Privy Council Appeal No. 39 of 1968

The Woodend (K. V. Ceylon) Rubber and Tea Company Limited - - - - - - - - *Appellant*

v.

The Commissioner of Inland Revenue - - - - *Respondent*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH APRIL 1970

Present at the Hearing:
LORD HODSON
LORD GUEST
LORD DONOVAN
LORD WILBERFORCE
SIR GORDON WILLMER

[*Delivered by* LORD DONOVAN]

The appellant Company carries on and derives profit from an agricultural undertaking in Ceylon. The operations are, however, controlled from the United Kingdom where the company's head office is situate. For the purpose of Ceylon income tax the company is therefore treated in Ceylon as a non-resident.

Assessments to income tax were made upon it in Ceylon for the years of assessment 1958/59 to 1961/62 inclusive. Being aggrieved by these assessments the company appealed against them to the Commissioner of Inland Revenue ("the Commissioner"). He dismissed the appeal.

The company next appealed to the Board of Review which reversed the Commissioner. He thereupon required the Board of Review to state a case for the opinion of the Supreme Court of Ceylon. This being done the case came before that Court in September 1967; and in December 1967 judgment was delivered allowing the Commissioner's appeal. Against that decision the Company now appeals to the Board.

On 26th July 1950 the Governments of the United Kingdom and Ceylon concluded a written agreement having as its object "the avoidance "of double taxation and the prevention of fiscal evasion with respect "to taxes on income". This agreement ("the 1950 agreement") was of familiar pattern. It was designed to afford a measure of relief from income tax to residents of each of the contracting parties who might have income arising in the territory of the other. But for the agreement such residents might find themselves liable to income tax in full on the same income in both countries. The precise way in which relief was accorded under the 1950 agreement is not material to this case. Normally however one country allows its own subjects to set

off against their tax bill the tax paid by them in the other country on the same income. The 1950 agreement was to continue indefinitely, but either Government could give written notice to terminate it, but not before 30th June 1954. Article XXI provides that each country should take steps to give the agreement the force of law in its own Territory. Ceylon did this by The Double Taxation (Relief) Act No. 26 of 1950 (" the 1950 Act ").

The following is an extract from the judgment of the Supreme Court against which this appeal is brought.

> " After the Kaldor Report was adopted with modifications in " Ceylon, the basis of taxation underwent radical changes. Profits " tax was abolished and the simple provisions governing income " tax, applicable both to persons and companies, gave way to a " more sophisticated method of taxation and the Income Tax " Ordinance (Cap 242) was accordingly amended by Act No. 13 " of 1959. So far as persons are concerned, the computation of " taxation is based on family units. The husband, the wife, and " four children are given certain units and the income tax is based " on slabs ranging according to the units. So far as companies are " concerned, the profits tax and all the provisions of the Income " Tax Ordinance under which companies were taxed earlier, were " repealed and Chapter VIII A of the Income Tax Ordinance was " introduced by the amending Act of 1959."

It is the appellant company's case that the provisions of this amending Act of 1959, (" the 1959 Act ") in so far as they relate to certain additional taxation imposed on non-resident companies such as itself, are a breach of either or both of two articles in the 1950 agreement, and are therefore to this extent contrary to the 1950 Act; that the assessments under appeal which purport to be made under the authority of the 1959 Act and which impose this additional taxation upon it are accordingly excessive, and should be reduced.

The articles of the 1950 agreement alleged to be so infringed are Articles VI and XVIII. They read as follows:

" ARTICLE VI

> " Where a company which is a resident of one of the territories " derives profits or income from sources within the other territory, " there shall not be imposed in that other territory any form of " taxation on dividends paid by the company to persons not resident " in that other territory, or any form of taxation chargeable in " connection with or in lieu of the taxation of dividends, or any " tax in the nature of an undistributed profits tax on undistributed " profits of the company, whether or not those dividends or " undistributed profits represent, in whole or in part, profits or " income so derived.

" ARTICLE XVIII

> " (1) The residents of one of the territories shall not be subjected " in the other territory to any taxation or any requirement connected " therewith which is other, higher or more burdensome than the " taxation and connected requirements to which the residents of the " latter territory are or may be subjected.
>
> " (2) The enterprises of one of the territories shall not be subjected " in the other territory, in respect of profits attributable to their " permanent establishments in that other territory, to any taxation

" which is other, higher or more burdensome than the taxation to
" which the enterprises of that other territory, and, in the case of
" companies, to which enterprises of that other territory incorporated
" in that other territory, are or may be subjected in respect of the like
" profits.

" (3) In this Article the term 'taxation' means taxes of every
" kind and description levied on behalf of any authority whatsoever."

The remainder of the Article is not relevant to the present issues.

The provisions of the 1959 Act which are alleged to be a breach of these two articles are contained in section 53C (1) which reads as follows:

" 53C. (1) In respect of any year of assessment commencing on
" or after April 1, 1958, the tax to which a non-resident company
" shall be liable—

" (*a*) shall, where there are remittances of such company in the
" year preceding such year of assessment, consist of a sum
" equal to 45 per centum, and an additional 6 per centum, of
" the taxable income of such company for such year of
" assessment and a sum which shall, if the aggregate amount
" of such remittances is less than one-third of such taxable
" income, be equal to 33⅓ per centum of such aggregate
" amount, and, if such aggregate amount is not less than
" one-third of such taxable income, be equal to 33⅓ per
" centum of one-third of such taxable income; and

" (*b*) shall, where there are no such remittances, consist of a sum
" equal to 45 per centum, and an additional 6 per centum,
" of such taxable income."

Remittances are defined in subsection (2) of the section in the following terms:

" (2) In sub-section (1), 'remittances', with reference to a non-
" resident company, mean—

" (*a*) sums remitted abroad out of the profits of that company,

" (*b*) such part of the proceeds of the sale abroad of products
" exported by that company as is retained abroad, and

" (*c*) in respect of any products exported by that company and not
" sold in a wholesale market or not sold at all, such part of
" the profits deemed under section 38 to be derived from Ceylon
" as is retained abroad."

No objection is raised by the appellant company to the tax equal to 45 per cent of its taxable income, nor to the additional tax of 6 per cent thereof. (The latter tax was preserved in the 1950 Agreement, since the shares of companies such as the appellant Company would not be moveable property situate in Ceylon for the purposes of Ceylon Estate Duty.) The dispute is confined to the additional tax of 33⅓ per cent which is payable when there are remittances in the year preceding the year of assessment. This further tax is alleged to be a tax " in lieu of " the taxation of dividends, or any tax in the nature of an undistributed " profits tax on undistributed profits of the company " and its imposition a breach of Article VI of the 1950 agreement.

Further, or alternatively, this additional tax is alleged to be other, higher or more burdensome than the taxation to which the enterprises of Ceylon are subject, and its imposition a breach of Article XVIII of the 1950 agreement.

To understand these contentions it is necessary to explain what income tax is imposed on resident companies in Ceylon. The relevant provisions are also to be found in the 1959 Act. So far as here material they read thus:

"53B. (1) In respect of any year of assessment commencing on "or after April 1, 1958, the tax to which a company resident in "Ceylon in the year preceding such year of assessment shall be liable "shall consist of—

"(*a*) a sum equal to 45 per centum of the taxable income of such "company for such year of assessment, and

"(*b*) a sum equal to 33⅓ per centum of the aggregate amount of "the gross dividends distributed by such company out of the "profits on which the taxable income of such company is "computed for such year of assessment:

. . . . .

"53B. (3) In sub-section (1), 'amount of the gross dividends' "of a company means the amount of the dividends before such "deductions as the company is entitled to make under this Ordinance "for tax are made from the dividends.

. . . . .

"53D. (1) Subject to the provisions of sub-section (2) and sub-"section (3), every resident company shall be entitled to deduct, from "the amount of any dividend which becomes payable during any year "of assessment commencing on or after April 1, 1959, to any "shareholder in the form of money or of an order to pay money, "tax equal to 33⅓ per centum of such amount."

. . . . .

"53D. (5) Every person who issues a warrant, cheque or other "order drawn or made in payment of any dividend which becomes "payable by a resident company during any year of assessment "commencing on or after April 1, 1959, shall annex thereto a statement "in writing showing—

"(*a*) the gross amount which after deduction of tax thereon "corresponds to the net amount actually paid;

"(*b*) the sum deducted as tax; and

"(*c*) the net amount actually paid."

"(6) Where the assessable income of a person includes a dividend "from a resident company in the form of money or of an order to "pay money, he shall be entitled, on production of a statement "relating to such dividend made in accordance with sub-section (5), "to a set-off against the tax payable by him of the amount of tax "shown on such statement:"

The company's allegation of a breach of Article VI is met on the Commissioner's behalf by an argument which may be summarised thus: There is no income tax in Ceylon charged on dividends declared by companies resident in Ceylon. Accordingly the additional tax payable by *non* resident companies when there have been remittances abroad is not a tax "in connection with or in lieu of the taxation of dividends" for there is no Ceylon tax of which it could be "in lieu". Nor is the additional tax a tax on dividends or a tax in the nature of an undistributed profits tax.

The rival contentions thus raise a question of the true construction of the provisions of the 1959 Act set out above. Since these provide for (*a*) payment of additional tax when a resident Ceylon company declares a dividend: (*b*) for the recoupment of that tax by the company by deduction at source on payment of the dividend: and (*c*) for a set-off by the taxpayer against his own liability of the tax so deducted, it is easy to regard the whole arrangement as the levying of tax on the dividends, and collection of that tax at source from the payer. This is, indeed how the appellant company wishes the relevant legislation to be construed: for Counsel on its behalf prayed in aid the language used by Lord Simon in *Allchin v. Coulthard* [1943] A.C. p.607 at page 619. In that case the liability to United Kingdom income tax on interest was concerned; and the provisions whereby the payer of interest deducted the tax at source, and in one way or another accounted for it to the Crown were treated simply as machinery for the easier collection of the tax. But in the United Kingdom Income Tax legislation a direct charge to tax on interest is imposed on the recipient: and were this so under s. 53B of the 1959 Act as regard dividends declared by a Ceylon resident company, the decision would be in point. It is, however, not so. The extra tax of 33⅓ per cent is a tax to which the company is made liable when dividends have been distributed and is, as a matter of construction, a further tax on its profits additional to the 45 per cent. The dividend, in a sentence, is not the subject matter of the extra tax: but the condition of its being levied; and this is so despite the provisions for recoupment by the company of the tax, and the set-off by the taxpayer. True it is, that the financial effect of the whole operation is the same as it would have been if the charge to tax had been directly upon the dividend, and the section had made this tax collectible by the company. But the financial effect of an operation is not necessarily its legal effect. In their Lordships' view the legal effect is as above expounded; and leads to the conclusion that the extra tax paid by a non-resident company in Ceylon where it has made remittances abroad cannot be said to be " taxation " chargeable in connection with or in lieu of the taxation of dividends ".

Nor, in their opinion is it a " tax in the nature of an undistributed profits " tax on undistributed profits of the company ". Here again the language of section 53C (1) makes it clear that the additional tax in question is not a tax " on " the remittances as such but on the company's taxable income whether distributed or not, albeit that the additional tax is measured according to the remittances. And, for what it is worth, the definition of " remittances " in s. 53C (2) shews that they may consist of other things than taxable profits.

It may well be the case that this additional tax was provided for having regard to the circumstance that the Ceylon legislature could not effectively levy a tax in respect of dividends received by non-resident shareholders; but the arguments raised by the appellant company in relation to Article VI of the 1950 agreement must be tested against the true construction of the relevant sections in the 1959 Act. Their Lordships' conclusion is that so tested the arguments fail.

Coming to Article XVIII, it will be convenient to consider first whether the additional income tax now in dispute is " higher or more burdensome " than the taxation to which resident companies are subjected. The Supreme Court of Ceylon treated this as raising a question of quantum; and looked at agreed figures shewing what tax the appellant company would have paid following the distribution of the dividends it actually paid in the relevant years, had it been a company resident in Ceylon instead of being non-resident. On that footing the dividends would have led to the company paying a further Rs.159,580.00 as tax upon its profits for the years of assessment under appeal. In fact as a non-resident company the

remittances it made led to an extra tax for these years of Rs.35,893.00. Their Lordships see nothing wrong or unreasonable in testing the matter in this way. The result is to negative the appellant company's argument on this part of Article XVIII.

Is the additional tax of 33⅓ per cent which is leviable when remittances are made by a non-resident company nevertheless " other taxation " within the meaning of that article, bearing in mind that it defines " taxation " for the purpose of the Article as meaning " taxes of every kind and " description . . . " Here the Supreme Court accepted the argument for the Commissioner that the extra tax levied on a non-resident where there had been remittances was still income tax and nothing else: that the resident companies were subjected to income tax and nothing else: and that accordingly there was no " other taxation " in sight, despite any differences in the measures of liability which there might be as between residents and non-residents.

This argument succeeded in the Supreme Court, but their Lordships have come to the conclusion that it involves too narrow a construction of the Article.

The first Article of the 1950 agreement provides that the taxes which are its subject matter are income tax (including surtax and the profits tax) levied in the United Kingdom and income tax and profits tax levied in Ceylon. Profits Tax was ended by section 33 of the 1959 Act as from April 1st 1958; and thenceforward the Ceylon tax with which the 1950 agreement was alone concerned for the purposes of relief was income tax. To speak in this context of " other " taxation must, so it would seem to their Lordships, at least include some income tax other than the income tax to which resident companies are subjected. Resident companies are not subjected to additional income tax simply because they make remittances abroad. Non-resident companies *are* so subjected; and it seems to their Lordships more appropriate to the purpose of the 1950 agreement to construe this additional tax which is special to non-resident companies as " other " taxation within the meaning of Article XVIII. It follows that in their view section 53C of the 1959 Act is *pro tanto* in conflict with the 1950 agreement.

What consequence follows? For the appellant company it is said that the 1950 Act must prevail. *Generalia specialibus non derogant.* For the Commissioner it is contended that the proper conclusion to be drawn is that any part of the 1950 Act which is inconsistent with the 1959 Act must be regarded as being impliedly repealed by the latter. The rule for resolving such a conflict is well settled.

> " . . . where there are general words in a later Act capable of " reasonable and sensible application without extending them to " subjects specially dealt with by earlier legislation, you are not to hold " that earlier and special legislation indirectly repealed, altered, or " derogated from merely by force of such general words, without any " indication of a particular intention to do so."
>
> (Per Lord Selborne in *The Vera Cruz* 10 A.C. 59 at p.68.)

If, however, " the provisions of a later enactment are so inconsistent " with or repugnant to the provisions of an earlier one that the two " cannot stand together, the earlier is abrogated by the later " (Maxwell on *Interpretation of Statutes* 12th edition p.193 et seq. and cases there cited).

The rule is more easy to state than it is, on occasions, to apply: for in almost all cases the later statute will contain general words inconsistent

with the words of the special statute—otherwise there would be no problem. In *Sinclair v. Cadbury Bros.* (18 Tax Cases 157: 149 L.T. 412) a statute of Charles II exempting certain lands from all manner of taxes thereafter to be imposed by Parliament or otherwise was treated as prevailing against the all-embracing language of the later Income Tax Acts which laid a tax upon " the property in all lands tenements " hereditaments and heritages in the United Kingdom ". Indeed this was admitted by the Inland Revenue: though it is difficult to conceive an instance where a later enactment was more " inconsistent with or " repugnant to " the provisions of an earlier.

In the present case the 1950 agreement prohibits " other taxation etc.". The 1959 Act imposes such " other taxation " under section 53C. Again the inconsistency or repugnancy could not be more complete. Are there however other considerations which, when taken into account, tilt the balance in favour of the view that the 1950 Act should nevertheless prevail? The agreement to which it gave the force of law was to " continue in effect indefinitely ". If either of the contracting Governments wished to end it, it was to give written notice to the other before 30th June in any calendar year not earlier than the year 1954. (Article XXI). This procedure was not followed in 1959. The 1950 agreement concerned Ceylon and the United Kingdom alone: and their Lordships were informed at the Bar that there were other countries with whom in 1959 there were no similar agreements. So that the general words of the Act of 1959 could be given effect by confining them to the non-resident companies in Ceylon whose residence was in those other countries. The 1950 Act was expressly repealed in Ceylon but not till 1963.

On the other hand, in a radical change of the taxation system such as took place in Ceylon in 1959, under which resident companies, in addition to the 45 per cent tax on their profits, became liable to a further tax thereon equal to 33⅓ per cent. of the gross dividend distributed, it is not surprising to find an additional tax also laid on the profits of non-resident concerns if they made remittances abroad. What would perhaps be surprising would be an intention to exempt from this additional tax the non-residents of one country with extensive commercial interests in Ceylon.

A similar problem was considered by the House of Lords in *Inland Revenue Commissioners v. Collco Dealing Ltd.* [1962] A.C.1. There a double taxation relief agreement had been concluded between the United Kingdom and the Republic of Eire, and was confirmed by the Income Tax Act of 1952. By a later enactment—Finance (No. 2) Act 1955, section 4(2)—repayments of income tax were denied to " a person entitled " under any enactment to an exemption from Income Tax " where certain defined circumstances existed. A company resident in Eire claimed that notwithstanding the existence of such circumstances in its own case, it was entitled to repayment of tax under the Income Tax Act of 1952, on the ground that the later enactment must be regarded as leaving such entitlement unaffected. The House of Lords held otherwise, Lord Radcliffe saying:

> " The only one of the appellant's contentions that appeared to me " to have any plausibility was that which sought to restrict the " apparent range of section 4(2) of the Finance (No. 2) Act, 1955, " by the argument that, if applied to persons enjoying exemption as " being resident in Eire but not also in the United Kingdom, it would " contradict the provisions of the inter-governmental agreements " about double taxation between the two countries. It is no doubt " true that statutory words apparently unlimited in scope may be " given a restricted field of application if there is admissible ground " for importing such a restriction: and the consideration that, if not

" construed in some unlimited sense, they would amount to a breach
" of international law is well recognised as such a ground. But a
" supposed intention not to depart from observance of the comity of
" nations is a much vaguer criterion by which to determine the range
" of a statute; and when the departure consists in no more than a
" provision inconsistent with an inter-governmental agreement about
" taxation, which by its own terms is subordinated to the approval
" of the respective legislatures of the countries concerned and persists
" only so long as its terms are maintained in force by those
" legislatures, I think that there is no useful aid at all to be obtained
" from this principle of interpretation. The principle depends
" wholly on the supposition of a particular intention in the legislature,
" and I do not think that in the case before us there is any reason to
" make the supposition which is suggested."

The fact that in this case the later enactment was passed in order to frustrate the abuse represented by " dividend stripping " can make no difference to the question of construction.

Their Lordships have not found this question easy to resolve in the present case. In the end it is whether the Ceylon legislature must have intended the expression " non-resident company " in section 53C (1) of the 1959 Act to apply to all non-resident companies or to be exclusive of those to whom the 1950 agreement applied. In reaching a decision their Lordships have borne in mind that as already stated, the 1959 Act was a Statute of very comprehensive character introducing a number of radical changes in the taxation laws of Ceylon. It is unlikely that in the course of preparing such a measure agreements such as the 1950 agreement would have been completely overlooked: and it may well be that the legislature considered that the provisions of the 1959 Act if given their full literal meaning would not be repugnant to the 1950 Act— as indeed the Supreme Court have held in this case.

Such a view would, of course, have a bearing on the legislature's intention. But leaving aside all speculation on this point, their Lordships are unable to find in the 1959 Act or in the circumstances which bear upon the present problem any evidence sufficient to justify the conclusion that while section 53C uses the general expression " non-resident company " it must nevertheless be construed as embodying the very important exclusion of those non-resident companies who were within the scope of the 1950 agreement. It seems to them that the general words must receive their full meaning.

An argument was addressed to the Board by junior Counsel for the Commissioner to the effect that the 1950 Act upon its true construction never at any time gave the force of law to Articles VI and XVIII of the 1950 agreement since these articles did not provide " for relief from income " tax or profits tax or for charging the profits or income arising from " sources in Ceylon to persons not resident in Ceylon " (See section 2 (1) 1950 Act). This argument, which was not advanced in the Supreme Court of Ceylon, was based upon an interpretation of the two Articles which their Lordships find altogether too superficial. They accordingly reject it.

In the result however they will for the reasons earlier indicated humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

310672—1 Dd. 178169 110 5/70

In the Privy Council

THE WOODEND (K. V. CEYLON) RUBBER AND TEA COMPANY LIMITED

v.

THE COMMISSIONER OF INLAND REVENUE

DELIVERED BY

LORD DONOVAN

Printed by HER MAJESTY'S STATIONERY OFFICE
1970