question arises whether the said sum of Rs. 15,750 was a death gratuity exempted from income tax by section 7(1)(k) of the Income Tax Ordinance (Cap. 188).

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3. The material provisions of the Ordinance read as follows :—

INCOME TAX ORDINANCE (Cap. 188)

Section 5(1)

“ Income tax shall, subject to the provisions of this Ordinance . . . . . be charged . . . . . in respect of the profits and income of every person. . . . .

- (a) wherever arising, in the case of a person resident in Ceylon, and
- (b) arising in or derived from Ceylon, in the case of every other person.”

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Section 6(1)

“ For the purposes of this Ordinance, ‘ profits and income ’ or ‘ profits ’ or ‘ income ’ means—

- (a) . . . . .
- (b) the profits from any employment ;”

Section 6(2) (as amended by section 3 of the Income Tax Amendment Ordinance, No. 25 of 1939)

“ For the purposes of this section—

- (a) “ Profits from any employment ” includes—
  - (i) any wages, salary, leave pay, fee, pension, commission, 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 an employee, or any allowance for the purchase of any such conveyance in so far as it is expended for such purpose; 20
  - (v) any other allowance granted in respect of employment whether in money or otherwise”. 30

Section 7(1)

“ There shall be exempt from the tax—

- (k) any capital sum received by way of retiring gratuity (other than a sum received in commutation of pension) or death gratuity, or as consolidated compensation for death or injuries.”

Section 11(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, and the profits and income arising from his estate from such day to the end of the year of assessment shall be statutory income of his executor for that year of assessment, and for the following year of assessment the statutory income of his executor from the estate shall be the profits and income of one year from that day."

- 10        4. The facts appear in the Case Stated by the Board of Review, Income Tax, for the opinion of the Supreme Court of Ceylon, and may be summarised as follows :— Pt. I, p. 1.
- (1) The deceased was managing director of the Company from November, 1939, to the date of his death on the 12th June, 1946, and the Respondent is his widow and the executrix of his estate. Pt. I, p. 1.
- 20        (2) The terms of the Deceased's employment were not embodied in any written contract, but it is common ground that "the deceased's contract of service was for the normal four-year period with six months' full pay leave and the cost of passages to the United Kingdom for himself and his wife."
- (3) The Deceased did not at any time from the commencement of his employment to the date of his death take leave to the United Kingdom, and no payment was made to him by the Company for leave pay or passage money.
- (4) From time to time the Company placed to reserve sums of money representing the amounts which it might become liable to pay to the Deceased for leave pay. As at the date of the Deceased's death the total of such sums was Rs.15,750. Pt. I, p. 2.
- 30        (5) At a Board Meeting of the Company held on the 17th July, 1946, the Directors passed a resolution in the following terms :— Pt. I, p. 2.  
Pt. II, p. 31.
- "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 and to authorise a payment to her of Rs.15,750."
- 40        (6) The sum of Rs.15,750 was paid to the Respondent in accordance with the said resolution, and it is to the said sum that this appeal relates. Pt. II, p. 26.
- (7) Apart from the resolution of the Board of Directors of the Company set out in sub-paragraph (5) above the only evidence before the Board of Review and the Supreme Court of Ceylon as to the terms of the Deceased's contract with the Company and as to the nature of the payment made by

Pt. II, p. 26,  
l. 20.

the Company to the Respondent was that contained in various letters which are attached to and form part of the Case Stated. These letters make varying statements as to the position. Thus, in a letter dated 1st June, 1948 to the Assessor, the Secretary of the Company said :—“ . . . the total amount of leave pay amounted to Rs.15,750 and the whole of this sum on the death of Mr. Sutherland lapsed and his Estate was not entitled to, and was, therefore, not paid this sum. This sum was, however, paid to his widow, Mrs. Sutherland, as an *ex gratia* payment in accordance with the following Resolutions . . . ”. (The Resolution set out in sub-paragraph (5) above was then quoted). On the other hand, the Company's Accountants, Messrs. Ford, Rhodes, Thornton & Co., informed the Assessor, in a letter dated 23rd February, 1949 that they had heard from the Managing Director of the Company—“ who states that the Rs.17,252 was in respect of accumulated furlough pay and passage money due to the late Mr. Sutherland to the date of his death. The payment is not an *ex gratia* payment.” (The sum of Rs.17,252 referred to in that letter represents the Rs.15,750 under dispute in this appeal together with passage money.)

Pt. II, p. 29,  
l. 1.

5. The said sum of Rs.15,750 was included by the Assessor in the assessment which was made under section 11(9) of the Income Tax Ordinance, of the Deceased's income for the period 1st April, 1946, to 12th June, 1946 in the year of assessment 1946/47.

Pt. I, p. 3,  
l. 16.

6. The Respondent appealed against the assessment to the Commissioner of Income Tax, and the Deputy Commissioner of Income Tax, who heard the appeal and confirmed the assessment on the ground that the sum of Rs.15,750 was a profit from the Deceased's employment.

Pt. I, p. 3,  
l. 21.

7. The Respondent thereupon appealed to the Board of Review constituted under the Income Tax Ordinance on the following grounds :—

(a) The sum of Rs.15,750 paid to the widow of the late Mr. Sutherland in terms of the resolution dated 17th July, 1946, does not constitute profits from employment carried on by the late Mr. Sutherland.

(b) The said sum of Rs.15,750 is a death gratuity exempted from Income Tax under section 7(1)(k) of the Income Tax Ordinance.

(c) In any event the said sum of Rs.15,750 does not constitute profit or income which accrued between 1st April, 1946, and 12th June, 1946, the date of Mr. Sutherland's death

and therefore does not constitute statutory income within the provisions of section 11(9) of the Income Tax Ordinance.

8. The Board of Review by a majority decision dismissed the Respondent's appeal. The Board by two of its members considered that the said sum of Rs.15,750 was leave pay which the Deceased had earned and to which he had a right at the date of his death, only the payment of it being deferred until he went on leave or retired or died. Even if the Deceased had no legal title to the said sum, the Board was of opinion that if it was paid as a moral obligation it was paid as profits from employment. Pt. II, p. 31 (Z1).  
Pt. II, pp. 32-35 (Z2)
- 10 The Chairman of the Board of Review, who dissented, took the view that the Deceased was entitled to leave pay only if he took leave, that the contingent right to that pay lapsed with his death, and that the payment to his widow was an *ex gratia* payment, motivated by his employment and death, but not forming profits from his employment within the purview of the Income Tax Ordinance. He would have allowed the appeal. Pt. II, pp. 35-37 (Z3)
9. Dissatisfied with the order of the Board of Review the Respondent applied to the Board for a Case to be stated for the opinion of the Supreme Court of Ceylon, and a Case was stated accordingly. Pt. I, p. 1.
10. The Supreme Court of Ceylon (Jayatileke, C. J. and Gunasekara, J.) heard the appeal argued on 22nd January, 1951, and decided on 27th April, 1951, in favour of the Respondent. Gunasekara, J., in delivering judgment with which Jayatileke, C. J., agreed, found nothing in the Case to show that any practice of the Company to pay leave pay instead of leave, if there was such a practice, was followed in the Deceased's case, nor was there any other evidence that his contract included a term entitling him to claim a money payment in lieu of leave. The payment was made to Mrs. Sutherland, and the circumstance that she happened to be the executrix was by itself insufficient to make it a payment to the Estate. There was no evidence that the sum that was paid represented a debt due from the Company to the deceased. The only evidence as regarded the nature of the payment was that it was a gift to Mrs. Sutherland from the Company that had been her husband's employer, and that the motive for the gift was the circumstance that it represented a sum of money to which her husband would have been entitled if he had survived. Expressions used by officials of the Company to describe the nature of the payment that was made in pursuance of the resolution of the Board of Directors had no bearing on the question. The only proper conclusion was that the payment in question was a gift to Mrs. Sutherland personally of a sum of money to which the Deceased Pt. I, pp. 5-10.  
Pt. I, p. 9, l. 19.  
Pt. I, p. 9, l. 44.  
Pt. I, p. 10, l. 6.  
Pt. I, p. 10, l. 12.
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Pt. I, p. 10,  
l. 30.

was not entitled, and was not a payment made to her in her capacity of executrix. It was therefore not a profit from the Deceased's employment within the meaning of section 6(1) of the Income Tax Ordinance.

By its decree the court judged that the appeal should be allowed with costs.

11. The appellant, feeling aggrieved by the judgment and decree of the Supreme Court of Ceylon, and being desirous of appealing therefrom, obtained on the 16th May, 1951, conditional leave to appeal, and on the 25th May, 1951, final leave to appeal to His Majesty the King in Council. 10

12. The Respondent humbly submits that the judgment of the Supreme Court of Ceylon is right and should be affirmed, and that this appeal should be dismissed for the following amongst other

#### REASONS

(1) Because under the terms of the Deceased's contract of service he was not entitled to leave pay unless and until he took leave;

(2) Because the Deceased died without taking leave so that neither he nor his estate became entitled to any payment in respect of leave pay; 20

(3) Because the payment of the said sum of Rs.15,750 made by the Company to the Respondent was made to her *ex gratia* and not as of right;

(4) Because the payment of the said sum of Rs.15,750 made by the Company to the Respondent was made to her in her personal capacity and not in her capacity as executrix of the estate of her late husband;

(5) Because even if the said sum of Rs.15,750 was not paid *ex gratia* it was a death gratuity exempted from Income Tax under section 7(1)(k) of the Income Tax Ordinance; 30

(6) Because the said sum of Rs.15,750 did not constitute profits from the employment of the Respondent's late husband;

(7) Because the judgment of the Supreme Court of Ceylon was right and well founded.

ROY BORNEMAN.

In the Privy Council.

**ON APPEAL FROM THE  
SUPREME COURT OF CEYLON**

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BETWEEN

THE COMMISSIONER OF INCOME TAX,  
COLOMBO

AND

MRS. A. J. SUTHERLAND (Executrix of the  
Estate of R. W. SUTHERLAND deceased)

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**CASE FOR THE RESPONDENT.**

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