Privy Council Appeal No. 24 of 1968

The Argosy Company Limited (In Voluntary Liquidation) *Appellant*

v.

The Commissioner of Inland Revenue – – – – *Respondent*

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH FEBRUARY 1971

Present at the Hearing:
LORD REID
LORD MORRIS OF BORTH-Y-GEST
LORD DONOVAN

[*Delivered by* LORD DONOVAN]

The appellant (" the Company ") was assessed to income tax in the sum of $25,000 by the respondent (" the Commissioner ") in Guyana for the year of assessment 1962. This sum was the Commissioner's estimate of the Company's profits for the year 1961 which are assessed to income tax in 1962.

The Company being aggrieved by the assessment appealed to the Income Tax Board of Review set up by section 12 of the Amending Income Tax Ordinance of 1956 and succeeded in getting the assessment annulled. The Commissioner on appeal to a single Judge of the Supreme Court (*Persaud J.*) succeeded in getting it restored; and succeeded further in resisting an appeal by the Company to the British Caribbean Court of Appeal (now the Guyana Court of Appeal). On 13th November 1967 leave to appeal to Her Majesty in Council was granted to the Company.

The appeal raises questions of importance arising out of section 48 (4) of the Income Tax Ordinance (Cap. 299) of Guyana which is in the following terms

> " Where a person has not delivered a return and the Commissioner is of opinion that the person is liable to pay tax he may, according to the best of his judgment, determine the amount of the chargeable income of that person and assess him accordingly . . ."

The concluding words of the sub-section are not material. The relevant facts are set out in the succeeding paragraphs.

The Company was incorporated in Guyana and carried on in Georgetown the business of printers, publishers, stationers and booksellers. In March of 1961 it sold all the sections of its business except the bookselling, which it continued. This in turn ceased when the Company went into voluntary liquidation in March 1962. Thus for the year 1961—the results of which are relevant for the income tax year of assessment 1962—the Company

(*a*) carried on its entire business up to March;

(*b*) thereafter carried on the bookselling section of that business only.

Income tax would be attracted if these activities produced profit; and it became the Liquidator's duty under the Income Tax Ordinance to submit a return of any such profit. In fact he could submit no return at all since all the books of account of the Company were destroyed by fire in a riot in February 1962.

This inability to render a return was explained to the Commissioner both in writing and in an interview between himself and the Liquidator which it seems must have taken place sometime in 1963. At this interview the Commissioner told his Clerk in the presence of the Liquidator to raise an assessment to income tax upon the Company in the sum of $25,000 and this was done on 31st October 1963. It was admittedly made under the provisions of section 48 (4) of the Ordinance above quoted. The tax exigible on this assessment was $11,250.

It is clear from the express terms of section 48 (4) that before the Commissioner can make an assessment " to the best of his judgment " he must first form an " opinion that the person is liable to pay tax ". This must mean a rational opinion, and not one which flies in the face of the facts, or which no reasonable person could form. Before the Board of Review the Company took this point and contended that the preliminary opinion which the Commissioner had to form was, in the circumstance of this case, clearly untenable.

The reason why this was so was that, even assuming that the Company had made a profit in 1961 of $25,000, or any other likely sum, in respect of the full business up to March 1961, and the bookselling section of it which alone was carried on after that date, it would be swamped by the Company's previous trading losses which under section 11 of the Income Tax (Amendment) Ordinance 1962 had to be set-off against any such profit.

Thus for 1959 the Company had made trading losses in a sum accepted by the Commissioner as being $32,173 : and in 1960 a further loss, also accepted by him, of $30,171—a total of $62,344 carry forward of loss. Under the said section 11 this loss would be set off against what would otherwise be the chargeable income of 1961.

Before the Board of Review no attempt was made on behalf of the Commissioner to explain how in the face of these facts and figures he could form an opinion that the Company was liable to pay tax for 1961. His representative, after admitting that he could not say on what grounds the Commissioner had formed that opinion, contented himself with arguing that the Commissioner had made an assessment to the best of his judgment, and that the onus was on the Company to prove that the assessment was excessive.

The Board of Review in its decision referred to " the admissions by the Commissioner's representative that the Commissioner had no evidence before him on which he could form the opinion that the Company was liable to pay tax."

This should have been the end of the case; for the condition precedent to making an assessment "to the best of" (the Commissioner's) "judgment" had not been fulfilled. Admittedly the onus of proving this lay in the first instance on the Company: but in civil proceedings the onus shifts from time to time according to the state of the evidence. Here, to put the matter at its lowest, a strong *prima facie* case had been made out that the Commissioner had formed an opinion on liability which no reasonable person could hold. It was then for him, if he could, to show the contrary, and he made no attempt to do so.

The Board of Review went on to say however that the Commissioner's assessment was in any event arrived at by guess work; that no facts had been submitted to the Board to support it; that in every case he must justify his assessment, and in this case he had failed to do so.

It seems to their Lordships that this part of the Board's decision was unnecessary having regard to the view which they had already expressed to the effect that no reasonable opinion that the Company was liable to tax was open to the Commissioner. Furthermore, it goes, they think, too far.

Once a reasonable opinion that liability exists is formed there must necessarily be guess work at times as to the quantum of liability. A resident may be known to be living well above the standard which his declared income would support. The Commissioner must make some estimate, or guess, at the amount by which the person has understated his income. Or reliable information may reach the Commissioner that the books of account of some particular taxpayer have been falsified so as to reduce his tax. Again the Commissioner may have to make some guess of the extent of the reduction. Such estimates or guesses may still be to the best of the Commissioner's judgment—a phrase which their Lordships think simply means to the best of his judgment on the information available to him. The contrast is not between a guess and a more sophisticated estimate. It is between, on the one hand, an estimate or a guess honestly made on such materials as are available to the Commissioner, and on the other hand some spurious estimate or guess in which all elements of judgment are missing. The former estimate or guess would be within the power conferred by section 48(4): the latter without.

The Company in the present case could not have succeeded in demonstrating that the assessment of $25,000 was thus *ultra vires* section 48(4). The Commissioner had before him evidence that the gross profit of the bookselling section (which was operated throughout 1961) had progressively increased between 1958 and 1960. In 1958 the gross profit was $880: in 1959, $10,168: and in 1960, $15,275. It is true that gross profit is not really "profit" at all: and that when overheads are debited a net loss may be revealed. It is also true that what the Commissioner had to determine "to the best of his judgment" is the chargeable income of the taxpayer, and by definition chargeable income means income after allowing appropriate deductions. (Section 2 of the Income Tax Ordinance). Nevertheless a progressive increase of substantial proportions in gross profit is reasonable ground for thinking that net profits might show a like increase, or at any rate exist. Accordingly, their Lordships cannot say that in the face of these figures, and in the absence of the books, the Commissioner (had there been no carry forward of past losses) would not have been entitled, bringing the best of his judgment to bear, to make the assessment which he did.

It was on this aspect of the case that *Persaud J.* and the Court of Appeal concentrated. *Persaud J.* cited numerous authorities from other jurisdictions on the considerations which should guide a person in the position of the Commissioner when making an estimated assessment to the best of his judgment. These authorities the Company in the proceedings before their Lordships was not concerned to dispute nor the Commissioner to reiterate. They need not therefore be canvassed. The learned judge said nothing in his judgment to elucidate the puzzle of how, in the face of the large losses which had to be set-off, the Commissioner could have formed a rational opinion that the Company was nevertheless liable to pay income tax: yet *Persaud J.* did recognise that this must be done before any estimate of liability could be made and embodied in an assessment.

The Court of Appeal dismissed the Company's appeal on 26th October 1966. In December 1967 it was asked to give a written judgment. It did so in December 1968. This judgment sets out the grounds of appeal, the second of which was that the Company had ceased to trade after February 1961, the bookselling branch being maintained thereafter merely as a collecting and not as a trading department.

There is no trace of any such contention by the Company before the Board of Review. Had it been advanced it is unlikely that the Company's representative would have contended before the Board, as he did, that " the Company had carried on business on a very limited scale in 1961 ". Nor would he have stated before *Persaud J.* that the " Book shop showed for same period a gross profit ". That judge found " that the book shop . . . continued to operate until March 1962 when they went into liquidation ". By implication the Court of Appeal held that the cessation of all business after February 1961 had not been established by the Company, and was clearly right to do so. The Court went on to hold that the onus was on the Company in these circumstances to show that the assessment of $25,000 was excessive, and that it had not discharged it. Despite the destruction of the books other material was available. For example figures of opening stock, sales, and closing stock in respect of the book shop for 1958 were known.

> " Using this as a starting point, it would have been a simple operation to check the Customs figures in order to ascertain the value of books imported in 1960 and 1961. Books are dutiable in Guyana and accurate figures of importations are kept. Although the 1962 fire destroyed the books Mr. C. P. Wight was alive in England. He must know who was employed and the value of books stored at the Russian Bear Shop. Assuming $8,000 " (the figure for which the books were sold in 1962) " was a reasonable price for the stock of books at March 1962, then the 1959, 1960 and 1961 importations would give a fair estimate of the profit made as the percentage of profit could be arrived at, having regard to the 1959 profit of $10,168·46 and the 1960 profit of $15,275·95 " (Sir Kenneth Stoby, Chancellor).

The last quoted figures are, as above stated, figures of gross profit: and no percentage of chargeable income could be worked out from them or from the other data referred to.

Another ground of appeal put forward in the Company's grounds of appeal referred to the agreed losses of $32,173 and $30,171 in the years 1959 and 1960. As to this the learned Chancellor said " No argument was addressed to us regarding tax loss and so this aspect was not considered."

There is no suggestion, however, that the point was abandoned: and before their Lordships it has been strongly pressed. Counsel for the Commissioner, perceiving its cardinal importance, endeavoured to meet it by the following two contentions. First, he said, the Company prior to 1961 had carried on not one business, but four separate businesses, and the bookshop was one of them. There was no evidence that the accumulated losses related in any measure to the bookshop. There was therefore nothing to set off against the estimated assessment of $25,000.

There is likewise no evidence that four separate businesses were carried on prior to 1961. It is true that *Persaud J.* early in his judgment asserts the fact. Why, it is not clear: and in the succeeding paragraph he says: "From all of this it can be seen that that part of the business which the respondents retained has been showing a gross profit which had been increasing from year to year." The book shop cannot be a separate business and at the same time a part of *the* business. Moreover in the Commissioner's own "Statement of Material Facts" he says: "The Respondents carried on the whole of their business part of the year 1961 and in a reduced state for the whole of the year 1961."

It seems to their Lordships, as it must have done to the Commissioner when he made this assertion, that the case was the perfectly common one of a single business comprising a number of departments.

The second contention advanced before their Lordships was based on section 10 of the Income Tax (Amendment) Ordinance of 1962 which was given retrospective effect from 1st January 1962 by section 1 (3) of the same enactment.

The effect of this provision was, so it was contended, to make the Company liable to an income tax of at least 2% of the turnover in the previous year despite the carry-forward of losses, and the case should therefore be remitted to enable the existing assessment to be adjusted.

Their Lordships are not prepared to do so. This is a wholly new contention, advanced for the first time before them, and one which even if correct would yield a very small sum of tax compared with that now in dispute. Moreover, as Counsel for the Commissioner conceded, the Company ought, in the event of a remit, to be given the opportunity of contending that that part of the business retained after March 1961 in respect of which the estimated assessment was raised, ought properly to be regarded as a different business from the one the greater part of which had been discontinued. The result would be that in relation to this different business there would be no turnover of the previous year on which to calculate the 2%. There might thus be opened a new vista of controversy in a case where the litigation has already lasted too long.

In their Lordships' opinion the Company has established that no reasonable opinion could be formed by the Commissioner under section 48 (4) that the Company was liable to income tax for the year of assessment 1962 owing to the large carry forward of losses which would have to be set against its chargeable income. The right to make an estimated assessment under the subsection never therefore arose; but even if it had, the same reason would have compelled its annulment on appeal or at any rate its very drastic reduction assuming that the aforesaid 2% provision applied. They will humbly advise Her Majesty that the appeal be allowed, the orders of the Court of Appeal and the Supreme Court set aside, and the assessment annulled. The Commissioner must pay the costs in the Courts below and the costs of this appeal except for those of the petition for special leave to appeal.

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DELIVERED BY
LORD DONOVAN

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