

13, 1971

No.26 of 1969

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

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

B E T W E E N :

GUYANA INDUSTRIAL AND COMMERCIAL INVESTMENTS LIMITED

-- and --

10 THE COMMISSIONER OF INLAND REVENUE

Appellants

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

Respondent

CASE FOR THE RESPONDENT

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20 1. This is an appeal brought by leave from a Judgment and Order of the Court of Appeal of Guyana (Luckhoo Chancellor, Cummings and Crane J.J.A.) dated 20th January, 1969, following an appeal by the Appellant from a Judgment and Order of Luckhoo C.J. sitting in Chambers dated 11th August 1964 in favour of the Respondent.

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30 2. The sole question in issue is whether for the purpose of computing the "net property" of the Appellant as defined in Section 3 of the Property Tax and Gift Tax Ordinance of 1962 (hereinafter referred to as "The Property Tax Ordinance") as at the valuation date of 30th November 1961, a sum of £1861 was a "debt owed" by the Appellant at that date. The said sum was the Appellant's liability to income tax for the Year of Assessment 1962 based on its

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profits for the year ending on the said valuation date.

3. At all material times Section 7 of the Property Tax Ordinance was as follows:-

"Subject to the provisions of this Ordinance, the 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 the corresponding valuation date, of every person." 10

The expression "net property" is defined in Section 3 of the Property Tax Ordinance, so far as is relevant, as follows :-

"'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 - 20

(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, 30

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

(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 40

(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,

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

4. The facts of this case may be briefly summarised as follows :-

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10 (i) The Appellant was at all material times a public company carrying on the business of holding shares in other companies. It started business on 1st December 1960 and drew up its first accounts to 30th November 1961. Under Section 9 of the Income Tax Ordinance it was permitted to take its profits for the year ending 30th November 1961 as its profits for the year preceding the year of assessment 1962 which would be liable to tax in the year of assessment 1962. Accordingly, under Section 8 of the Property Tax Ordinance which came into operation on 1st January 1962 the Appellant was also permitted to treat 30th November 1961 as its valuation date for the purposes of Property Tax for the year of assessment 1962.

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(ii) In its Property Tax return for the year of assessment 1962 submitted on 2nd May 1963 the Appellant returned net property of the value of \$3,966,250 after deducting as debts owed, inter alia, \$117,000 and \$1861 in respect of a provision for dividend and a provision for taxation respectively. The Appellant also claimed, and was allowed, a set-off of property tax in respect of shares owned in other companies by virtue of Section 13 of the Property Tax Ordinance. The Appellant subsequently relinquished the claim to deduct the provision for dividend. By a letter dated 28th October 1963 the Commissioner of Inland Revenue refused to allow the provision for taxation of \$1861 as debt owed at the valuation date of 30th November 1961. Out of which refusal this appeal arises.

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(iii) By 30th November 1961 no assessment to income tax for any year of assessment had been made on the Appellant. The profit of the first year of the Appellant's business did not come into charge until the year of assessment 1962, that is, 1st January to 31st December 1962. The amount of \$1861 was the Appellant's liability to income tax for the year of assessment 1962 calculated on the basis of the Appellant's profit for the year ending 30th November 1961. The net chargeable income of the Appellant for the year ending 30th November 1961 was \$251,887.45 against which set-offs in the amount of \$250,027.35 were available, leaving a balance of \$1861: see Notice of Appeal to Judge in Chambers.

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5. (i) The Appellant appealed against the refusal of the Respondent to allow the provision for taxation of \$1861 as a debt owed as at 30th November 1961 to the Board of Review. In a decision given on the 25th April 1964, the Board held unanimously that the sum of \$1861 was not a debt owed at that valuation date. The Appellant appealed to Judge in Chambers. The appeal was heard by Luckhoo C.J. and judgment given on 11th August 1964.

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(ii) The learned Chief Justice distinguished a liability to pay income tax which in British Guiana arose as soon as income was derived and the fixed amount that eventually became payable as a result of that liability. Applying that distinction, he held that, although at the valuation date there was a liability on the Appellant to pay income tax in the succeeding year, there was no debt due at that date since the Respondent could not then enforce any payment. The Learned Chief Justice appeared to construe "debt owed" in the definition of "net property" as equivalent to "debt due". He considered that various sections of the Income Tax Ordinance, some introduced subsequently, pointed to the same distinction, namely Sections 69A(4), 69C(1), (2) and (5).

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The learned Chief Justice dismissed the argument advanced for the Appellant that the

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property tax was a tax on "net worth" which was market value taking into account all liabilities. There was no provision in the Income Tax and Property Tax Ordinances by which an income tax liability was a charge on property.

10 He did not consider that the English case of In re Duffy (deceased), Lakeman v. Attorney General, /1948/ All E.R. 756 was directly in point owing to the dissimilarities between the preceding year basis of tax under Case I of Schedule D in the United Kingdom and the basis of imposing tax in British Guiana. In British Guiana, the position was that there was a liability to pay income tax as soon as income arose in any year, but, generally, there was no debt of income tax due until the following year when that income was assessed. p. 12

20 6. (i) The Appellant appealed against the judgment of Luckhoo C.J. to the Court of Appeal of the Supreme Court of Guyana (Luckhoo Chancellor, Cummings and Crane J.J.A.). Judgment was given on 20th January 1969 by a majority (Cummings J.A. dissenting). p. 13 p. 16

30 (ii) The learned Chancellor agreed with the judgment to be given by his brother Crane J.A., and occurred in dismissing the appeal. He observed that wide powers were given to the Respondent to accept or reject a taxpayer's return of income under the Income Tax Ordinance. The Respondent, not the taxpayer, fixed the taxpayer's liability to tax. As no assessment could be made on profits earned to 30th November 1961 until the calendar year 1962, no debt of income tax in respect of those profits was owing at 30th November 1961. p. 17 p. 18 p. 19

40 (iii) Cummings J.A., in a dissenting judgment, analysed at length the cases cited before him which bore on the meaning of debts, debts due or owing or accruing. He considered that there was established a distinction, on the one hand, between debts in praesenti and debts

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in futuro which were both "debts owing" and, on the other hand, between liabilities based on a contingency which were not "debts owing". There was no contingency in the present case. The obligation or liability arose as soon as a profit was dissolved.

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The learned Justice of Appeal considered that the learned Chief Justice had misdirected himself by reading "debt owed" as "debt due". Consequently, Inland Revenue Commissioners v. Port of London Authority/1923/ A.C. 507 did not help the Respondent.

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Turning to the object of the property tax, the learned Justice of Appeal considered that it was to impose a tax on net worth, that is, the value of assets less what would have to be paid to creditors even though payment was deferred. The Respondent became a statutory creditor as soon as income arose in the year ending 30th November 1961. He also considered that Section 10(b) of the Estate Duty Ordinance was in pari materia with the sections of the Property Tax Ordinance in issue. In practice "debts" in that section included liability to tax not assessed at the deceased's death on profits arising up to the deceased's death.

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(iv) In the opinion of Crane J.A., there was a distinction between a debt owed and debt due which lay in the time for payment. With a debt due the time must have arrived, but not so with a debt owed. The solution to the issue lay in finding the meaning of "debt owed" in the Property Tax Ordinance and of "liability" and "indebted" in the Income Tax Ordinance.

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The learned Justice of Appeal considered that in the cases under the repealed Common Law Procedure Act 1854 which contained the expression "debt owing or accruing" it was clear that there had to be an existing obligation before there was a "debitum in praesenti". The charging sections of the Income Tax Ordinance, namely Sections 5 and 48, themselves created a liability without the need for an assessment. However, a liability

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was not an obligation. The decision in O'Driscoll v. Manchester Insurance Committee [1915] 3 K.B. 499 was not authority for the fact that an unquantified amount could be a debt owing giving rise to an obligation to pay. An obligation had there already been created by the National Health Insurance Regulations and articles of agreement. There was no obligation to pay an amount unless that amount was capable of being quantified. The learned judge relied on Seabrook Estates Co.Ltd. v. Ford [1949] 2 All E.R. 94. The liability created by Section 5 of the Income Tax Ordinance did not become an obligation until an assessment had been made.

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The same result was reached by treating an obligation as no less the right of the creditor than the liability of the debtor. While there was only a liability of the debtor, as when there was income derived by a subject but not assessed, no legal obligation existed.

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Accordingly, no legal obligation to pay the sum of \$1861 existed at 30th November 1961. The learned judge saw confirmation of this in Sections 39(1), 69C(1), 2(2)(a) and 5 and 71 of the Income Tax Ordinance.

7. (i) The Respondent respectfully submits that the problem before the Court is (1) to give a meaning to the expression "debts owed" as it occurs in Section 3 of the Property Tax Ordinance and (2) to determine whether at 30th November 1961 the provision for taxation of \$1861 was a "debt owed" in the relevant sense under the terms of the Income Tax Ordinance.

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(ii) On the first question, the Respondent submits that a word having a clear, primary legal meaning is to be given that meaning in construing a Statute unless the result is to defeat the object of the legislation or to produce an absurdity. It is submitted that the expression "debt owed" has a clear, primary legal meaning. The significance of debt is "a sum of money due by certain and express agreement" (Blackstone's Commentaries 3, 153)

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or, where the debt arises out of a statute, by implied agreement (ibid. 3, 158). The essence of a debt is therefore twofold. First, there must be a fixed sum. Second, the debtor is presently obliged, to pay the sum, whether immediately or in the future, subject to no contingency. The significance of "owed" in this context is, in the Respondent's respectful submission, "not necessarily payable".

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(iii) The Respondent submits that the legal meaning of "debts owed" should be preferred to any popular meaning on the further ground of the use of expressions involving "debt" or "liabilities" in the Property Tax Ordinance. In the Respondent's submission, "debt due" in Section 12(1)(c) of the Property Tax Ordinance is to be contrasted with "debts owed" in section three. Moreover, the gifts tax imposed in the same ordinance envisages a valuation of shares in or debentures of a company by reference to the market value of the company's assets less its liabilities including liabilities not yet matured and contingent liabilities (Section 18(4)(a)(1) of the Property Tax Ordinance). "Contingent liabilities" are to be contrasted with "debts owed", and both are to be given their meaning in law.

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(iv) The Respondent submits that if the expression "debt owed" is given its meaning in law, the object of the property tax is not frustrated, nor is any other absurdity produced. The property tax is not a tax on net worth or market value of property. The system of valuation of property in section twelve of the Property Tax Ordinance ignores market value for the most part, and is based instead on the cost of acquisition or market value on acquisition of property. No injustice results necessarily from the inability of a taxpayer to deduct contingent liabilities that are not debts owed from a valuation of his property which must usually be less than its market value.

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Moreover, the property tax is an annual tax. The accurate estimate each year of the

value of contingent liabilities of a taxpayer would involve much labour. The scheme of the property tax is to ignore liabilities which have not crystallized into debts owing. To the objection that in principle it would seem inequitable to include as "property" rights whether conditional or contingent but to disallow as deductions conditional or contingent liabilities, the Respondent replies that where the liability is foreseeable at the time of acquisition of the property, the method of valuation set out in section 12 of the Property Tax Ordinance avoids any injustice.

Conversely, the gifts tax contained in the same Ordinance is not an annual tax. It might be expected that for such a tax an accurate assessment of the value of the subject matter of the gift would be required taking into account conditional and contingent liabilities. Such an assessment is provided for in section 18 of the Property Tax Ordinance.

(v) In so far as the Appellant intends to rely on O'Discoll v. Manchester Insurance Committee, [1915] 3 K.B. 499, the Respondent respectfully submits that in the judgments it was not made clear by the learned judges whether they considered Dr. Sweeny's claim to be a debt owing or a debt accruing. If it was the latter, it was strictly not a debt at all but merely a claim about to crystallize into a debt. Alternatively, under the terms of Dr. Sweeny's contract, he was entitled to a fixed amount once he had done certain work. There was a debt owing then in existence though it might not be paid in full.

(vi) On the second question, the Respondent respectfully submits that income tax is not a "debt owed" in the relevant sense until an assessment has been made. Until that time, no fixed amount is owed by the taxpayer. The Respondent may not accept the taxpayer's return (Section 48(2)). Again, the rate of tax may be altered or new allowances given. Secondly no amount is "owed". The taxpayer

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is not presently obliged to pay tax until an assessment has been made. For example, should the Respondent fear that a subject might leave the country without being assessed to tax which may prove irrecoverable, he may require the subject to make a return, assess him, and require security for payment (Section 49(2)). The implication, it is submitted, is that the Ordinance itself does not create an obligation to pay tax; it provides the machinery 10 whereby an obligation arises. Nor indeed without an assessment would income tax become a debt payable (Section 67(1)).

(vii) In so far as the Appellant intends to rely on Commission of Inland Revenue v. Barcellos [1957] B.G.L.R. 105 as authority for the proposition that unassessed income tax in Guyana is a debt, the Respondent submits that it was merely decided in that case that unassessed income tax was a liability within 20 the meaning of section 35 of the Insolvency Ordinance, that is, a liability present or future, certain or contingent. The Respondent concedes that once profits have been derived, income tax though unassessed is a future or contingent liability (In re Sutherland (dec'd) Winter v. Inland Revenue Commissioner [1963] A.C. 235).

8. The Respondent humbly submits that the majority decision of the Court of Appeal should 30 be upheld and that this appeal should be dismissed with costs for the following among other

R E A S O N S

- (1) BECAUSE the expression "debts owed" as it occurs in section 3 of the Property Tax Ordinance must be given its ordinary, legal meaning.
- (2) BECAUSE income tax in respect of income derived but not assessed is not a "debt 40 owed" within the meaning of that expression in the Property Tax Ordinance

(3) BECAUSE the decision of Luckhoo C.J. was
right.

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(4) BECAUSE the decisions of Luckhoo
Chancellor and Crane J.A. were right.

S. J. L. OLIVER

No.26 of 1969

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

O N A P P E A L

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

B E T W E E N

GUYANA INDUSTRIAL AND
COMMERCIAL INVESTMENTS
LIMITED

Appellants

- and -

THE COMMISSIONER OF
INLAND REVENUE

Respondent

CASE FOR THE RESPONDENT

CHARLES RUSSELL & CO.,
Hale Court,
21 Old Buildings,
Lincoln's Inn,
London, W.C.2.

Solicitors for the Respondents