

14/83

No. 2 of 1981

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL OF JAMAICA

BETWEEN :

THE COMMISSIONER OF INCOME TAX Appellant

- and -

K.P. CHATANI Respondent

CASE FOR THE RESPONDENT

Record

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1. This Appeal from the Judgment of the Court of Appeal of Jamaica dated 27th July 1979 is brought with the Leave of the Court of Appeal of Jamaica given on 6th October 1980.

pp 13-22

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2. The question raised by this Appeal is whether a person who is or has at some time been manager or principal officer of a body corporate "owes" the income tax assessed on that body corporate. The question arises in the context of Schedule 2 Part II paragraph 2 of the Income Tax Act ("the Act") which empowers the Commissioner of Income Tax to serve a Notice on a person requiring that he shall not leave the Island unless

"at the time of leaving he has in his possession a certificate issued by or on behalf of the Commissioner stating that he does not owe any tax".

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The Respondent was served with such a Notice; the Appellant claims that the Respondent owes the tax assessed on the Company which employed him by virtue of section 52(2) of the Act which reads as follows:-

pp 23/24

"(2) The manager or other principal officer of every body of persons shall be answerable for doing all such acts, matters and things as shall be required to be done by virtue of this Act for the assessment of such body and the payment of the tax".

Record

3. The relevant facts are as follows:-

(i) For several years prior to March 1978 the Respondent was managing director of a company incorporated under the laws of the Island having limited liability and called P. Kalidas Limited ("the Company").

pp 23/24

(ii) On 21st May 1976 a notice issued under Schedule 2 Part II paragraph 2 had been issued by the Commissioner of Income Tax: (that notice is referred to as "the Restriction Notice").

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(iii) At the time when the Restriction Notice was served the Respondent owed income tax on his personal income.

(iv) Between 21st May 1976 and 29th September 1978 the Respondent fully discharged his liability to income tax on his personal income.

p 26

(v) On 29th September 1978 an application was made on the Respondent's behalf to have the Restriction Notice removed.

p 36

(vi) The Appellant replied on 9th October 1978 refusing to lift the Restriction Notice. The grounds for the Appellant's refusal were that assessments had been raised, in March 1978, upon the Company, being a body corporate of which the Respondent was then the manager and/or principal officer; it was asserted by the Appellant that the Respondent was, in accordance with section 52 of the Act, liable for payment of the tax charged by the assessments raised on the Company.

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(vii) The Company has, at all material times, owed Income Tax amounting to \$89,891 on its chargeable income.

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pp 6/7

4. On 5th December 1978 the Respondent applied ex parte for leave to apply for an Order of Mandamus directed to the Appellant. Leave was given by the Honourable Mr. Justice Rowe in Chambers.

pp 7/8
pp 10/11

5. The Respondent proceeded by way of Notice of Motion before the Full Court of the Supreme Court (Ross, White and Raymond J.J.). The Full Court gave judgment on 9th January 1979 dismissing the Respondent's application. The grounds for their judgment were that, because "answerable" in section 52(2) meant "liable", the Respondent was liable for tax charged and assessed on the Company.

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6.1 The Respondent appealed to the Court of

Appeal (Zacca, Henry and Rowe J.J.) which allowed the appeal. An Order of Mandamus was, following the Order of the Court of Appeal, dated 7th August 1979, issued to the Appellant Commissioner of Income Tax requiring him to issue his notification to the Respondent stating that the Respondent did not owe any income tax.

Record

p 13

10 6.2 In their written Judgment published on 16th April 1980, the Court of Appeal concluded, following an examination of the surrounding provisions of the Act, that the word "answerable" should be given the meaning "responsible": the manager or other principal officer was, therefore, responsible for complying with the procedural requirements (i.e. "the acts, matters and things... required to be done by virtue of (the) Act") for the payment of the tax. In particular the Court of Appeal concluded that section 52(2) imposed no personal liability on the Respondent as manager or
20 principal officer of the company. Had the legislation intended to produce such a result, the relevant statutory words would have been clear and precise; whereas the wording in other sections was sufficiently clear and precise to make one person chargeable for another's tax, the words of Section 52(2) could not be construed as producing this result.

pp 14/22
p 21

30 7. The decision of the Court of Appeal is, it is submitted, correct in all respects. The Respondent adopts the reasoning of the Court of Appeal as the basis of his contention that he "owed" no tax once his personal liability in respect of his own income tax had been finally discharged in September 1978.

40 8. It is submitted as a matter of principle that the Jamaican Income Tax Code, in common with the United Kingdom Code, imposes income tax by three stages. First there is a declaration of liability; that is the charging part which determines what persons are to be charged and what property and income is to be made the subject matter of such charge. The second stage is the assessment: that particularises the exact sum which a person liable has to pay. Lastly come the rules as to payment and the methods of recovery of the tax so charged and assessed. Exceptions to this general rule are found in both Codes. (The obligation to pay tax may arise
50 before, or even in the absence of, the raising of an assessment - for example: see sections 65 and 66 of the Act). There are, however, no exceptions to the principle that a person is obliged to pay tax only if there are words of "charge" to make him liable.

Record

9. The charging provisions in the Jamaican Code are contained in section 5, which applies to both individuals and companies, (sections 32 and 33 applying special rates of tax to the chargeable incomes of bodies corporate). None of those provisions imposes any charge to income tax on the Respondent in respect of the income tax of the Company. There is nothing in section 52(2) operating as an independent charging provision imposing liability on the Respondent in respect of the Company's income. All that sub-section does is to make the Respondent "answerable" for doing all such acts, matters and things as are required to be done for the payment of the tax charged on the Company. It is submitted that the context in which the word "answerable" is found shows that the word should be given the meaning "responsible"; the word cannot, however, be taken as imposing a charge to income tax on the Respondent in respect of the Company's income. 10
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10. The Court of Appeal has, the Respondent submits, adopted the correct approach in comparing the words of section 52(2) with other sections in the Jamaican Act which, subject to certain limitations, operate to impose liability to tax on one person in respect of the income of another. Those other sections contain plain words of charge, absent in section 52(2), showing a clear intention on the part of the legislature to make one person liable to tax on another's income. 30
Reference is made to:-

(i) Section 41(4) which provides that the directors of a body corporate shall (subject to the limitations imposed by the sub-section) be "jointly and severally liable" for the tax in fact deducted at source from certain payments made by a company,

(ii) Section 49 which requires the income of a married woman to be "assessed and charged" to tax in the name of the husband. 40
(See footnote),

(iii) Section 54(1) which directs, inter alia, that the income of a non-resident shall be "assessable and chargeable" in the name of the agent,

Footnote Sections 49 and 50 were repealed with effect from 1st January 1980 by Income Tax (Amendment) Act 1980: the same wording is now contained in the substituted section 50(1).

(iv) Section 54(2) which contains words to like effect,

(v) Section 55(1) which makes, inter alia, an agent "chargeable to income tax" as well as "answerable for the doing of all acts, matters and things required to be done" for the assessment of any person for whom he acts and for "the income tax chargeable on him" in respect of any non-resident person; and

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(vi) Section 57 by which a person is made "personally liable for the tax" payable by him on behalf of, for example, a non-resident shareholder: the section, in terms, limits the liability of that person.

It is submitted that, in the absence of any such words of charge in section 52(2), that section cannot be construed as imposing a personal liability to tax on the Respondent.

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11. A further reason why the Appellant cannot be said to "owe" the tax assessed and charged on the Company is because he has not been assessed to that tax. His name would not appear in the assessment lists referred to in section 77(1) and, therefore, no income tax will become payable by him in accordance with section 78(1). Thus even the recovery provisions of the Jamaican Code are not drafted on the basis that a manager is "liable" for his employer company's tax.

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12.1 The Appellant's argument that a manager is made liable, by section 52(2) for his employer company's tax may be tested by asking

(i) whether that liability remains his if he ceases to be a manager or principal officer before the tax has been paid and

(ii) whether unpaid tax assessed and charged on a company in past years becomes the liability of a manager or principal officer appointed in a subsequent year.

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It is this imprecision of language which, in the Respondent's submission, makes it highly unlikely that section 52 is a charging section. The section not only lacks words of charge but also fails to identify the allegedly chargeable individual.

12.2 It is also relevant in this connection that the Respondent, according to his Affidavit, was

p 25

Record

"managing director" of the Company only until March 1978. If it be right that section 52(2) does make the manager or principal officer liable for his employer company's tax, the Respondent's liability, it will be submitted, came to an end when he ceased to hold office as managing director.

13.1 The words used in section 52 are substantially similar to those contained in the United Kingdom Code (Income and Corporation Taxes Act 1970, section 71(1) and (2)). The words of section 71(2) are, so far as relevant, similar to those contained in the Income Tax Act 1803 section 88, reproduced in Income Tax Act 1842 section 40, Income Tax Act 1918 section 108 and Income Tax Act 1952 section 362. The section and its forbears, in the United Kingdom legislation, is mentioned in four decided cases without any comment relevant to the present problem. The Income Tax Codification Committee (Chairman, the Right Honourable Lord McMillan) referred to the relevant words (then found in Income Tax Act 1918 section 106) on page 183 of their Report (Command 5131). There they stated that the section:

"seems to contemplate officers of bodies of persons being made responsible for the payment of the tax liability but it has not been treated as authorising a charge being made on any such officer...where there is a body corporate there is no reason why the body should not be charged in the corporate name".

The Respondent submits that the most likely purpose behind the words in section 52(2) is to make the payment of tax the statutory responsibility of the manager or principal officer of the particular body corporate. Thus, even if the service agreement between the manager and his employer "company" excludes from his duties the paying of the tax charged on that body corporate, the manager is none the less authorised and required to do so by statute which specifically makes payment his responsibility.

13.2 It is significant that the words "shall be answerable" were originally introduced into the United Kingdom income tax legislation more than 50 years before the Limited Liability Act of 1855 (later incorporated in the Joint Stock Companies Act 1856) permitted the incorporation of companies with limited liability.

14. And the Respondent respectfully submits that

the Appeal should be dismissed for the following
(among other)

Record

R E A S O N S

- (1) BECAUSE the Respondent at no time "owed" the tax assessed and charged on the Company or any part thereof and, therefore the Restriction Notice ceased to be effective when he had discharged his personal liability to income tax.
- 10 (2) BECAUSE Section 52(2) is not a charging provision and cannot impose any liability for an employer company's tax on its manager or principal officer
- (3) BECAUSE even if section 52(2) is a charging section, the Respondent ceased to be liable for his employer's tax once he ceased to hold office as managing director
- (4) BECAUSE the decision of the Court of Appeal was correct and ought to be upheld

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S. J. L. OLIVER

ANGELA C. HUDSON PHILLIPS

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-- and --

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CASE FOR THE RESPONDENT

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