

Privy Council Appeal No. 3 of 1956

Commissioner of Income Tax - - - - - *Appellant*

v.

Williamson Diamonds Limited - - - - - *Respondents*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 2ND OCTOBER, 1957.

Present at the Hearing:

LORD TUCKER

LORD DENNING

MR. L. M. D. DE SILVA

[*Delivered by MR. L. M. D. DE SILVA*]

This appeal is concerned with the interpretation of Section 21 of the Tanganyika Income Tax (Consolidation) Ordinance 1950 which provides that under certain conditions the Commissioner of Income Tax may, for the purpose of assessing the income of the shareholders of a Company, make order that, within prescribed limits, the undistributed profits of a company be regarded as having been distributed dividends.

The section reads:—

“21.—(1) Where the Commissioner is satisfied that in respect of any period for which the accounts of a company resident in the Territory have been made up, the profits distributed as dividends by that Company up to the end of the sixth month after the last date upon which its accounts for that period are required by virtue of the provisions of the Companies Ordinance to be laid before the company in general meeting, increased by any tax payable thereon are less than sixty per cent. of the total income of the company ascertained in accordance with the provisions of this Ordinance for that period, he may unless he is satisfied that having regard to losses previously incurred by the company or to the smallness of the profits made, the payment of a dividend or a larger dividend than that declared would be unreasonable, by notice in writing order that the undistributed portion of sixty per cent. of such total income of the company for that period shall be deemed to have been distributed as dividends amongst the shareholders as at the said last date and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purposes of this Ordinance.”

The respondent has a large holding in the shares of the Buhemba Mines Limited (hereafter referred to as the company). In respect of the year ending 31st December, 1950, no dividends were declared by the company. The total income for income tax purposes was £38,160 and the Commissioner made order that 60% of this sum, namely £22,896, should be regarded for tax purposes as having been distributed to the respondent and other shareholders.

From the decision and order of the Commissioner the respondent appealed to an appellate tribunal known as the Local Committee which

affirmed the decision of the Commissioner. From the decision of the Local Committee the respondent appealed to the High Court of Tanganyika which affirmed the decision of the Local Committee. On appeal to the Court of Appeal for Eastern Africa the case was remitted to the Commissioner for a second decision by him on the basis of an interpretation which the Court of Appeal placed upon section 21 different to the interpretation placed upon it by the Commissioner and on the previous appeals. This is an appeal by the Commissioner from the decision of the Court of Appeal. No question has been raised by the parties as to the right to appeal of the appellant in the appeals mentioned.

Under the procedure obtaining in Tanganyika the proceedings before the Commissioner and before the Local Committee are not placed before the Courts but under the relevant law a statement of facts is attached to the "memorandum" of appeal to the High Court.

It will be seen from the Section that the Commissioner had, before making an order under it, to decide whether or not "he is satisfied that having regard to losses previously incurred by the company or to the smallness of the profits made, the payment of a dividend would be unreasonable."

The question which had to be decided was whether the Commissioner had properly interpreted and properly applied these words to the facts of this case. The Commissioner took the view that there was no direction in these words to take capital losses into account. The Court of Appeal thought that there was. It will be seen from what follows in this judgment that a decision upon this point was not necessary to the decision of this case.

It appears from the statement filed with the memorandum of appeal and from the judgments in the Courts below that before the High Court (and presumably before the Commissioner and the Local Committee) the respondent relied upon a Balance Sheet and a Profit and Loss Account for the year ending 31st December, 1950, to establish that the Company had suffered loss and that therefore it was unreasonable to pay a dividend. No oral evidence was led. The documents showed a net profit of 1,081,630 shillings (the items are shown in shillings) for the year. In the Balance Sheet under the heading "Assets & Losses" appear the following entries:—

ASSETS AND LOSSES

Fixed Assets at Cost *less* Depreciation:
(Except where otherwise stated)

DEVELOPMENT:

No. 1 Account

As per last Balance Sheet	1,762,402·95
Less: Amount w/off 20 per cent. approx.	587,469·65

Representing old Development to be written off	1,174,935·30
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No. 2 Account

As per last Balance Sheet	393,401·67
Additions during year	368,485·24

				761,886·91
Less: Redemption—33,052 tons at Sh. 7/26				239,957·52

Representing Current Development				521,929·39
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Nigoti Claims

As per last Balance Sheet	20,318·61
Additions during year	451·05

				20,769·66
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Less: Loss Claims Nos. 7588/89, 7592 and 7594 abandoned			4,000·00	
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Amount w/off	11,769·66	
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				15,769·66
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					5,000·00
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It was agreed in the courts below that the sum of 1,174,935 shillings shown in "Development No. 1. Account" had to be written off completely as the mine to which it related was a failure. This was the only material relied on by the respondent to establish his case in the Courts below. Accepting his statement that there had been a loss on the first item, the balance sheet does not reveal the value of the assets of the company. The figures set against the items of assets are their "cost less depreciation" and not market value. With regard to the item "No. 2. Account" in the balance sheet the Court of Appeal said:—

"The Company has two mines of which one is worthless. A large sum spent on that worthless mine has been lost and is being written off. The other mine is working and producing profits. A large sum spent on developing it is rightly regarded as an asset; but no attempt has been made to show in the balance sheet or otherwise the value of the mine itself."

and it went on to hold "the balance sheet is valueless for the purpose of estimating the company's true capital position." There can be no doubt that these views are correct. Both the Courts in Africa have held, and it is clear to their Lordships, that the respondent has failed to establish that the Company sustained a loss of capital and, as this is the only loss the respondent sought to establish, it has not established a loss of any kind whatsoever. The case for the respondents was that the Company had suffered considerable losses in previous years. There was no assertion of "smallness of profits" the alternative ground appearing in section 21. As the respondent failed to establish losses of any kind its case fails and must inevitably fail before the Commissioner on the material the respondent chose to rely upon, if, as ordered by the Court of Appeal, it is sent back for a second decision by the Commissioner.

It was argued that some losses were established and therefore it was for the Commissioner to find out for himself whether there had been compensating gains. Their Lordships do not think that there is anything in the language of the Ordinance which casts any such duty upon the Commissioner. It would moreover be, in the generality of cases, a task, which a person with the limited knowledge of the affairs of a company which can be imputed to the Commissioner, could not efficiently perform.

It is, for the reasons already given, unnecessary for their Lordships to decide whether the Commissioner should under section 21 take capital losses into account. But their Lordships will consider it as it has been fully argued and a decision upon it would be helpful in the future application of the section.

The word "loss" is defined in the Act thus in section 2:—

"2. In this ordinance, unless the context otherwise requires:—
'loss' in relation to a trade, business, profession or vocation means loss computed in like manner as profits."

It is common ground that if this meaning is given to the word "loss" it would bear the meaning it does in every other part of the ordinance and would not include a loss of capital.

It is not possible in law to give to the word "losses" any meaning other than the meaning given to it in the defining section of the statute unless, as stated by the statute itself, the "context otherwise requires". To do so would be to disregard and disobey the terms of the statute.

Their Lordships are of the view that the context does not "require" any departure from the meaning already set out. They are therefore of the opinion that the word "losses" does not include capital losses.

It was said in the course of the argument that on the ground of fairness the word "losses" should be interpreted to include capital losses. It will be seen from what follows that the interpretation already given does not lead to unfairness but, even if it did, it would not be possible to alter the interpretation plainly laid down by the statute on the ground of fairness.

It does not follow from what has been said that capital losses should not be taken into account by the Commissioner. Two matters are mentioned specifically in the words which give him a direction, the first is "losses" (as interpreted above) and the second is "smallness of profits". The Commissioner is directed to come to a decision upon the question whether "the payment of a dividend or a larger dividend than that declared" is unreasonable.

The form of words used no doubt lends itself to the suggestion that regard should be paid only to the two matters mentioned but it appears to their Lordships that it is impossible to arrive at a conclusion as to reasonableness by considering the two matters mentioned isolated from other relevant factors. Moreover the statute does not say "having regard only" to losses previously incurred by the company and to the smallness of the profit made. No answer, which can be said to be in any measure adequate, can be given to the question of "unreasonableness" by considering these two matters alone. Their Lordships are of the opinion that the statute by the words used, while making sure that "losses and smallness of profits" are never lost sight of, requires all matters relevant to the question of unreasonableness to be considered. Capital losses, if established, would be one of them.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be allowed and the decision of the High Court restored. It was agreed between the parties that the appellant should pay the costs of this appeal. The respondent must pay the costs in the High Court and in the Court of Appeal.

In the Privy Council

THE COMMISSIONER OF INCOME TAX

v.

WILLIAMSON DIAMONDS LIMITED

DELIVERED BY MR. L. M. D. DE SILVA

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