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IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 17 of 1971

BEFORE: The Hon. President (Ag.)
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Zacca, J.A. (Ag.)

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THE COMMISSIONER OF INCOME TAX — APPELLANT

v.

COMMONWEALTH DEVELOPMENT FINANCE COMPANY LIMITED — RESPONDENT

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Mrs. A. Hudson-Phillips and Mrs. B. Phillips for the appellant.

J.L.R. Bovell and Miss Ethlyn Norton for the respondent.

April 28, 29, 30; May 26, 1975

LUCKHOO, P. (Ag.):

The sole question for determination in this appeal is whether an industrial or commercial enterprise or undertaking carried on by a resident of the United Kingdom (hereinafter referred to as a "United Kingdom enterprise") which does not carry on trade or business in Jamaica through a permanent establishment situated therein is relieved by virtue of the provisions of the Double Taxation Relief (Taxes on Income) (United Kingdom) Order, 1965 from payment of Jamaican income tax on interest received by that enterprise from its investments in Jamaica.

The respondent, the Commonwealth Development Finance Company Ltd., was incorporated in the United Kingdom in or about 1953. The shareholders of the company are approximately 140 United Kingdom Companies for industry and commerce in addition to banking concerns in the city of London. The respondent company is resident for income tax purposes in the United Kingdom. It carries on the business of development bankers and investment dealers and its income is derived from the investment of funds in various businesses in the Commonwealth in the form of dividends, interest, and commissions as well as the proceeds from the disposal of investments. On or about September 14, 1961 the respondent company purchased £250,000 worth of 7% registered debenture stock in the Jamaica Public Service Co. Ltd., a company incorporated and registered in Jamaica and resident for income tax purposes in Jamaica. In the years 1963, 1964, 1965 and 1966, the respondent company received from the Jamaica Public Service Co. Ltd., interest in respect of that debenture stock and from which income tax was deducted at source. In or about June, 1965, the respondent company acquired 13,300 £1 shares in N.M. Holder and Sons Ltd., a company incorporated and registered in Jamaica and resident for income tax purposes in Jamaica. In the years 1965 and 1966 the respondent company received loan interest from N.M. Holder and Sons Ltd., from which income tax was deducted at source. The respondent company had no permanent establishment in Jamaica during the years 1964, 1965, 1966 and 1967.

During 1966 the then Commissioner of Income Tax accepted a submission on behalf of the respondent company that by virtue of the provisions of Article III of the Double Taxation Relief (Taxes on Income) (United Kingdom) Order, 1965, the respondent company was not liable to pay income tax in Jamaica on interest earned from its Jamaican investments -

Accordingly sums totalling $3,914.75, being tax deducted at source by the Jamaica Public Service Co. Ltd. and N.M. Holder and Sons Ltd. were refunded the respondent company in respect of the years of assessment 1964, 1965 and 1966.

In or about August 1969, the Commissioner of Income Tax took the view that the respondent company was liable by virtue of Article VII of the Double Taxation Relief (Taxes on Income) (United Kingdom) Order, 1965, to pay tax in Jamaica on the interest earned from its Jamaican investments. By Notice of decision dated March 3, 1970, the Commissioner of Income Tax confirmed the chargeable income of the respondent company for the years of assessment 1964, 1965, 1966 and 1967 at $14,708, $13,500, $9,736 and $6,780 respectively. The respondent company appealed against this decision to the Income Tax Appeal Board. The Board allowed the respondent company's appeal holding that the respondent company was not liable to tax in Jamaica for those years of assessment. Thereupon, the Commissioner appealed against the Board's decision to a judge in chambers. Chambers, J. affirmed the decision of the Income Tax Board of Appeal. The Commissioner now seeks to have the **decisions** of the Board and of Chambers, J. set aside and the decision of the Commissioner restored. For the respondent company it is sought to support Chambers, J's decision on grounds other than those relied upon by that judge in addition or alternatively to the grounds relied upon by that judge.

It is not disputed that but for the operation of a double taxation relief provision the respondent company would be liable to tax in Jamaica on the income from its Jamaican investments. (S.5 (a) (iii) and S.5 (b) (1) of the Income Tax Law, 1954). It is also not disputed that in any event the respondent company is chargeable to tax in the United Kingdom in respect of its income in Jamaica by virtue of the fact that under the United Kingdom tax laws a resident of the

United Kingdom is liable to be taxed on the resident's world income. It was considered desirable that relief from such double taxation should be afforded the United Kingdom resident and reciprocally the Jamaican resident. In fact some relief from double taxation was afforded in Jamaica by the provisions of s. 54 of Cap. 156 (1953 Revised Edition of the Laws) enacted in 1941. By s. 15 of Law 38 of 1948 (appearing in the 1953 Revised Edition of the Laws as s. 55 of Cap. 156) it was provided that legal effect may be given to double taxation arrangements made between the Jamaican and the United Kingdom Governments whereupon the provisions of s. 54 of Cap. 156 shall cease to have effect in Jamaica except in so far as the arrangements otherwise provide. Such an arrangement was brought into force by the Double Taxation Relief (Taxes on Income) (Jamaica) Order, 1949 (S.I. 1949. No. 362). Under Article III of that arrangement the "industrial and commercial profits" of a United Kingdon enterprise were not subject to Jamaican tax unless the enterprise was engaged in trade or business in Jamaica through a permanent establishment (as defined in the arrangement) situated therein. It is common ground that interest earned by such an enterprise from its Jamaican investments being "industrial and commercial profits" of the enterprise was not liable to Jamaican tax. There was no separate Article in that Arrangement dealing with "interest". By Article 16 of that Arrangement, the Arrangement was to continue indefinitely but either of the Governments might give notice of termination to the other Government and subject to certain specified provisions "shall cease to be effective".

The Income Tax Law, Cap. 156 (1953 Revised Edition of the Laws) was repealed by s. 80 (1) and the Fifth Schedule of the Income Tax Law, 1954 (No. 59) but s.80 (5) specifically saved the Double Taxation Relief (Taxes on Income) (United Kingdom) Order 1949. That Order continued to have full force and effect until it was replaced by the Double Taxation Relief (Taxes on Income) (United Kingdom) Order, 1965 made under the provisions of s. 65 of the Income Tax Law, 1954, bringing into effect arrangements made between the two Governments. By s. 64 of the Income Tax Law, 1954 provision is made for some measure of relief from double taxation in the event that no agreement between the Governments is in force. Article III of the 1965 Order is in terms similar to Art. III of the 1949 Order and provides as follows:

> (1) The industrial or commercial profits of a United Kingdom enterprise shall not be subject to Jamaican tax unless the enterprise carries on a trade or business in Jamaica through a permanent establishment situated therein. If it carries on a trade or business as aforesaid, tax may be imposed on those profits by Jamaica, but only on so much of them as is attributable to that permanent establishment.
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> (2) The industrial or commercial profits of a Jamaican enterprise shall not be subject to United Kingdom tax unless the enterprise carries on a trade or business in the United Kingdom through a permanent establishment situated therein. If it carries on a trade or business as aforesaid, tax may be imposed on those profits by the United Kingdom, but only on so much of them as is attributable to that permanent establishment.
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> (3) Where an enterprise of one of the territories carries on a trade or business in the other territory through a permanent establishment situated therein there shall be attributable to that permanent establishment the industrial or commercial profits which it might be expected to derive in that other territory if it were an independent enterprise engaged in the same or similar activities under the same or similar conditions and dealing at arm's length with the enterprise of which it is a permanent establishment.

(4) In determining the industrial or commercial profits of a permanent establishment, there shall be allowed as deductions all expenses which would be deductible if the permanent establishment were an independent enterprise in so far as they are reasonably allocable to the permanent establishment, including executive and general administration expenses so deductible and allocable, whether incurred in the territory in which the permanent establishment is situated or elsewhere.

(5) No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise."

Article VII of the 1965 Order which relates to "interest" as defined therein (there was no comparable provision in the 1949 Order) provides as follows -

(1) Where interest is derived from sources within one of the territories by a resident of the other territory who is subject to tax in that other territory in respect thereof, the rate of tax imposed thereon in the first-mentioned territory shall not exceed 12½ per cent.

(2) The provisions of paragraph (1) of this Article shall not apply where a resident of one of the territories has a permanent establishment in the other territory and such interest is attributable to that permanent establishment; in such event such interest as is attributable to that permanent establishment shall be treated as if it were industrial or commercial profits to which the provisions of Article III are applicable.

(3) In this Article, the term "interest" means income from Government securities, from bonds or debentures, whether or not secured by mortgage, or from any other form of indebtedness, as well as all other income assimilated to income from money lent by the taxation law of the territory in which the income arises.

(4) Where, owing to a special relationship between the payer and the recipient or between both of them and some other person, the amount of the interest paid, having regard to the indebtedness in respect of which it is paid, exceeds the amount which would have been agreed upon by the payer and the recipient in the absence of such relationship, the provisions of this Article

> shall apply only to the last-mentioned amount. In that case, the excess part of the payments shall remain taxable according to the Contracting Governments' own laws, due regard being had to the other provisions of the present Agreement."

Before proceeding to consider the submissions made in support of the appeal it will be convenient to deal with the submission made on the part of the respondent company to the effect that as a United Kingdom enterprise which did not carry on trade or business through a permanent establishment situated in Jamaica was relieved by Article III of the 1949 Order from Jamaican tax on interest derived from its Jamaican investments such an enterprise could not be taxed in Jamaica on interest derived from such investments after the 1949 Order ceased to be effective for the reason that there was no subsequent-re-imposition of Jamaican tax on interest derived by a United Kingdom enterprise from investments in Jamaica. The argument in support of that submission proceeded on the basis that Article III of the 1949 Order amended s.5 of the Jamaican Income Tax Law to the extent that it created an exception and relieved from tax particular people in particular circumstances. The respondent's submission is in my view misconceived. The 1949 Order did not amend the Income Tax Law in the sense that it altered the provisions of that Law. The Arrangement itself provided that the arrangements specified therein would "cease to be effective in certain circumstances and at certain specified times. The arrangements were designed to afford relief from double taxation and not to alter the charging provisions of the law.

Turning now to the argument advanced on behalf of the appellant it is submitted by Mrs. Hudson-Phillips that although the expression "industrial or commercial profits" would in its ordinary connotation include interest derived from investments by an industrial or commercial enterprise or undertaking yet having regard to the provisions of paragraphs (1) and (2) of Article VII of the 1965 Order the respondent company would be liable to Jamaican tax under paragraph (1) of that Article and would not be exempt from Jamaican tax under Article III of the 1965 Order. Mrs. Hudson-Phillips contends that in relation to interest Article VII would in its terms be regarded as a particular enactment and Article III as a general enactment and that being the case the particular enactment would be operative and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply. Mr. Bovell for the respondent company on the other hand submits that in relation to interest Article III is in its terms a particular enactment while Article VII which deals with interest generally is in its terms a general enactment and that applying the same canon of construction as that applied by Mrs. Hudson-Phillips the respondent company would be exempt from Jamaican tax on interest derived from the Jamaican investments by virtue of Article III. Mr. Bovell contends that (putting aside for the moment Article VII) Article III exempts from Jamaican tax only such interest as is derived from the industrial or commercial operations of the enterprise and interest derived otherwise than by way of the enterprise's industrial or commercial operations would not fall to be treated under Article III but instead would fall to be treated under Article VII. Article VII Mr. Bovell contends deals with interest generally and paragraph (1) of that Article (which provides that where interest is derived from sources within one of the territories by a resident of the other territory who is subject to tax in that other territory in respect thereof the rate of tax therein in the first-mentioned territory shall not exceed 12½ per cent) in effect only fixes an upper limit of tax where interest derived from sources in one of the territories by a resident of the other territory is to be subject to tax in the first-mentioned territory; that paragraph (2) of Article VII however denies the concession of the fixed upper limit of tax given by paragraph (1) where the interest subject to tax in the first-mentioned territory is attributable to a permanent establishment in the other territory. In such a case such interest as is attributable to the permanent establishment shall be treated as if it were industrial or commercial profits to which the provisions of Article III are applicable and would thereby be taxed at the appropriate higher rate.

The scheme of the 1965 Order must be examined in the quest for the answer to the question raised in this appeal. Various heads of income are dealt with in the several Articles contained in the Order. Then comes Article XVII which provides that any income not specifically dealt with in the foregoing provisions derived by a resident of one of the territories who is subject to tax there in respect thereof shall be subjected to tax only in that territory. Article XVII is only a compendious way of providing a complete exemption from tax in one of the territories in respect of those heads of income not specifically dealt with and has the same effect as if in separate Articles each such head of income were specifically made exempt from tax in the territory in which it was derived. It could hardly follow that because a head of income is dealt with in a separate Article such head of income is thereby excluded from the expression "industrial or commercial profits" appearing in Article III for if that were so that expression as used in that Article would be meaningless. One must revert to an examination of the provisions of Article VII. Paragraph (1) of that Article provides an upper limit of 12½ per cent of tax where interest derived from sources in one of the territories by a resident of the other territory is to be subject to tax in the first-mentioned territory. That paragraph does not effect a charge to tax. The charge to tax is already effected by the Income Tax Law. As for paragraph (2) of Article VII it seeks firstly to deny the advantage of the upper limit of 12½ per cent of tax where interest is derived by an industrial or commercial enterprise having a permanent establishment, that is a fixed place of business in the other territory in which the business of the enterprise is wholly or partly carried on, and such interest is attributable to such permanent establishment. Such a provision would be quite unnecessary if such interest were intended to form part of the industrial or commercial profits of an enterprise for obviously the provisions of Article III would be applicable. Secondly, paragraph (2) of Article VII requires that such interest as is attributable to that permanent establishment shall be treated "as if it were industrial or commercial profits to which the provisions of Article III are applicable" that is to say such interest shall not be treated otherwise than under the provisions of Article III. Such a requirement would be quite unnecessary if such interest formed part of the industrial or commercial profits of an enterprise. In my view the words "<u>as if</u>" have been inserted in the concluding words of the paragraph "<u>as if</u> it were industrial or commercial profits to which the provisions of Article III are applicable" for the reason that such interest would not otherwise be regarded as industrial or commercial profits.

In the result I would hold that the interest received by the respondent company from its investments in Jamaica during the years 1964, 1965, 1966 and 1967 is not relieved from the payment of Jamaican tax by virtue of Article III of the Double Taxation Relief (Taxes on Income) (United Kingdom) Order, 1965. I would therefore allow the Commissioner's appeal and order that the decisions of the Income Tax Appeal Board and the Judge in Chambers be set aside and that the decision of the Commissioner be restored with an order for costs to the Commissioner here and in the tribunals below.

<u>HERCULES, J.A.:</u> I agree.

<u>ZACCA, J.A.:</u> I agree.

<u>LUCKHOO, P.(Ag.)</u>: In the result the appeal is allowed. The decisions of the Income Tax Appeal Board and the Judge in Chambers are set aside and the decision of the Commissioner is restored. The appellant will get his costs here and in the tribunals below.