31/83

No. 50 of 1982

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF MAURITIUS

BETWEEN:

THE COMMISSIONER OF INCOME TAX — Appellant

- and -

ESPERANCE COMPANY LIMITED — Respondent

CASE FOR THE APPELLANT

RECORD

1. This is an Appeal from the Judgment of the Supreme Court of Mauritius, dated 9th April 1982 (Espitalier-Noel and Ahmed J.J.) which allowed an appeal by the Respondent against an additional Notice of Assessment in the sum of Rs 14,997 received as a Preference Shareholder in the Mon Loisir Sugar Estates Company Limited (hereinafter called "MLS"); being the Respondent's entitlement in respect of a partial distribution of the Liquidator of MLS. p.33

2. The substantive question in this Appeal is whether the distribution (hereinafter called "the Distribution") which was paid in respect of "bonus" Preference Shares (such shares being issued prior to 1st July 1971 and paid up out of undistributed reserves of MLS) is taxable pursuant to Section 2 (2) of the Income Tax Act 1974 (hereinafter called "the 1974 Act"). pp.36/7

3. There may also be raised by the Respondent a preliminary or additional issue. This concerns the question whether the Notice of Motion supporting the application for leave to appeal to Her Majesty's Privy Council was made validly within rule 3 of the Mauritius (Appeals to Privy Council) Order 1968 which says: Please see additional Br ("A B")

> 3. Applications to the Court for leave to appeal shall be made by motion or petition within 21 days of the date of

RECORD

the decision to be appealed from, and the applicant shall give all other parties concerned notice of this intended application.

Notice of the Appellant's motion for leave to appeal to Her Majesty's Privy Council was served on the Respondent on 26th April 1982; the judgment of the Supreme Court having been
p.33 delivered on 9th April 1982. But the motion itself was moved on 3rd May 1982. It is to be noted that the judgment was delivered during the vacation and the motion was made on the first day of the second term, which is also the first day on which the Court heard motions made subsequent to the judgment. The Supreme Court
p.9 of AB (Rault C.J. and Ahmed J.) held the application had been made in time as rule 3 was directory and not mandatory. In the Appellant's submission, the learned judges for the reasons given in their judgment, dated 19th May 1982, came to the correct decision. In that judgment, a thorough and correct analysis was undertaken of Mauritian authority on this
pp.10/11 of AB point; following Perrine v. Foogooa (1967) Mauritius Reports 134. In terms of English authority, support for the decision of the learned judges can, in the Appellant's submission, be found in the judgment of Bingham J. in Broken Hill Proprietary Company Limited v. Xenakis (1982) 2 Lloyd's Reports 302. The Xenakis case supports the contention that the application was effectively made within the twenty-one day period laid down by rule 3.

4. As to the substantive issue, MLS on five occasions between 4th May 1951 and 29th August 1969, issued "bonus" shares fully paid up out
pp.46/7 of undistributed reserves. During the same period MLS made three reductions in capital. Such involved, with the sanction of the Court, the cancellation of "bonus" shares and the Distribution of the nominal paid up capital to shareholders. On 1st June 1981, MLS went into voluntary liquidation. On that date the entirety of the Preference Share Capital of MLS was constituted by "bonus" issues. In accordance with the rights of the Preference
p.47 Shareholders, the liquidator (before dealing with any distribution to the Ordinary Shareholders) made on 29th June 1981 a partial distribution in respect of the Preference Shares.

RECORD

5. By a letter, dated 2nd October 1981, the Appellant wrote to the Respondent and contended, firstly, that the repayment of the Preference Share Capital could not be considered a "genuine repayment" of capital and, secondly, that the Distribution on 29th June 1981 constituted the payment of a dividend pursuant to Section 2(2) of the 1974 Act; the dividend being chargeable to income tax by virtue of Section 11 (1) (d) of the 1974 Act. He accordingly assessed the Respondent on 16th October 1981 upon the sum received of Rs 14,997; the income tax payable amounting to Rs 9,898. p.48

6. The Respondent appealed and the Supreme Court allowed the appeal and discharged the assessment. It was held (i) that the Distribution to the Respondent was a "genuine repayment of capital" (see Section 2(2)(a) of the 1974 Act) and (ii) the question being whether Section 2(2) of the 1974 Act operated retrospectively (and in coming to an answer to that question to consider whether Section 5 of the Income Tax Ordinance 1950 as amended by Section 2 of the Income Tax (Amendment No. 2) Act 1971 (hereinafter called "the 1971 Act") also operated retrospectively); that they did not. Consequentially the Supreme Court held that the Distribution by the Liquidator of MLS being a capital repayment in respect of share capital issued before the 1971 Act was in force could not be treated as a dividend pursuant to subsequent liquisation. p.41 p.40

7. It was common ground before the Supreme Court (if there is no statutory provision to the contrary) that the repayment of capital in respect of shares, in a winding up, is capital and not income for tax purposes: Commissioners of Inland Revenue v. Blott (1921) 2 AC 11; Commissioners of Inland Revenue v. Burrell (1924) KB 52. In the Appellant's submission, that proposition is correct. p.35

8. The relevant provisions of the 1974 Act are as follows:

Section 2(2) says:

2(2) - in this Act "Dividends" means-

(a) any distribution out of the assets of a company whether in money or money's worth to a shareholder of the company or to a relative of a shareholder, except so much of the

distribution, if any, as represents a genuine repayment of capital on the shares or as is, when it is made, equal in amount or value to any consideration given for the distribution;

(b) .....

(c) .....

(d) Any repayment of share capital to a shareholder where at or before or after the time of that repayment the company repaying the share capital issued as paid up, otherwise than for the receipt of new consideration, any share capital, except insofar as the amount repaid exceeds the amount or aggregate of amounts of share capital previously simultaneously or subsequently issued as paid up otherwise than for the receipt of new consideration;

9. In the Appellant's submission, Section 2(2)(d) charges the Distribution to income tax. The language is unambiguous, and quite clear. This submission is without prejudice to any argument that the Distribution was not a genuine repayment of capital in terms of Section 2(2)(a) of the 1974 Act.

10. In terms of Section 2(2) of the 1974 Act, it is neither necessary nor helpful to refer to earlier similar provisions. The drafting of earlier provisions cannot affect or alter the plain meaning of the words used. This is so, in the Appellant's submission, whether or not the 1974 Act is considered to be a consolidation statute. In Commissioners of Inland Revenue v. Joiner 1975 1 WLR 1701 Lord Diplock considered the purposes of consolidating legislation and then said (at page 1715) as follows:

> "It is only where the language of the Consolidation Act is ambiguous (i.e. it has failed to achieve its purpose of clarifying the law) that it is legitimate to have recourse to the repealed enactments to see if their meaning is clearer, and, if it is, to resolve the ambiguity in the Consolidation Act by

ascribing to its language whichever of the alternative meanings would not affect a change in the previously existing law. What cannot ever be legitimate is to have recourse to the repealed enactments to make obscure and ambiguous that which is clear in the Consolidating Act.

I find nothing in Kirkness v. John Hudson & Co Limited (1955) AC 696 which conflicts with this. This House was there concerned with an entirely different question of statutory construction. The statute which regulated the legal rights and obligations of the parties and where in issue in the case was the Income Tax Act 1945. Four of their Lordships held the language of this statute to be clear and unambiguous as to the matter in dispute. It had been argued that from the language in two provisions contained in subsequent Finance Acts of which the primary purpose was to change the existing statute law upon matters other than that which was the subject of dispute in the Kirkness case it could be inferred that the draftsmen of the subsequent Finance Act believed that the language of the provision of the Income Tax Act 1945 that was applicable to the Kirkness case bore a meaning different from that which their Lordships, by a majority, considered to be clear and free from ambiguity. What this House decided was that the existence of such a belief, whether on the part of the draftsman or of the Parliament which adopted his wording, did not justify the further inference that either of the subsequent Finance Acts had as its secondary purpose to effect a retrospective change in the particular provision of the existing statute law with respect to which the belief was held, so as to make it accord with the belief even though the belief should prove to be unfounded. Had the language of the particular provisions of the existing statute been ambiguous the different considerations that I have already indicated would apply and it might

have been legitimate to infer that a secondary purpose of the subsequent Finance Act was to remove doubts as to what the law had always been.

The speech of Viscount Simonds in the Kirkness case emphasises the duty of the court to consider first the actual language of the provisions of the statute relied upon as giving rise to those legal rights or obligations that form the subject matter of dispute; and it contains a vigorous warning against too great a readiness to detect in that language ambiguities which would justify recourse to other statutes to clarify its meaning."

11. Further, the Appellant submits that it is not legitimate to consider earlier legislation as the 1974 Act by its preamble indicates that the purpose was "amend and consolidate" the income tax legislation. It was not merely to clarify the previously existing statute law: as to this phrase in a preamble see Erskine May, Parliamentary Practice, 19th Edition, at pages 524 and 525. In contrast the 1971 Act contained a preamble which indicated its purpose was "to impose tax or income and regulate the collection thereof". In the Appellant's submission the Supreme Court was not entitled to regard the 1974 Act as a pure consolidating statute and construe it by reference to the 1971 Act provisions.

12. The 1974 Act does not impose a charge to tax retrospectively. It does not charge tax on past transactions. It merely charges the relevant distributions by companies to income tax. The relevant distribution triggers the charge and must take place after the date of enactment. This, in the Appellant's submission, was the obvious intention of the legislature. If reference must be had to the 1971 Act, it is to be noted that in the 1974 Act there is no "back stop date" as provided by Section 5(1) of the 1971 Act. That provision reads:

"The amendment made by Section 2 shall not affect any distribution made before

1st July 1971".

This may be because the draftsman in the 1971 Act uses the word "issues" as regards the creation of "bonus" share capital (see Section 5(1)(i)(e), sub-paragraph (d) of the Income Tax Ordinance 1950, as amended) whereas in the 1974 Act the past tense is used, "issued". In the Appellant's submission, it is fallacious to argue that because a source of receipt (theretofor, arguably, not charged to income tax) was brought within charge, that the legislation is retrospective. It is submitted that Section 2(2)(d) clearly demonstrates that the legislature sought to tax the relevant distributions made after the date of enactment whether or not such were in respect of share capital issued earlier.

12. Section 17(3)(c) of the Interpretation and General Clauses Act 1974 provides no guide whatsoever as to the proper construction of Section 2(2) of the 1974 Act. The fact that a particular state of affairs or source of receipt of money had not been taxed theretofor cannot be described as a "right or privilege" which had accrued under a repealed enactment. If recourse must be had to the Interpretation and General Clauses Act 1974 then Section 5(7) inferentially supports the construction proposed by the Appellant. This provision says: p.40

> (7) The law shall be considered as always speaking, and where any matter or thing is expressed in the present tense it shall be applied to the circumstances as they occur.

While that provision itself is difficult to construe, it does indicate that the use of the past tense refers to events which may have happened before enactment of the relevant statute. It is to be noted that the Interpretation and General Causes Act 1974 (Act No. 33 of 1974) received assent on 12th July 1974 whereas the 1974 Act (being No. 41 of 1974) received assent on 25th July 1974. If the draftsman failed to charge relevant distributions to income tax, by the 1971 Act, then by the patent amendment (from the use of the word "issues" as to share capital to "issued") in the relevant provision of the 1974 Act, he succeeded thenceforth.

13. The learned judges of the Supreme Court misdirected themselves, and erred in law, not only for the reasons set out above, but also for the following reasons inter alia:

(i) They put too much weight upon a direct comparison of the Mauritian and United Kingdom legislation: Sections 234 and 235 of the Income and Corporation Taxes Act 1970. Such a comparison is of limited help as the relevant provisions are in different terms. Further, such a comparison cannot prove a positive guide as to the intention of the Mauritian legislature.

(ii) No account was taken of the fact that the 1974 Act was to "amend and consolidate" the relevant legislation. The learned judges approached the issue as if the 1974 Act was a pure consolidating statute.

(iii) There is no reason to assume a grammatical error in the drafting of the legislation and a clear result can be found from a natural construction of the words used.

14. The Appellant accordingly submits that the decision of the Supreme Court should be reversed and that this Appeal should be allowed with costs herein below for the following among other

R E A S O N S

(1) BECAUSE the distribution is taxable pursuant to Section 11(1)(d) and Section 2(2) of the 1974 Act.

(2) BECAUSE the Supreme Court has misconstrued Section 2(2) of the 1974 Act.

(3) BECAUSE Section 2(2)(d) of the 1974 Act is not concerned with whether the relevant share capital was issued before or after its enactment.

(4) BECAUSE the decision of the Supreme Court was wrong.

ROBIN MATTHEW

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF MAURITIUS

BETWEEN:

THE COMMISSIONER OF INCOME TAX — Appellant

- and -

ESPERANCE COMPANY LIMITED — Respondent

CASE FOR THE APPELLANT

CHARLES RUSSELL & CO.,
Hale Court,
Lincolns Inn,
LONDON, WC2A 3UL.
Tel: 01-242 1031
Ref: R/JA/17554.
Solicitors for the Appellant