

13, 1971

No. 26 of 1969

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF THE SUPREME COURT
OF JUDICATURE GUYANA

IN THE MATTER of THE PROPERTY TAX AND
GIFT TAX ORDINANCE 1862

B E T W E E N

10 GUIANA INDUSTRIAL AND COMMERCIAL
INVESTMENTS LIMITED Appellants

AND

THE COMMISSIONER OF INLAND
REVENUE Respondent

INSTITUTE OF
LEGAL STUDIES
-7 APR 1972
25 RUSSELL SQUARE
LONDON, W.C.1.

CASE FOR THE APPELLANTS

RECORD

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|----|---|----------------------------------|
| 20 | 1. This is an appeal brought by leave from the Judgment and Order of the Court of Appeal, Guyana (Luckhoo, C. (ag), Cummings J.A. and Crane J.A., (ag)) dated the 20th January 1969 dismissing an appeal by the Appellants from an Order of the Supreme Court of British Guiana (Sir Joseph Luckhoo C.J.) dated the 11th August 1964 by which Order the Appellants' appeal against a decision of the Income Tax Board of Review of British Guiana dated the 25th March 1964 was dismissed. By its said decision the Income Tax Board of Review had upheld an assessment to Property Tax, dated the 30th September 1963 made on the Appellants for the year of assessment 1962. | 56

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| 30 | 2. The substantial question raised by the appeal concerns the computation of the amount of the "net property" of the Appellants for the year of assessment 1962 for the purposes of the Property Tax and the Gift Tax Ordinance 1962 on the valuation date for Property Tax, the 30th November 1961, and is whether (as the | |

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Appellants contend) the amount of \$1,861, which was the amount of the Appellants' liability to income tax on that date for the year of assessment 1962 in respect of their income earned, was a debt owed by the Appellants on the valuation date, notwithstanding that the amount was not quantified until a later date.

3. The facts of the matter appear from the Record and may be summarised as follows :-

68 (1) The Appellant Company is a public limited liability company holding shares in other companies with offices at 165 Charlotte Street, Georgetown; 10

69 (2) The Appellant Company commenced business for the first time since incorporation on the 1st December 1960 and prepared its first accounts for the year ended the 30th November 1961;

69 (3) The Respondent under the provisions of Section 9 of the Income Tax Ordinance permitted the gains or profits of the Appellants' business to be computed for the purposes of that Ordinance upon the income of the year terminating on the 30th November; 20

2 (4) The Respondent under the provisions of Section 8 of the Property Tax and the Gift Tax Ordinance 1962 permitted the 30th November to be the valuation date for the purposes of Part IV of that Ordinance in respect of property held for the purposes of the Appellants' business; 30

68 (5) The Appellant Company was assessed to income tax in respect of the Year of Assessment 1962 on its profits of the preceding year ended the 30th November 1961 in the sum of \$1,861

4. The relevant provisions of the Property Tax and the Gift Tax Ordinance 1962 are as follows:

"2. This Ordinance shall -

"(a) with respect to the Property Tax be deemed "to have come into operation with respect to and "from the year of assessment commencing on the "1st January, 1962; 40

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"3. In this Ordinance, unless the context
"otherwise requires -

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"net property" means the amount by which the
"aggregate value, computed in accordance with
"the provisions of this Ordinance, of the
"property of any person on the valuation date
"is in excess of the aggregate value of all the
"debts owed by him on that date other than -

10 "(a) any debt incurred without consideration,
"or without full consideration, in money or
"money's worth,

"(b) any debt incurred which is not wholly for
"his benefit,

"(c) any debt in respect of which there is any
"right to reimbursement from any other person
"unless such reimbursement cannot be obtained

20 "(d) any debt charged or secured on, or
"incurred in relation to, any property of his
"which is to be excluded for the purposes of
"the Property Tax under the provisions of this
"Ordinance, and

"(e) any debt incurred by him outside British
"Guiana other than any such debt which is
"contracted to be paid in British Guiana or
"secured on property in British Guiana,

"and account being taken not more than once of
"the same debt charged upon different portions
"of property;

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"'Valuation date', in relation to any year of
"assessment, means the last day of the year
"preceding that year of assessment;
"'year of assessment' means -
"(a) in the case of the Property Tax, the
"period of twelve months commencing on the
"first day of January 1962, and each
"subsequent period of twelve months

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"'year preceding the year of assessment' means
"the period of twelve months ending on the
"31st December immediately prior to such year of
"assessment.

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" PART IV

" Imposition of Property Tax

"7. Subject to the provisions of this Ordinance,
"and more particularly to the other provisions
"of this Part of this Ordinance, there shall be
"charged, levied and collected for each year of
"assessment a tax (to be called the Property
"Tax) at the appropriate rate or rates
"specified in the first schedule to this
"Ordinance, in respect of the net property, on 10
"the corresponding valuation date, of every
"person.

"8. Where the Commissioner has permitted any
"person under the provisions of section 9 of the
"Income Tax Ordinance to compute the gains or
"profits from his trade or business for the
"purposes of the Income Tax Ordinance upon the
"income of a year terminating on some day other
"than that immediately preceding any year of
"assessment, the Commissioner may permit that 20
"day to be the valuation date for the purposes
"of this part of this Ordinance in respect of
"property held for the purposes of such trade
"or business

"12. (1) In the computation of net property
"the value of any property other than cash
"shall be computed in accordance with the
"following provisions -

"(a) Where any property was acquired before 1st
"January, 1956, its value shall be the 30
"aggregate of its estimated price in open
"market, as at 1st January, 1956 (which price
"shall be estimated by the accountable person)
"together with the cost of improvements and
"additions made to it after 1st January, 1956:

"Provided that the Commissioner may in any case
"estimate the price of such property as at 1st
"January, 1956, if he is dissatisfied with the
"price estimated by the accountable person:

"Provided further that in the case of property 40
"being stocks and shares quoted on a recognised
"Stock Exchange the value shall be the middle
"market price on 1st January, 1956.

"(b) Where any property was acquired on or
"after 1st January, 1956, its value shall -

"(i) if it was acquired by purchase, be an
"amount equal to the aggregate of the cost of
"purchase and the cost of improvements and
"additions made to it after its purchase; and

10 "(ii) if it was acquired otherwise than by
"purchase be an amount equal to the aggregate
"of its market value, on the date of
"acquisition and the cost of improvements and
"additions made to it after its acquisition.

"(c) Where the property consists of debts due
"to the person, the nominal amount of these
"debts.

"(2) Where the price of any property has been
"satisfied otherwise than in cash, the then
"value of the consideration actually given for
"the property shall be treated as the price
"at which the property was acquired.

20 "(3) The price or value of any property shall
"for the purposes of this Part of the Ordinance
"be subject to the following deductions -

"(a) in the case of property other than a
"debt any deductions for wear and tear and
"annual allowances (but not initial allowances)
"since the acquisition of the property or 1st
"January, 1956, whichever is the later, as are
"authorised by the Income Tax Ordinance; and

30 "(b) in the case of debts, any deduction from
"the nominal amount which has been allowed in
"respect thereof for income tax purposes."

" PART VI

"Returns, Assessment, Appeals, Payment,
"Recovery and Repayment, and Offences, etc.

"19. (1) Property Tax ... shall be assessed
"and collected by the Commissioner

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"(4) The provisions of the sections of the

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"Income Tax Ordinance specified in the third
"schedule to this Ordinance (which relate to
"returns, assessments, objections and appeals
"therefrom, the signing and service of notices,
"the payment and recovery of tax, and offences)
"shall, mutatis mutandis, have effect with
"respect to the Property Tax ... as they have
"effect with respect to the Income Tax."

5. The relevant provisions of the Income Tax Ordinance (as amended to the 31st December 1962) are as follows : 10

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"5. (1) Income Tax, subject to the provisions
"of this Ordinance, shall be payable at the
"rate or rates herein specified for each year
"of assessment upon the income of any person
"accruing in or derived from the Colony or
"elsewhere, and whether received in the Colony
"or not, in respect of -

"(a) gains or profits from any trade, business,
"profession or vocation ... 20

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"8. Subject to the provisions of this
"Ordinance, tax shall be charged, levied and
"collected for each year of assessment upon the
"chargeable income of any person for the year
"immediately preceding the year of assessment.

"9. Where the Commissioner is satisfied that
"any person usually makes up the accounts of
"his trade or business on some day other than
"that immediately preceding any year of
"assessment, the Commissioner may permit the
"gains or profits of that trade or business to
"be computed for the purposes of this Ordinance
"upon the income of the year terminating on
"that day in the year immediately preceding
"the year of assessment on which the accounts
"of the said trade or business have been
"usually made up;" 30

6. The Appellants claimed that for the purpose
of ascertaining its net property on the 30th
November 1961, being the valuation date for the
Property Tax for the Year of Assessment 1962,
there should be deducted from the aggregate 40

value of their property on that date the sum of \$1,861 being the sum charged for income tax on their income earned in the year which ended on the valuation date. The Respondent rejected the Appellants' claim

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10 7. On an appeal to the Board of Review, the Board upheld the Respondent's contention that the reservation of this sum for income tax was not a debt owed by the Appellants on the 30th November 1961 and dismissed the appeal

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20 8. The Appellants appealed to a Judge in Chambers from the decision of the Board of Review, and their appeal was heard on the 25th July 1964 by Luckhoo C.J. in Chambers. The learned Chief Justice delivered Judgment dismissing the appeal on the 11th August 1964. He referred to Phillips v. C.I.R. (1963) 5 W.I.R. 304 in which it was held that it is the chargeable income for the year immediately preceding the year of assessment which stands charged with the payment of income tax in British Guiana and not the income or chargeable income in the year of assessment; and to C.I.T. v. Barcellos (1957) L.R.B.G. 105 in which Stoby J. had observed that as soon as income is derived in the Colony over and above a certain sum the obligation to pay income tax arises and that the taxpayer's liability did not depend on the arithmetical calculations of a Government official: it is the extent of his liability which is dependent on the ascertainment of his chargeable income.

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40 The learned Chief Justice had no doubt that the Appellants were liable to pay income tax for the Year of Assessment 1962 on income earned during 1961 at the valuation date, the 30th November 1961, and had a legal obligation at that date to pay income tax in the next succeeding year 1962, but he held that since there was no legal right in the Respondent to enforce payment at the valuation date there was therefore no debt due at that date. He rejected the Appellants' contention that the value of a property for Property Tax should be considered to be its market value, which would take into account liability to income tax on

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p.11 the grounds that it is not the taxpayer's property which stands charged with his liability to income tax. The Respondent had cited to him the case of Re Duffy (deceased) Lakeman v. Attorney General (1948) All E.R. 758, but he emphasised that care must be taken in applying English decisions to cases to be decided under the provisions of the British Guiana Income Tax legislation and drew no guidance from the decision in that case. 10

p.13 9. On the 8th September 1964 the Appellant Company gave Notice of Appeal to the British Caribbean Court of Appeal. The Grounds of Appeal contained in the Notice were as follows:-

(1) The learned Chief Justice erred in holding that the sum of \$1,861 was not a debt owed by the Appellants at the valuation date, the 30th November 1961, within the meaning of Section 3 of the Property Tax and the Gift Tax Ordinance 1962 20

(2) The learned Chief Justice misdirected himself by applying the test of whether the tax was a debt due on the valuation date, and not whether it was a debt owed within the meaning of the said section

(3) The learned Chief Justice correctly held that the Appellants were at the valuation date, the 30th November 1961, liable to pay income tax for the year of assessment 1962, on the income earned during the year 1961, but erred in holding 30 that because it was not due and payable on the valuation date it is not deductible.

(4) In the alternative, the Chief Justice erred in not allowing the said sum of \$1,861 to be brought into account, if not by deduction as a debt, then as a liability against the profits of the Appellants in order to ascertain the true aggregate net value of the property of the Appellants on the valuation date within the true intent and meaning of the Ordinance. 40

p.16 10. The appeal came on for hearing in the Court of Appeal, Guyana pursuant to the provisions of section 9 (1) of the Guyana Independence Order 1966 on the 6th and 7th

November 1968 before Luckhoo C. (ag.), Cummings, J.A. and Crane J.A. (ag.) On the 20th January 1969 the Court of Appeal, Cummings J.A., dissenting, delivered judgment dismissing the appeal.

11. The Acting Chancellor, delivering the first judgment, said that he agreed with the judgment of Crane J.A., (ag.) and only wished to append some observations. He said that by the Income Tax Ordinance only the Respondent could make an assessment and only when a fixed and settled assessment is accepted or finally approved by the Courts can it be said that a debt is truly owed. Under the Property Tax Ordinance the debt must be owed on the valuation date: debts not then owed but expected to accrue subsequently cannot be cognisable and do not qualify.

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12. Cummings J.A., delivered a dissenting judgment. He cited one of the entries against the word "debt" in the 3rd Edition of Stroud's Judicial Dictionary "money in the hands of a man who cannot refuse to pay it somehow or another is a 'debt' and if so it can be attached" and the case of Webb v. Stanton (1883) 11 Q.B.D. 522 in which it was shown that a debt is a sum of money which is now payable or will become payable in future by reason of a present obligation. He pointed out that in C.I.T. v. Barcellos (1957) B.G.L.R. 105 the Commissioner for Income Tax had succeeded in his contention that provided an obligation to pay income tax arose before the date of a receiving order a claim based on an income tax assessment made thereafter was admissible as a debt provable in insolvency pursuant to the Insolvency Ordinance.

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In Whitney v. C.I.R. (1924) 10 T.C.88 at p.110 Lord Dunedin had stressed that liability to pay tax does not depend on assessment, which particularises the exact sum which a person liable has to pay. The learned Justice of Appeal distinguished the English decision in Re Duffy by observing that in Guyana the liability or obligation to pay income tax goes beyond moral certainty for which every businessman ought to make provision, since it is a legally existing liability or obligation as soon as the income is earned

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p.28 In reaching his conclusion favourable to the Appellants the learned Justice of Appeal cited the speech of Lord Reid in Winter v. I.R.C. (1963) A.C.235 in which Lord Reid referred to the Scottish principle that obligations are either pure or to a certain day or conditional, obligations in diem arising in the case of debts which become properly due from the very date of the obligation because it is certain that the day for performance will exist. The learned Justice of Appeal illustrated this principle by referring to a number of English decisions, which he said pointed to the difference between debts in praesenti and debts in futuro on the one hand and liabilities based upon a contingency on the other hand. In the present case the obligation to pay tax arose as soon as the company's trading account disclosed a chargeable income, and accordingly there was a debt owed, though payable in the future, at the valuation date. 10

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p.38 In conclusion the learned Justice of Appeal drew support from the invariable practice of the authorities under the Estate Duty Ordinance, whereby the executor was always permitted to deduct Income Tax on the chargeable income of the deceased even though no assessment had been made at the date of death.

p. 42 13. Crane J.A. (ag.) considered that there must be something which the law recognises as a debt before it can be said to be owing and accruing and that the debt must not merely be a liability but an obligation. In the present context a debt cannot arise until the time has arrived when the Commissioner has power to assess, demand, sue for and recover the tax. He found support for his views in the decision in Re Duffy where Lord Greene M.R. had held that the word "liabilities" in S.55 of the Finance Act 1940 meant present legal liabilities as opposed to liabilities in the wider and business sense of anything which appears on the debit side of the balance sheet of a company. 30

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p. 48 The learned acting Justice of Appeal thought that the argument that the appellants' income tax liability cannot be justly included

in a valuation of their net property tends to beg the question and confuse the concepts of liability and legal obligation. He considered that the crucial issue was whether the sum in question could have been lawfully demanded from the appellants on the valuation date. Since the Respondent had no power to demand payment, there was a mere liability to tax and no obligation to pay it and the learned Chief Justice in the Court below was wrong in holding that there was such a legal obligation on them at that date.

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The learned acting Justice of Appeal cited the judicial explanation of an obligation in the Dictionary of English Law 1959 which connotes "the relation between two persons one of whom can take judicial proceedings or legal steps to compel the other to do or abstain from doing a certain act." Since there was no such relation between the Appellants and the Respondents on the valuation date, there was no debt owed by the Appellants on that date.

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14. On the 19th July 1969 the Court of Appeal granted the Appellants final leave to appeal to Her Majesty's Privy Council.

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15. The Appellants respectfully submit that the majority of the Court of Appeal was wrong in holding that the Appellants' liability to the income tax charged on its income for the year ending on the 30th November 1961 was not a debt owed on the 30th November 1961 within the meaning of S.3 of the Property Tax and the Gift Tax Ordinance 1962. The Appellants at that date were unavoidably liable to this income tax and this liability was not affected by any of the considerations which carried weight with the English Court of Appeal in the Duffy case, which was a case decided on a different system of Income Tax.

It is respectfully submitted that the intention of the legislation was to impose tax on the Appellants' net property as at the turn of their tax year and that at that moment of time they were absolutely liable to the tax in

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question and that if they had reserved a sum for the payment of income-tax they were no longer making the mere book-entry of a prudent businessman but were acknowledging a debt which they owed to the Respondent and which they could not avoid paying. The subsequent assessment in Lord Dunedin's words in I.R.C. v. Whitney, merely "particularises the exact sum which the person liable has to pay." Unless the Appellants' contentions are upheld, they will be 10
taxed on the tax they owe; it is respectfully submitted that if this had been the intention of the Ordinance, it would have needed very clear terms indeed to express it, and these words are nowhere to be found in this Ordinance.

It is further submitted that (if the sum of \$1,861 was not deductible from the aggregate value of the Appellants' property on the 30th November, 1961, for the purpose of determining the net property of the Appellants) that sum 20
fell to be taken into account as a prospective liability of the Appellants against its profits in order to ascertain the aggregate value of its property.

16. The Appellants humbly submit that the decision of the Court of Appeal is wrong and ought to be reversed and that the Appeal ought to be allowed with costs here and below for the following amongst other

R E A S O N S 30

1. BECAUSE the Appellants' year of income for Income Tax purposes ended on the 30th November 1961 and on that date tax was charged for the Income Tax year of assessment 1962 upon the Appellants' net chargeable income earned during that year of income.

2. BECAUSE the Appellants' liability to this income tax constituted a debt owed by the Appellants at that date within the meaning of S 3 of the Property Tax and the Gift Tax Ordinance 1962. 40

3. BECAUSE the reasoning of the judgment of Cummings J.A. is correct.

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4. BECAUSE the sum of £1,861 fell to be taken into account as a prospective liability of the Appellants against its profits in order to ascertain the aggregate value of its property.

J. RAYMOND PHILLIPS

HENRY BROOKE

No. 26 of 1969.

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GUYANA INDUSTRIAL AND COMMERCIAL
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CASE FOR THE APPELLANTS

SIMMONS & SIMMONS,
14 Dominion Street,
E.C.2.

Appellants' Solicitors.