31/83

IN THE PRIVY COUNCIL No.50 of 1982

ON APPEAL

FROM THE SUPREME COURT OF MAURITIUS

BETWEEN :-

THE COMMISSIONER OF INCOME TAX — Appellant

- AND -

ESPERANCE COMPANY LIMITED — Respondent

CASE FOR THE RESPONDENT

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10 1. This is an appeal from the judgment of the Supreme Court of Mauritius given on 9th April 1982 and is brought with the leave of the Supreme Court given on 19th October 1982. p.33

2. The present case is a test case concerning the proper construction of the Income Tax Act 1974 Section 2(2)(d). ("the 1974 Act"). The question in issue is whether certain repayments of share capital in a winding up fall to be treated as "dividends" for income tax purposes. The repayment 20 was made to the Respondent shareholder after the commencement of the Income Tax (Amendment NO.2) Act 1971 ("the 1971 Act") but was in respect of "bonus shares" issued before the commencement of that Act. It is common cause that before the commencement of the 1971 Act repayment of the share capital represented by the bonus shares would not have been taxable. The question in this appeal is whether a repayment after the date of commencement of the 1971 Act, of bonus share 30 capital created before that date falls to be treated as a taxable dividend under Section 2(2)(d) read with Section 11(1)(d) of the 1974 Act.

3. The Respondent was at all material times a holder of shares in Mon Loisir S.E. Company Limited ("the Company"). The Company had in 1951, 1954, 1965, 1968 and 1969 issued to its shareholders (including the Respondent) new shares by way

of "bonus issues". That is to say, the new shares had been issued by the Company fully paid up, not by way of a fresh subscription of funds by shareholders but out of undistributed reserves. The bonus shares so issued included non-redeemeable preference shares. In June 1981 the Company commenced voluntary winding up and in accordance with the preferential rights of its preference shareholders the liquidator on 29th June 1981 repaid to holders of preference shares in the Company (including the Respondent) part of the capital paid up on those shares. The shares in question were bonus shares. That is, issued "otherwise than by the receipt of new consideration", in the manner described in this paragraph. 10

4. The Commissioner of Income Tax was of the opinion that the partial repayment of preference shares referred to above could not be regarded as "a genuine repayment of capital" in terms of Section 2(2)(a) of the 1974 Act and further, that pursuant to the 1974 Act Section 2(2)(d) it was liable to be treated as a dividend, and was thus chargeable to income tax under Section 11(1)(d) of the Act. In accordance with this determination the Commissioners of Income Tax assessed the Respondent to income tax on the amount of capital repaid to the Respondent in respect of its holding of preference shares in the Company. The assessment is in the sum of Rs 14,997, on which the tax payable is Rs 9,898. (p.48; 20; p.48; After p.50; 30)

5. The Respondent appealed to the Supreme Court of Mauritius against the said assessment. The Supreme Court (P.Y. Espitalier-Noel, J. and AMG Ahmed J) allowed the Respondent's appeal and set aside the assessment. The Supreme Court held that the repayment of capital was genuine, and would, before 1971, have been treated as a capital payment for tax purposes and not as a dividend. Further, the Supreme Court held that neither the change in the law effected by Section 2 of the 1971 Act nor the provisions of Section 2(2)(d) of the 1974 Act operated retrospectively so as to affect any share capital issued prior to the coming into force of the 1971 Act. Since the repayments in the present case were of capital which had been issued prior to the entry into force of the 1971 Act it followed that those repayments could not be treated as dividends. (p.1; p.33; p.41; 40; 50)

6. It is submitted that as a matter of principle, and in the absence of fiscal legislation to the contrary, any repayment of capital in respect of shares in a winding up is

capital for all purposes, including tax purposes. This was the position in Mauritius before the coming into force of the 1971 Act and in England before the 6th April 1965. This principle was common ground between the Appellant and the Respondent in argument before the Supreme Court in Mauritius. The proposition is established in English law by Commissioners of Inland Revenue v. Blott /1920/ 2 KB 657 at 675 per Scrutton, L.J., at 675; see also /1921/ 2 A.C. 171 at 184-5, per Lord Haldane; Commissioners of Inland Revenue v. Burrell /1923/ 2 KB 478 affirmed at /1924/ 2 KB 52, especially at 64 and 68, and Hill v. Permanent Trustee Co. of New South Wales /1930/ A.C. 720 at 730-732.

7. Section 2 of the 1971 Act introduced to Mauritius a new rule for tax purposes by charging income tax on "distributions". It added a new subsection (6) of Section 5 of the Income Tax Ordinance 1950 ("the Ordinance"), which defined "distributions". Subsection (6) as added included the following provisions:-

"(6) (i) ... the term "distribution" means:-

(a) any distribution out of the assets of a company (whether in cash or otherwise) to a shareholder of the company or to a family 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 new 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 issues as paid up otherwise than by the receipt of new consideration any share capital, except in so far as the amount repaid exceeds the amount or aggregate amounts of share capital previously or subsequently issued as paid up otherwise than

by the receipt of new consideration;"

8. It will be seen that paragraph (a) of the definition still exempted a "genuine repayment of capital" from taxation. Assuming that the repayment to the Respondent was a genuine repayment of capital, it will be taxable only if it fell within paragraph (d) of the definition. That paragraph was aimed at the repayment of bonus shares but only, in our submission, bonus shares issued after the coming into force of the 1971 Act. 10

9. As a matter of language, the terms of subsection (6)(i)(d) do not apply to any issue of share capital made before the coming into force of the 1971 Act. The phrase "the Company ... issues ... any share capital" is indicative of an issue after the date of the 1971 Act and not before that date. To give the 1971 Act the meaning for which the Appellant contends the phrase would have to have provided: "the Company issues or has at any time issued any share capital" - a common enough form of statutory provision where some degree of retrospectivity is intended. For examples in English tax legislation, see the Finance Act 1976 Section 46(1) and the Finance Act 1978 Section 31(3). 20

10. An indication that the word "issues" prima facie refers to a future issue is afforded by contrasting the 1971 Act with the comparable English legislation. The English legislation upon which the Mauritian provision now in issue was obviously based was first introduced in the Finance Act 1965 Section 11 paragraph 2 which provides (inter alia) as follows:- 30

"2.(1) Where -

(a) a company issues any share capital as paid up otherwise than by the receipt of new consideration, or has done so after 6th April 1965; and 40

(b) ...."

(See also paragraph 1.(3) of Schedule 11).

The inclusion in paragraph 2(1)(a) of the phrase "or has done so after 6th April 1965" indicates the draftsman's recognition that in the absence of that phrase the provision would apply only to

issues of share capital after the coming into force of the Finance Act 1965. It is submitted that the provisions of the Finance Act 1965 Schedule 11 paragraph 2 (1) and 1(3) and the corresponding provisions of the 1971 Act are materially indentical save for the limited element of retrospectivity expressly introduced by the Finance Act 1965. (Another distinction,
10 immaterial for present purposes, is that the English Act contains an exemption from these provisions in respect of repayments of share capital in a winding up). It is therefore submitted that the only reasonable construction of paragraph (d) of the definition is that it takes effect only in relation to issues of shares made after the entry into force of the 1971 Act.

11. The terms of Section 5(1) of the 1971 Act do not detract from the above interpretation. Section
20 5(1) does not deal with the scope of Section 5(6) (i)(d) of the Ordinance. ie. to what issues of new share capital the paragraph applies. It deals only with the date of distributions of whatever kind by a company. In this respect it has a full field of operation wholly consistent with the construction for which the Respondent contends. In addition, the terms of Section 5(1) afford an indication that the legislator did not intend to give the 1971 Act retrospective effect generally.

30 12. If (contrary to the Respondent's contention) the word "issues" in paragraph (d) as introduced by the 1971 Act is capable of including share capital issued before the entry into force of that Act, then in the Respondent's submission it ought to be construed so as to avoid that result. It is a basic and long-established principle of statutory construction that unless there is an express or clearly implied direction that a statute is to have retrospective effect it should
40 not be given such effect: together with the subordinate rule that a statute is not to be construed as having a greater retrospective operation than its language renders necessary. This canon goes behond the presumption in favour of preserving existing rights. The presumption is that the legislature intends a new statute to operate only on transactions which come into existence after the statute was passed. (Halsbury's Laws, 4th Edition, Volume 44 at paragraph 921;
50 Phillips v. Eyre (1870) LR 6 QB 1 at 23; Lauri v. Renad /1892/ 3 Ch. 402 at 421; Gardner & Co. v. Cone /1928/ 1 Ch. 955 at 967; Carson v. Carson & Stoyek /1964/ 1 WLR 511 at 516). In Phillips v. Eyre, supra, Willes, J. expressed the principle as

follows at page 23:-

> "Retrospective laws are, no doubt, prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law ... Accordingly, the Court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature."

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This principle is applicable in a fiscal context; see James v. Commissioners of Inland Revenue /1977/ 1 WLR 835 at 838.

13. Accordingly, it is the contention of the Respondent that, either as a matter of language or alternatively because of the application of the rule against retrospective application of a statute, holders of shares issued otherwise than for new consideration before the entry into force of the 1971 Act and prior to the enactment of the 1974 Act were entitled on any repayment of such share capital to receive that repayment as capital in their hands and not as a distribution liable to income tax. In the Respondent's further submission, Section 2(2)(d) of the 1974 Act was not intended to alter this position. Nor is there any reason for construing that Act so as to give it any retrospective operation - at least not in respect of anything done prior to the coming into force of the 1971 Act.

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14. The word "issued" is used in Section 2(2)(d) of the 1974 Act, where the 1971 Act had "issues". The 1974 Act, in its definition of "dividends" in Section 2(2) is plainly following the scheme of the 1971 Act. The 1974 Act is entitled, an Act "to amend and consolidate the law relating to income tax". It is submitted that Section 2 (2) was intended as part of the consolidation, and that paragraph (d) of the sub-section was not intended to amend paragraph (d) of the definition introduced by the 1971 Act. If the legislator had intended to create a retrospective operation where none had existed before, he would not have done so by the indirect method of a change of tense which is at best ambiguous. The use of a verb in the past tense, such as "issued", does not necessarily connote somthing done before the commencement of the statute in which it appears.

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This is well established by In re Athlumney /1898/ 2 QB 547. That case concerned the Bankruptcy Act 1890. Section 23 of that Act enacted that:-

> "Where a debt has been proved .. interest /shall be calculated at a specified rate/".

The question in issue was whether the phrase "has been proved" in that Section meant that the section of the Act applied to debts which had been proved before its commencement. The High Court (Wright J.) answered that question in the negative. After reiterating the general rule that a statute is not to be construed as having retrospective operation unless the language unambiguously requires it, the learned judge said at page 553:-

> "Then is the Section so expressed as to be plainly retrospective? No doubt the words "where a debt has been proved under the principal Act" are capable of such a meaning. But this form of words is often used to refer, not to a past time which preceded the enactment, but to a time which is made past by anticipation - a time which will have become a past time only when the event occurs on which the statute is to operate. In former times draftsmen would have used the words "where a debt shall have been proved", but in modern Acts the past tense is frequently used where no retrospective operation can be intended .. it seems to me that the case for the trustee cannot be put higher than this - that either construction is possible; but if so, the authorities to which I have referred show that retrospective force ought not to be given to the Section".

The Respondent respectfully adopts this reasoning of the learned judge. In the context of Section 2(2) of the 1974 Act which is a section concerned with prospective rather than retrospective events, the legislature can hardly be said by the single use of the word "issued" to have manifested an unequivocal intention to give the 1974 Act retrospective effect without limit of time. The use of the words "issued" is, as In Re Athlumney, supra, shows, in itself probably indicative of a prospective and not a retrospective change in the law. Whether that is so or not, the words cannot in the Respondent's submission be said to amount to that very clear provision or necessary implication that the Courts require before holding that a statutory provision was intended to have retrospective effect.

15. Quite apart from the general principle that a statute should be construed so as to avoid any retrospective effect, there is a separate and narrower common law rule which is embodied in the Interpretation and General Clauses Act 1974 of Mauritius. ("the Mauritius Interpretation Act"). Section 17 (3)(c) of the Mauritius Interpretation Act is in materially the same form as Section 16(1)(c) of the corresponding English legislation, namely the Interpretation Act 1978. Section 17(3)(c) of the Mauritius Interpretation Act provides as follows:- 10

> "(3) Subject to subsection (4), the repeal of an enactment shall not -
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed enactment."

In the Respondent's submission the 1971 Act had on a proper construction excluded from its scope repayments after the entry into force of that Act of share capital issued prior to its entry into force. Before the enactment of the 1974 Act but after the coming into force of the 1971 Act, a purchaser of such share capital was entitled to assert that upon repayment of it on a liquidation or otherwise he should be treated as having received capital and not a distribution liable to income tax. That freedom from liability to tax, if not a "right", was at least a "privilege" within the meaning of the Mauritius Interpretation Act. Therefore in the absence of any express provision or necessary implication in the 1974 Act that it is to be construed as retrospectively altering the situation under the 1971 Act, it should not be so construed. In the Respondent's contention there is no such express provision in the 1974 Act. Nor is there any necessary reason to imply any such provision. In particular, the use of the word "issued" does not give rise to a necessary implication, for the reasons given in paragraphs 14 hereof. 20 30 40

16. As we have submitted, Section 2(2) of the 1974 Act is a consolidating provision. There is a well-known and long-established presumption that a consolidating act is not to be construed as altering the law as it existed immediately before the consolidating act was passed. Although this presumption cannot stand in the face of clear language to the contrary, it is helpful where there is any doubt or ambiguity. The proper approach to a consolidating act has been considered by Lord Diplock in Commissioners of 50

Inland Revenue v. Joiner /1975/ 1 WLR 1701 at page 1711E-G where he said:

> "...the primary rule of construction of a consolidation act is to examine the actual language used in the Act itself without reference to any of the statutes which it has repealed. If this examination leads to the conclusion that, when read in the context of other provisions of the Act, the language in which a general description of some factual situation is expressed is more apt to include than to exclude the particular factual situation found to exist in the case for decision or vice versa, the duty of the Court is to ascribe to that language the more apt meaning and to give effect to it accordingly. It is only where such an examination of the actual language of the general description has led to the conclusion that it is no more apt to include than to exclude the particular factual situation that it is permissible for a court of construction to have recourse to the repealed legislation in order to see if its meaning was clearer, and, if it was, to ascribe to the corresponding provision of the consolidation act a meaning which would not involve an alteration in the previous law."

Lord Diplock's approach to the construction of consolidating statutes requires that if there is any ambiguity in the 1974 Act, it must be construed in accordance with the law as it existed in the 1971 Act. In addition, it is noteworthy that Section 5(1) of the 1971 Act is not repeated in the 1974 Act. This cannot mean that pre-1971 repayments of share capital are now included within the definition of distributions. If it were to be argued that the legislature intended in the 1974 Act to amend the 1971 Act to give it retrospective effect, the absence from the 1974 Act of Section 5(1) would be more significant than the change of tense from "issues" to "issued". Yet it would be absurd to suggest that repayments before the 1971 Act were caught by the 1974 Act. If they were caught they would be caught whenever they had occurred since the normal six-year time limit is excluded by Section 79(1) of the 1974 Act in relation to assessments under (inter alia) Section 2(2). This result, it is submitted, cannot have been intended.

17. It may be said that the 1974 Act applies retrospectively in the sense that it must apply

to any bonus shares issued after the coming into force of the 1971 Act. This may well be so. Such a construction is consistent with the canons of interpretation which, we have submitted, should be applied. If the Section in question is part of a consolidation it should not be construed as improving the taxpayer's position or worsening that of the Appellant. It might then be said that, given the legislative history, that degree of retrospectivity is to be implied. But given the statutory language and the legislative history, no greater retrospective operation than that is warranted. 10

18. In his determination alleging the Respondent's liability to tax, the Commissioner of Income Tax asserted that the repayment of share capital in the course of the winding up of the Company had not been a "genuine" repayment of share capital. In the Respondent's respectful submission there can be no substance in that assertion. The bonus issues in question were made in respectively 1951, 1954, 1965, 1968 and 1969. The last was therefore made nearly twelve years before the first repayment. There is no suggestion by the Appellant that the shares were not duly issued as paid up on those dates. Nor that the repayments did not take place or were in respect of anything other than those shares. It is therefore difficult to understand the Appellant's contention. The Supreme Court rejected that contention and the Respondent submits that there is no evidence on which any other view could be sustained. 20 30

19. And the Respondent respectfully submits that the Appeal should be dismissed for the following among other

R E A S O N S

1. BECAUSE the terms of Section 2(2)(d) of the 1974 Act are clear and do not have any retrospective effect. 40

2. BECAUSE even if the terms of Section 2(2)(d) of the 1974 Act are ambiguous they should not be construed to have any retrospective effect.

3. BECAUSE even if the terms of Section 2(2)(d) of the 1974 Act have some retrospective effect, that retrospective effect is limited to shares issued and distributions made after the commencement of the 1971 Act. 50

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4. BECAUSE the terms of Section 5(6)(i)(d) of the Ordinance were not retrospective in that they had no application to shares issued before the entry into force of the 1971 Act.

5. BECAUSE the decision of the Supreme Court of Mauritius was right and ought to be upheld. p.33

SYDNEY KENTRIDGE

STEPHEN ALLCOCK

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- AND -

ESPÉRANCE CO. LTD Respondent

CASE FOR THE RESPONDENT

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