1976, 8

IN THE PRIVY COUNCIL No.12 of 1974

ON APPEAL

FROM THE COURT OF APPEAL OF JAMAICA

BETWEEN:

THE TRUSTEES OF SERAMCO LIMITED SUPERANNUATION FUND — Appellants

- and -

THE COMMISSIONERS OF INCOME TAX — Respondent

CASE FOR THE RESPONDENT — RECORD

1. This is an Appeal from the Judgment of the Court of Appeal of Jamaica (Luckhoo, Ag.P., Smith & Edun J.A.) dated 20th December 1973, which upheld the Appeal of the Respondents from a judgment of Grannum J. of the High Court of Jamaica dated 7th March 1969 upholding the decision of the Income Tax Appeal Board on the 6th March 1967 which allowed a claim by the Appellants, the Trustees of the Seramco Limited Superannuation Fund, for a refund of tax in the sum of £37,368 which the Respondent says he is not liable to repay. p.49 p.31 p.1

2. (i) The material facts are that the Appellants are the Trustees of a Superannuation Fund established for the benefit of the male employees of Seramco Limited (hereinafter referred to as "Seramco"). Seramco was incorporated on 28th August 1963 and at all material times had an authorised capital of £100 and an issued capital of £22. In October, 1963 the Board of Directors of the Company decided p.130 p.10 p.3

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to set up a Superannuation Fund.

p.15 (ii) By letter dated 18th December 1963, the Carp Corporation Limited, a company retained to set up the Superannuation Fund, submitted to the Respondent a draft Trust Deed for a Superannuation Scheme and an application for approval of the draft Trust Deed under Section 25 of the Income Tax Law, Law 59 of 1954 (hereinafter referred to as the 1954 Act). By letter dated 8th January 1964, the Respondent purported to approve the draft Trust Deed. By Deed of Trust made on the 16th January, 1964 the Superannuation Fund was established.

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(iii) On the 22nd June 1964, the Trustees entered into an agreement with the shareholders of a company known as the Seaforth Sugar and Rum Limited, (hereinafter referred to as "Seaforth") for the purchase of all the issued shares. On the 23rd June, 1964, the Trustees became directors of Seaforth.

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(iv) The purchase price for all the issued shares was £407,934. At the date of purchase the only money in the Superannuation Fund was a sum of £400. The purchase price was payable by eight instalments with the last due on the 31st December, 1965. The vendors of the shares were given an option to repurchase the shares from the Appellants at any time before the 31st December 1965 for £215,904. The purchase price for the shares less the option price could only come from the large sum of unappropriated profits of £200,334 Seaforth had at the time of the Agreement for the purchase of its shares. It was anticipated that as a result of the transaction the Appellants would make a "profit" of about £8,000.

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(v) On 23rd June 1964 the Respondent was requested to authorise the payment of dividends without deduction of tax to the Superannuation Fund and allow the amount which would otherwise be deducted as a credit to Seaforth in respect of its own income tax liability. By a letter dated the 25th June 1964 the Respondent authorised payment of dividends to be made without deduction of tax.

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(vi) At the Annual General Meeting of Seaforth on 1st July 1964 a final dividend of 48½ per cent, amounting to £100,686, was declared out of the undistributed profits of Seaforth up to 30th September 1963. p. 4

(vii) On the 2nd July 1964 the Secretary of Seaforth informed the Respondent by letter that, consequent upon the authority given on the 25th June 1964 to make payments of dividends to the Appellants without deduction of Income Tax from the dividends, a dividend of £100,686 had been paid to the Appellants. The letter "opened the eyes of the Respondent to what was going on" and on the 28th July 1964 he revoked the authority contained in the letter of the 25th June 1964 to make payment of dividends to the Appellants without deduction of tax. p. 5 p. 5

(viii) On the 28th December 1964, Seaforth declared a gross dividend of 48 per cent, £99,648 less £37,368 tax out of the accumulated profits up to 30th September 1964. By letter dated 5th January, 1965, the Trustees made a claim under Section 63 of the Income Tax Law, Law 59 of 1954, for a refund of the sum of £37,368 being the amount of the tax withheld from the dividend of £99,648. By two letters dated 9th February 1965, the Respondent firstly gave notice of withdrawal of approval of the Scheme with effect from the 8th of January, 1964 to the Trustees and secondly refused their claim for a refund of the said £37,368. p. 6 p. 192 p. 194

(ix) It was admitted by the Appellants that together with the vendors of the shares in Seaforth they were engaged in an operation of dividend stripping. p. 4

(x) The "profit" of about £8,000 which it was anticipated that the Appellants would make was based on the following figures :

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Unappropriated Profits of Seramco available for distribution by way of dividend	£200,334
Option Price receivable by Appellants for Seramco shares	£215,904
	£416,238
Less Purchase price to be paid by Appellants for Seramco shares	£407,934
Balance ...	£ 8,304

p.120-1 (xi) In fact, by the date of the commencement of proceedings before the Income Tax Appeal Board on 20th September, 1965, the terms of the Agreement for the sale of the shares were not fully implemented; but the Appellants retained a sum of £8,636 from the dividends declared from the unappropriated profits and used to pay the first two instalments and part of the third. The position is as follows :-

1st Gross Dividend received by the Appellants from Seramco	£100,636
2nd Net Dividend received by the Appellants from Seramco	£ 62,280
(Tax Deducted £37,368)	
	£162,916
1st Instalment £54500 paid by the Appellants	
2nd Instalment £62500 paid by the Appellants	
3rd Instalment £37280 paid by the Appellants Part Only	£154,280
Balance retained by Appellants	£ 8,636

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3. There are a number of questions raised in this Appeal. On the footing that the Superannuation Fund was properly and validly approved, three of those questions arise out of the fact that the Trustees entered into a dividend stripping operation.

4. First, it is contended that in entering into and carrying out a dividend stripping operation the Trustees were acting beyond their powers. It is submitted that the Trustees have no trading or dealing powers. They have powers of investment and these are set out in Rule 18 of the Rules scheduled to the Superannuation Fund. It is contended that the dividend stripping operation does not come within the provisions of Rule 18. It was the view of Smith J.A. that the transaction was not a genuine investment within Rule 18. p. 92

The Respondent approved the Scheme having examined the Trust Deed and the Rules. It is contended that the Respondent's approval does not extend to acts outside the constitution of the Superannuation Fund and beyond the powers of the Trustees. To be entitled to the tax relief on income of approved Superannuation Fund afforded by Section 7 of the 1954 Act, it is submitted that it is not sufficient to establish that there is an approved Superannuation Fund which has income That entitlement, it is submitted, covers income of an approved Superannuation Fund derived from operations authorised by its constitution which was approved. The profit or fee from the dividend stripping operation does not satisfy, it is submitted, this requirement. In so far as this is a new point the Respondent will apply for leave to introduce it in the course of the hearing.

5. Secondly on the dividend stripping transaction, if, contrary to the Respondent's contention, the transaction is within the constitution of the Superannuation Fund and the powers of the Trustees this could only be as a result, it is submitted, of an alteration of the constitution and addition to the powers. The Respondent received no notice of any such alteration or addition. Rule 5 of the Income Tax (Superannuation Funds) Rules 1955

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requires that on any alteration in the Rules, constitution or conditions of a superannuation fund the Trustees must forthwith in writing notify the Commissioner and, in default, any approval given is deemed to have been withdrawn as from the date on which the alteration had effect, unless the Commissioner otherwise orders. It is contended that the dividend stripping transaction could only come within the constitution of the Superannuation Fund by an alteration to that constitution and that, as there has been no notice of any such alteration to the Commissioner, the approval of the Fund is deemed to have been withdrawn from the date on which the alteration had affect, and, accordingly, the Appellants are not entitled to the tax relief claimed.

This is a new point and the Respondent will apply for leave to introduce it in the course of the hearing.

6. Thirdly as to the dividend stripping transaction, it is submitted that it was not a genuine investment transaction at all but was, in relation to investment, an artificial transaction within the meaning of Section 10(1) of the 1954 Act. It was artificial because, while purporting to be an investment, it was in fact purely a device to obtain a tax advantage.

7. In Luckhoo, Ag.P's view in deciding the nature of the transaction Section 10(1) of the 1954 Act enables the Respondent to have regard to the substance of the matter and not only the legal effect as would be the case if the principle in

p. 68 Commissioners of Inland Revenue v. Duke of Westminster (1936) A.C.I. applied. In looking at the true nature of the transaction following the emphasis placed upon such an approach in the reported cases and more particularly in Lupton v. F.A. & A.B. Ltd. (1971) 3 W.L.R. 670, there was no room for doubt that the transaction in the

p. 69 instant case from its true nature was not one of sale and purchase of shares in the company with a view to investment but rather of a device under the guise employed by the vendors of the shares

in Seramco and the Appellants in order to "execute a raid on the Treasury". The Respondent was therefore entitled to treat the transaction as artificial, disregard it with the result that the Appellants could not lawfully claim a refund. RECORD p. 69

The interpretation of "artificial" in section 10(1) of the 1954 Act, by reference to Section 10(B) of the 1954 Act, as inserted by Section 11 of the Income Tax (Amendment) Act 1970, cannot affect any transactions effected before the coming into operation of Section 11. p. 70

8. In Smith J.A's view an "artificial" transaction was one that had both form and substance but the substance was not genuine. In adopting that interpretation he was disagreeing with the meaning given to the words by Marsh J. in Liner Diner v. Commissioner of Income Tax (unreported) decided on April 12, 1973. p. 90

But, in following the line of cases beginning with Bishop v. Finsbury Securities Ltd. (1966) 3 All. E.R. 105 and applying the principle to be derived from those cases the purchase of the shares was not a genuine investment under the Appellants' powers contained in Clause 18 of the Rules of the Fund. p. 92
The income the Appellants received was only a fee for accomodating the vendors of the Seramco shares. p. 93
The learned judge then considered that as the transaction was only artificial in the limited sense that it was not an investment by the Appellants, the provisions of Section 10(1) of the 1954 Act were not apt to deal with the situation and the Respondent was therefore not justified in refusing the Appellants' claim for a repayment. p. 94

9. Edun J.A. conducted a wide ranging review of the authorities. p. 101

Following the conclusion of the agreement on 22nd June 1964 the events which happened were, according to the learned judge, not only mere pretences but were pieces of machinery gone through in form in order to satisfy the law to deprive the Respondent of taxes. For the view he formed

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the learned judge referred to particular dictum in the judgment of Megarry J. in F.A. & A.B. Ltd. v. Lupton (1968) 1 W.L.R. 1401, which was approved in the House of Lords and further placed great reliance on the principales expressed by their Lordships in the hearing in F.A. & A.B. Ltd.

p.111-115 v. Lupton (1971) 3 All. E.R. 948.

10. There are a number of other questions in this Appeal in addition to those arising because of the dividend stripping transaction. The first of them relates to Section 63 of the 1954 Act. The Respondent contends that this is not a charging section but is a relieving Section which gives only a limited right of appeal. The whole history of legislation must be considered. From such a review it clearly appears that no appeal existed from a decision of the Assessment Committee on a claim for a repayment of tax. The right of appeal in limited circumstances from the Respondent's decision was introduced by Section 63(3) of the 1954 Act. The appeal exists where there has been an excess payment of tax by deduction or otherwise and a repayment of tax has been made by the Respondent but a taxpayer objects to it as being too little. Upon the strict wording of Section 63(3) of the 1954 Act there is no appeal from the Commissioner's decision when no amount is repaid.

11. In Luckhoo, Ag.P's view, an historical review

p. 71 of the provision relating to claims for repayment of tax was merited. He concluded that there was no provision for an appeal against the decision

p. 73 of the Assessment Committee on a claim for repayment.

Section 63(3) which was introduced in 1954 only provided a right of appeal where the

p. 74 Respondent repaid tax which was less than the amount claimed by the taxpayer. He further

p. 74 pointed out that the taxpayer was not left without a remedy if a claim was rejected. He found that the Appellants had no right of appeal from the Respondent's refusal to refund the tax.

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12. Smith J.A. also considered there was no right of appeal. He had three reasons for reaching that conclusion. The first drew assistance from the history of Section 63 of the 1954 Act. The right of appeal was given for the first time by Section 63(3) and the historical review does not support a liberal attitude on the part of the legislature which the Appellants sought to read into the section. His second reason was the distinction between Section 63(3) and other provisions in the 1954 Act where a general right of Appeal was given from the "decision" of the Respondent; the legislature discreiminates in granting rights of appeal. In the learned Judge's view the third and most cogent reason for reaching his conclusion was the construction of Section 63 as a whole as the Appellants' contention would necessarily require the redrafting of Section 63(3) and (1).

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13. Edun J.A's view was that the Appellants had no right of appeal.

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14. The Respondent also contends that provided the facts as found by the Judge in Chambers were sufficient then a new point may be taken at any time. There were sufficient facts found by Grannum J. to ground a contention that the fund was void ab initio. The hearing before Grannum J. was res integra and during such a re-hearing all points may be taken by the Appellants or Respondent. It was therefore open to the Respondent to maintain that when considering the approval of the Fund he had no jurisdiction and therefore any decision made was of no effect. If this contention is upheld the Respondent accepts he acted outside his powers as there was no trust in existence on January 8, 1964 and that a subsequent letter ratifying the exercise of that power was of no effect. Further, and in any event, it is contended that the Fund was not set up under an irrevocable trust within the contemplation of Section 25(2)(a) of the 1954 Act.

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15. In Luckhoo Ag.P's view the Judge in Chambers was not prevented from reaching a decision upon the evidence adduced before him. The learned judge agreed with the reasoning and conclusion in

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O et al. v. The Commissioner of Income Tax (1953) (Civil Appeals Nos. 96, 97 and 98 of 1953) the East African Court of Appeal and cited Sir Alfred D'Costa v. Commissioner of Income Tax (1965) (unreported) (C.A.). The learned judge's view was that the approval of the superannuation
p. 60 fund on January 8th, 1964 was confirmatory of a trust that was in effect since January 1st, 1964. The further point whether the trust was, however, irrevocable was answered by the learned judge in
p. 205 the negative because of the express terms of Paragraph 12 of the Rules which enable the employer
p. 138 to bring the trust to an end by causing
p. 63 contributions to the Fund to cease. The trust was, therefore, not irrevocable and the Respondent
p. 66 could not validly approve the Fund under Section 25(2) of the 1954 Act and a claim for a refund of tax could not be entertained.

16. In Smith J.A's view the Respondent could raise for the first time before Grannum J. the new point on the question of the validity of the approval of the Fund. The learned judge agreed with the Appellant's submission that there was a
p. 78 completely constituted trust after the meeting on
p. 197 30th Dedember 1963 in the terms of the draft Trust Deed. Further, the Income tax (Superannuation Funds) Rules, 1955 made under Section 73(3)(c) of the 1954 Act were ultra vires insofar as they purported to restrict the
p. 79 irrevocable trusts referred to in Section 25(2)
p. 80 of the 1954 Act to trusts created by deed. It was the trusts that had to be looked at to see if they were irrevocable and not the Fund for the purposes of Section 25(2) of the 1954 Act. Rule 12 is an exception to the irrevocable
p. 131 provisions in Clause 6 but being only a rule it
p. 80 does not affect the irrevocability of the trusts created by the Trust Deed.

17. The Respondent respectfully submits that the appeal should be dismissed and the Order of the Court of Appeal of Jamaica should be confirmed and that the Appellants be ordered to pay to the Respondent his costs of this Appeal for the

following (among other) RECORD

REASONS

(1) BECAUSE the divided stripping transaction was not within the constitution of the Superannuation Fund and to that extent and in relation to that transaction the Superannuation Fund was not an approved fund within the meaning of Section 7(1) of the 1954 Act.

(2) BECAUSE if, contrary to the Respondent's submission, the dividend stripping transaction was within the constitution of the Superannuation Fund, that constitution must have been altered before the transaction was entered into with the result that approval of the Fund must be deemed to have been withdrawn under Rule 5 of the Income Tax (Superannuation Fund) Rule 1955 as from the date on which the alteration had effect.

(3) BECAUSE the dividend stripping transaction was not investment of any or all the moneys of the Superannuation Fund under Clause 18 of the Superannuation Fund but was simply a device to secure a tax advantage and therefore was an artificial transaction within the meaning of those words in Section 10(1) of the 1954 Act.

(4) BECAUSE the provisions of Section 10B of the 1954 Act did not restrict the interpretation of Section 10(1) of the 1954 Act.

(5) BECAUSE Section 63 of the 1954 Act only provides for a limited right of appeal in certain circumstances where there has been an actual repayment of tax.

(6) BECAUSE the Appellants have not discharged the onus upon them to show that upon the strict construction of section 63(3) of the 1954 Act there is other than a limited right of appeal granted by the aforesaid relieving section.

(7) BECAUSE the Superannuation Fund was not established under irrevocable trusts the Respondent's

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approval of the Fund under Section 25(2) of the 1954 Act was void ab initio.

(8) BECAUSE the approval of the Superannuation Fund was void ab initio any income of the Fund was not exempt by Section 7(1) of the 1954 Act.

(9) BECAUSE of the opinions expressed by Luckhoo Ag.P. Smith and Edun J.A.

STENART BATES

BRIAN KIERAN

No. 12 of 1974

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N:

THE TRUSTEES OF SERAMCO LIMITED SUPERANNUATION FUND

Appellants

- and -

THE COMMISSIONERS OF INCOME TAX

Respondent

CASE FOR THE RESPONDENT

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