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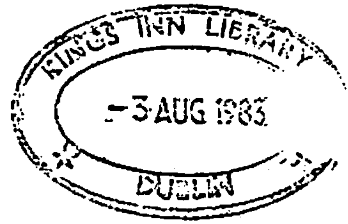
1982 No. 40 S. S.

KELLYSTOWN COMPANY

.v.

H. HOGAN, INSPECTOR OF TAXES



Judgment of Mr. Justice McWilliam delivered the 13th day of April 1983.

This matter comes before me by way of case stated and concerns the interpretation of Sections 52 and 53 of the Finance Act, 1920, relating to the charge of corporation profits tax imposed by Part V of that Act. Although the entire of this Part has been repealed by Section 164 and the Third Schedule of the Corporation Tax Act, 1976 it has been so repealed that liability for accounting periods prior to 5th April, 1976 is not affected. This case relates to profits made by Kellystown Limited, the Appellants, for the accounting period ending 31st March 1974, consisting of two dividends received from Hardwicke Limited and Judd Brothers Limited, both of which arose out of the sales by those companies of certain capital assets. No assessments to corporation profits tax in respect of these sales was made on either of these two companies.

The Appellant was incorporated in 1959 as a company without limited liability. Its sole activity consisted in the holding of investments and it has never carried on any trade.

002919

The provisions of the Act of 1920, as amended by the Finance Act, 1932 in so far as they are relevant, are as follows:-

52 - (1) Subject as provided by this Act, there shall be charged, levied and paid on all profits being profits to which this Part of this Act applies and which arise in an accounting period ending after the thirty-first day of December, nineteen hundred and nineteen, a duty (in this Act referred to as "corporation profits tax") of an amount ....

(2) The profits to which this Part of this Act applies are,

(a) the profits of a British company carrying on any trade or business, or any undertaking of a similar character, including the holding of investments:

(b) the profits of a foreign company carrying on in the United Kingdom any trade or business, or any undertaking of a similar character, so far as those profits arise in the United Kingdom:

(3) In this Part of this Act -

The expression "company" means a body corporate but does not include a private company the liability of whose members is unlimited ....

53 - (1) For the purpose of the Part of this Act, profits shall be taken to be the actual profits arising in the accounting period, and shall not be computed by reference to the income tax year or on the average of any years.

(2) Subject to the provisions of this Act, profits shall be the profits and gains determined on the same principles as those on which the profits and gains of a trade would be determined for the purposes of Schedule D set out in the First Schedule to the Income Tax Act, 1918 as amended by any subsequent enactment, whether the profits are assessable to income tax under that schedule or not:

Provided that, for the purposes of this Part of this Act -

(a) profits shall include all profits and gains arising from any lands, tenements, or hereditaments forming part of the assets of a company, and all interest, dividends and other income arising from investments or any other source and received in the accounting period, not being interest, dividends, or income received directly or indirectly from a company liable to be assessed to corporation profits tax in respect thereof, and no deduction shall be allowed on

account of the annual value of any premises used for the purposes of the company:

Section 26 of the Finance Act, 1964 provided:-

(1) With effect as on and from the 1st day of January 1964, sub-section (3) of Section 53 of the Finance Act, 1920 shall be construed and have effect as if, in the definition of the word "company" contained in that sub-section, the words "nor a private company the liability of whose members is unlimited" were omitted.

It is first submitted on behalf of the Appellant that, as distributions such as these had not previously been charged to corporation profits tax, a taxpayer should be allowed to arrange his affairs on the basis of the practice of the Revenue Commissioners. I do not accept that this submission has any validity. I can see no ground for saying that, because a provision in a statute has not been operated for a number of years, it thereby becomes obsolete or becomes subject to the operation of some unspecified rule of law analogous to a provision of a statute of limitations. Certainly, no authority was cited to me in support of such a proposition. In addition, it has been pointed out on behalf of the Inspector of Taxes that it was only in 1964 that the liability to this tax

was imposed on a company the liability of whose members is unlimited.

In the Circuit Court a submission was made that, as the Appellant did not carry on any trade, it did not come within the provisions of Section 52(2)(a). This argument in this form was abandoned before me but it was submitted that, because there was no trade carried on and the mechanics for assessing the profits are as for Case 1 of Schedule D, the tax cannot be assessed at all. I regret to say that I have difficulty in following this argument although I appreciate the ingenuity in advancing it. I do not accept that it is sound.

It was then submitted that the proviso to sub-section (2) of Section 53 is of doubtful and ambiguous meaning with regard to the application of the words "in respect thereof". In support of this argument certain hypothetical cases were suggested in which it might be difficult to apply the proviso. I was referred to a number of cases in which the principle that, to tax a person, the words of a taxing statute must be clear and unambiguous. I will refer to only two of them. In the case of Russell .v. Scott (1948) A. C. 422, Viscount Simon, at page 433, said "I feel that the taxpayer is entitled to demand that his liability to a higher charge should be made out with reasonable clearness before he is adversely affected." Lord Simonds said, at page 433, "My Lords, there is a maxim

of income tax law which, though it may sometimes be overstressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him. It is necessary that this maxim should on occasion be reasserted and this is such an occasion." In the case of Cape Brandy Syndicate .v. I.T.C. (1921) 1 K.B. 64 Rowlatt, J., said at page 71, "It is urged by Sir William Finlay that in a taxing statute clear words are necessary in order to tax the subject. Too wide and fanciful a construction is often sought to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown, or that there is to be any discrimination against the Crown in those Acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is not room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used." Taking into consideration all the views expressed in these passages, I do not consider that the proviso is of an ambiguous or doubtful meaning when applied to the facts of this case and I am not prepared to hold that, because there may be difficuly in applying the proviso to the facts of other cases, the Sections cannot be applied at all.

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The final submission which is, in a way, associated with the previous submission, is that the reference in sub-section (2) of Section 53 to Schedule D and the First Schedule to the Income Tax Act, 1918, is purely for the purpose of determining profits and does not in any way associate the liability to corporation profits tax with the liability to income tax, so that no question of the difference between capital and income arises and Hardwicke and Judd were liable to pay corporation profits tax on the sale of their capital assets. This argument was not developed so as to indicate what are the profits and gains in respect of which it is contended that Hardwicke and Judd would be liable to corporation profits tax on the sale of a capital asset. The cases of I.R.C. .v. Reid's Trustees (1949) A.C. 361 and Cenlon Finance Company Limited .v. Ellwood 40 Tax Cases 1976 make it clear that money raised on the sale of capital assets may be capital in the hands of companies selling the assets but may be income in the hands of shareholders to whom it is paid, the capital of such shareholders being the shares in the company and this remains unaltered although the value of the shares may be reduced. As the sales by Hardwicke and Judd were sales of capital assets, it appears to me that the proceeds of the sales could not have been subject in their hands to corporation profits tax. It may be that some element of profit on the sales may have been so subject but, even if this is so, I am of opinion that the

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proviso is not operative to relieve the Appellant from liability on its dividends.

The answer to the question asked in the case stated will, therefore, be that the Circuit Court Judge was correct in holding that Kellystown was chargeable to corporation profits tax in respect of the said dividends.

Herbert R. McWilliam

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