JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 14 of 1973

BEFORE: The Hon. Mr. Justice Edun, J.A., Presiding.
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Zacca, J.A.(ag.).

B E T W E E N DOUGLAS J. JUDAH - Appellant

A N D THE COMMISSIONER OF INCOME TAX - Respondent

Mr. R. Mahfood Q.C. for the Appellant.

Mrs. A. C. Hudson-Phillips for the Respondent.

19th, 20th, 21st, 22nd and 26th May, 1975
17th October, 1975

EDUN, J.A.:

The facts are not in dispute and are as follows:-

The appellant is a solicitor of the Supreme Court and the senior partner of the firm of Judah, Desnoes and Co., Solicitors. During the calendar year 1961, the appellant carried on his profession as solicitor in accordance with a partnership agreement and as member of the firm of Judah and Randall. On December 31, 1961 Mr. Randall retired from that firm and on January 1, 1962 a new partnership was executed and entered into between the appellant and Mr. J.C. Willman.

The appellant's share of the profits of the firm of Judah and Randall for the calendar year 1961 was $13,676 and for the calendar year 1962 was $17,058. The respondent (hereinafter referred to as the "Revenue") assessed the appellant by estimate, for the year 1962 on a chargeable income of $19,400 and the appellant objected to that assessment by notice of objection dated October 10, 1962.

By notice of decision dated April 27, 1971, the appellant's chargeable income for the year of assessment 1962 was varied to the sum of $17,080 which included the sum of $13,676 (being the appellant's share of the profits in Messrs. Judah and Randall for the year 1961), in accordance with the provisions of Section 6(1) of the Income Tax Law 1954.

Against that decision, the appellant appealed to the Income Tax Board. He contended that the Revenue ought to have assessed him, for the year 1962, in accordance with s.6(2) and (3) of the said Income Tax Law No. 59 of 1954 on the ground that the partnership of which he was a member during the year of assessment 1961 had ceased to exist on December 31, 1961. The Revenue contended that the appellant being a person who had neither permanently ceased to exercise his profession on December 31, 1961, nor commenced to exercise his profession on January 1, 1962, fell to be assessed in accordance with the provisions of section 6 (1) of the Income Tax Law, on the income earned by him from the exercise of his profession as a solicitor during the year of assessment 1961.

The Income Tax Board (following a previous decision of Shelley J. in Bovell v Commissioner of Income Tax dated October 28, 1963) held that the provisions of section 6 (2) and (3) were applicable and ordered that the original assessment for the year 1962 be varied in accordance with section 6 (2). The Revenue appealed against that decision to a Judge in Chambers who allowed the appeal, set aside the decision of the Income Tax Board and restored the original assessment. It is against the decision of the Judge in Chambers that the appellant has now appealed to the Court of Appeal.

Before us, learned attorney for the appellant repeated submissions he made before the Income Tax Board and the Judge in Chambers. In particular, he urged that in relation to the facts of the case, Mr. Judah's income for the year 1961 was the basis year for his 1962 assessment as his partnership with Mr. Randall was terminated on December 31, 1961 and a new partnership commenced with Mr. Willman on January 1, 1962. Learned attorney for the Revenue also repeated her submissions before the Income Tax Board and the Judge in Chambers. In particular, she urged that the Revenue is concerned with the liability of the individual and an individual partner is liable to be taxed as a person under section 5 of the Income Tax Law which provides that every person shall be taxable at the rates specified for each year of assessment in respect of all his income, profits or gains in any employment or vocation. In her view, the fact that Mr. Judah's partnership with any other

person commenced or ceased at a certain date has not any relevance in the assessment of his taxes.

Many cases were cited by both parties in support of their respective submissions but opinions by the law Lords in the case of I.R.C. v Gibbs (1924) 24 T.C. 221 have been copiously referred to by both sides as relevant. It would be helpful and rewarding if I consider the reasons for judgment in that case because the answers to many problems may well be found therein. That case turned upon the construction of Rule 9 of the Income Tax (U.K.) Act 1918 (C.40) Sch. 1. Schedule D Cases 1 and 11. The relevant portion of that Rule provides as follows:-

> "9 - (1) If a person charged under this Schedule ceases within the year of assessment to carry on the trade, profession or vocation in respect of which the assessment is made, and is succeeded therein by another person, the Surveyor shall, within four months from the 5th day of April next after any such change, certify to the General Commissioners for the division in which the assessment is made the particulars thereof, and the full name and residence of the person charged and of his successor and the date of the charge, if the same be known to the Surveyor.
>
> ......"

In that case, a new partner was admitted on February 7, 1938 to a firm of stockbrokers during the year of assessment 1938. No notice was given requiring the taxpayer to be recomputed as if the business had been discontinued and a new business set up. In July 1938, the Inspector of Taxes sent a certificate to the General Commissioners concerned as required by the said Rule 9 informing them of the admission of the new partner. The Commissioners proposed to consider the apportionment but the firm applied for an order of prohibition to prevent them considering and adjusting the assessment on the ground that there was no cessation or succession on February 7, 1938 within the meaning of Rule 9. The order was refused. That Rule has been held to be applicable where a business during the year of assessment passes from the hand of one person or set of persons to another person or another partnership, even though some of the old partners continued in the new partnership.

A year of assessment in Jamaica means the period of twelve months commencing on the first day of January in each year. According to the facts of the instant case the termination of the partnership and its yearly accounting period coincided with the final date of the fiscal year 1961. There is here no problem of apportionment of taxes between any old, new or continuing partners during the year of assessment. I have studied the various reasons for judgments by the law Lords in Gibbs' case. I am considerably impressed with those reasons given by Lord Wright, more particularly with his dicta on p. 254. As far as I am concerned his concept of the law of partnership has considerable bearing upon the construction of partnership tax legislation. He said:-

> "..... The framers of Rule 9 may fairly be held to have taken the view that if four partners admit a new partner and continue the business as a partnership of five, there is a change. The four old partners do not carry on the business on the same footing as before even if the actual business operations are unchanged. There is on any view a cessation of the old partnership business and the starting of a new partnership business. Even if the business remains the same and the name remains the same as before the change, still the five who carry it on succeed to the four if the four cease to carry it on, which is the fact because five partners carrying on a business jointly are different from four. Thus a change in the persons jointly carrying on a business by the admission of a new partner may fairly be held to come within the general words of Rule 9, even though in one sense the previous partners may not cease to carry on the business. But the business is not the old business. The old business is superseded by a new business, with a different division of property ownership, of powers of agency and representative capacity, of rights of dissolution and of all the incidents of partnership, including joint liability. The draftsman may have had in mind that by English law the admission of a new partner involves a dissolution of the partnership and the starting of a new partnership which succeeds to the old firm. In that sense, the old partners may be said to cease to carry on the business. It is a joint business. A joint business carried on by four is different from a joint business carried on by five, even if the five include the original four. The addition of the new partner changes the constitution of the firm."

There is no doubt that up to midnight of December 31, 1961 Mr. Judah and Mr. Randall were in partnership business which ceased at the last stroke of midnight. From then on, in that partnership there was a change, the kind of which affected its constitution. There were:-

1 a new division of property ownership,
2 a new pair of persons, that is, Messrs. Judah and Willman having powers of agency and representative capacity,
3 new rights of dissolution and of all the incidents of partnership, including liability,
4 a joint partnership business carried on by A and B is different from a joint partnership business between A and C, and
5 there is no doubt that the law of partnership and its concept are the same both in England and in Jamaica; that is, that a partnership firm is not a legal entity like a limited company.

However, learned attorney for the Revenue submitted that the common law concept of partnership is irrelevant so far as the tax legislation in Jamaica is concerned. She said that one has to look at the different texts of section 144(1) of the Income Tax (U.K.) Act 1952 and section 44(1) of the Income Tax Law in Jamaica, and in the Jamaican context the fact of a new partner does not absolve the precedent or continuing partner from making a return of the individual earnings of the partners, be they of whatever personnel. Thus, the notice of decision of assessment dated April 27, 1971, which assessed the appellant's chargeable income for the year 1962 and which included $13,676 for 1961 and $3,404 for 1962, was correct. In other words Mr. Randall would have no responsibility for any part of $3,404 for the year of assessment 1962, nor would Mr. Willman have any responsibility for any part of $13,676 for the year of assessment 1961. The Jamaican tax provision, she urged, unlike the United Kingdom provision, depended upon the charge to tax on the individual partner. Learned attorney for the appellant urged that that could not be so and that sections 6(2) and 6(3) of the Law are applicable to facts of the instant case.

Section 144 (1) of the Income Tax (U.K.) Act, 1952 provides as follows:-

> "Where a trade or profession is carried on by two or more persons jointly, the tax in respect thereof shall be computed and stated jointly and in one sum, and shall be separate and distinct from any other tax chargeable on those persons or any of them, and a joint assessment shall be made in the partnership name."

Section 44 (1) of the Income Tax law in Jamaica provides as follows:-

> "Where a trade, profession or business is carried on by two or more persons jointly the income of any partner from the partnership shall be deemed to be the share to which he is entitled for the year preceding the year of assessment in the income of the partnership and shall be included in the return of income to be made by such partner under the provisions of the law."

Section 44 (2) goes on to provide that the precedent partner shall make and deliver a return of the income of the partnership for any year of assessment, such income being ascertained in accordance with the provisions of this law. In my view, the methods by which taxes are computed and collected do not alter the concept of partnership in the law. That concept remains the same even though the liability of persons trading jointly is in England computed on the basis of the partnership name whereas in Jamaica it is computed on the basis of the individual partner's share in the partnership.

In I.R.C. v Gibbs (supra) it has been stated by Lord MacMillan that for taxing purposes "a partnership firm is treated as an entity distinct from the persons who constitute the firm". Lord Denning in Harrison v Willis Bros. (1964) 43 T.C. 61 said at p.73 that he did not think that was correct. His view of section 144 of the Income Tax (U.K.) Act 1952 is that the assessment made "in the partnership name" was machinery by which those persons designated were partners during the year when the profits were made. They were still to be designated by that name, even after the partnership was dissolved. That use of the partnership name was a familiar piece of machinery. He continued at p.54: ".... So long as they [the partners] are still alive they are all chargeable for the tax in the years they traded in partnership.

The assessment must be made in the partnership name. But in point of law an assessment is made on those persons jointly and the tax is charged on and are payable by them. This is clearly accepted as the law of England by section 63 (3) of the Finance Act 1960." That section of the Act provides: "For the purposes of this Part of this Act, an assessment made in the partnership name and the tax charged in such assessment shall, ... be deemed to be respectively an assessment made on the partners and the tax charged on and payable by them."

In Jamaica, though an assessment is not made in the partnership name, an assessment is made in accordance with section 44 of the law on those persons individually as machinery by which the partners are designated during the year when the profits were made. There is no joint liability and so each partner must severally bear his share of the taxes of the partnership when finally assessed. That is, the share to which he is entitled for the year preceding the year of assessment in the income of the partnership.

However, that is so far as the machinery is concerned. One must now look to other provisions of the law to ascertain the income of the individual partners. Learned attorney for the Revenue urged that we must not look further than section 5 and section 6(1) of the law and "person" does not include the plural, whereas learned attorney for the appellant urged that we must have regard to section 6(2) and 6(3) of the law and "person" includes the plural. The relevant portions of sections 6(1), (2) and (3) provide as follows:-

> "Section 6(1). Subject to the provisions of this section, the statutory income of any person shall be the income of that person for the year immediately preceding the year of assessment:
>
> Provided that in respect of income from emoluments (as specified in paragraph (c) of section 5 of this law) the statutory income shall be the income of that person for the year of assessment:
>
> Provided further ....."

Section 6 (2) provides thus -

> " (2) The statutory income of any person from any trade, profession or business for the year of assessment in which he commenced to carry on or exercise such trade, profession or business .... shall be ascertained in accordance with

the following provisions -

(a) for the first year the statutory income shall be the amount of the income for that year.

....."

Section 6(3) provides thus -

" (3) Where a person permanently ceases to carry on or exercise a trade, profession or business, his statutory income therefrom shall be -

(a) as regards the year of assessment in which the cessation occurs, the amount of the income of that year:

(b) as regards the year of assessment preceding that in which the cessation occurs the amount of the income of that year or of the year preceding tnat year, whichever is greater, and he shall not be deemed to derive income from such trade, profession or business for the year of assessment following that in which the cessation occurs; and such additional assessment may be made as shall be necessary to give effect to this paragraph:

Provided ....."

If the contentions of the Revenue are correct, then first of all, I fail to see the reason for the local income tax legislation enacting section 44 and in it to use the words "partner" and "partnership". That provision being in the law, it cannot be ignored if the incomes of persons trading jointly in partnership are to be ascertained in a way different from incomes of persons from emoluments arising or accruing from any office or employment of profit. Section 5 of the law makes no reference to a person commencing to carry on or exercise a trade, profession or business jointly or otherwise. Nor does it say anything about a person ceasing, permanently or otherwise to carry on or exercise a trade, profession or business. The facts of the instant case which remain undisputed are:-

1 The partnership of Messrs. Judah and Randall ceased on December 31, 1961 and

2 the partnership of Messrs. Judah and Willman commenced on January 1, 1962.

The incomes of Mr. Judah for the material years of assessment, 1961 and/or 1962 are to be ascertained in accordance with provisions of sections — 6 (2)(a) and 6 (3)(b), rather than in accordance with sections 5 and 6 (1) of the Income Tax Law, alone.

The principle in the case of Davis v Braithwaite (1933) 18 T.C. 198 was whether Miss Lilian Braithwaite should have been assessed under Schedule D as following her profession of an actress or whether she ought to have been assessed under the particular engagements which she made - employment. It was held that she exercised her profession in respect of profits of which she was assessable to income tax under Case II of Schedule D. Upjohn J. in Mitchell and Edon v Ross (1960) 40 T.C. p. 11 said: "The main question I have to determine is whether in accepting such appointments, the profits or gains arising from such appointments are profits or gains arising from an "office or employment". And at p. 36 he said: "The case it is said is analogous to the case of Davis v Braithwaite (1931) 2 K.B. 628. It was there held that Miss Lilian Braithwaite, who accepted many engagements on the stage, films and B.B.C., was only exercising her talents as an actress, and that each of these engagements could not be considered as an employment but merely as an engagement in exercising a profession." It is true that in the context of the Jamaican tax legislation there are not categories known as Schedules A.B.C.D and E as in the English legislation. Nevertheless section 6 (1) and the first proviso make the distinction that the statutory income in respect of income arising from emoluments shall be the income of that person for the year of assessment whereas the statutory income of any other person shall be the income of that person for the year immediately preceding the year of assessment. Mr. Judah's income, having regard to the authorities of Davis v. Braithwaite (supra) and Mitchell and Edon v Ross (supra), cannot be categorised as income arising from emoluments. That being so, where a person ceases to carry on or exercise a trade, profession or business, his statutory income must be determined according to section 6(3)(b), "and he shall not be deemed to derive income from such trade, profession or business for the year of assessment following that in which the cessation occurs ..."

My conclusion being what it is, it follows that many arguments and references made to other cases and provisions of law would be worth no useful purpose to consider. Either I am correct that:-

(1) "person" in sections 6 (1), (2) and (3) includes references to persons trading jointly in partnership, having regard to section 44 of the law; and

(2) Lord Wright's concept of "permanent cessation" of a joint venture in partnership includes such a change in partnership as the facts of the instant case warrant;

or I am not correct. I have not made any reference to Act No. 29 of 1969 as we have been called upon to consider matters which occurred long before the enactment of such legislation.

For the reasons given, I would allow the appeal, set aside the judgment of the learned Judge in Chambers and restore the decision of the Income Tax Board. That is, the chargeable income of the appellant for the year of assessment 1962 be varied to include only, the appellant's share of the profits of the firm of Judah and Randall for the year of assessment 1961, in the sum of $13,676. The appellant shall have his costs in Court of Appeal and before the Judge in Chambers, to be taxed or agreed upon.

HERCULES, J.A.:

The stencilled judgment of the learned presiding judge was handed to me on 2nd October, 1975. Time does not now permit me to express my views at length.

I recognise however that the matter for determination was whether Judah as a partner is a person who ceased permanently to exercise his profession in 1961 and commenced again in 1962, thereby coming within the provisions of Sections 6 (2) and (3) of the Income Tax Law No. 59 of 1954. The Appellant's Attorney submitted that Sections 6 (2) and (3) apply to Judah, since his income in 1962 was derived from a series of activities carried on under a different business, a different set of profits from 1961 and a different partnership.

I do not consider the English cases cited in support thereof to be helpful, as they all turned on peculiarities in the English legislation, not found in the local legislation. I am ever mindful of the common law principles relating to partnership. But in my view the person charged under Rule 9 of the Income Tax (U.K.) Act 1918 (C. 40) Sch.1. Schedule D Cases 1 and 11 is not synonymous with the person in Section 6 of Jamaican Law No. 59 of 1954. I do not think therefore that one can be substituted for the other.

I have concluded that in the law as it stood at the material time (1961/2), person in Sections 6 (1), (2) and (3) is capable of applying to an individual, even though his income was derived from business in partnership. A partnership per se is not subject to tax in Jamaica. Therefore I respectfully disagree with the conclusion of Edun and Zacca, J.J.A. I would dismiss the appeal and restore the order of Robinson J. in chambers.

ZACCA, J.A.(ag.):

I have had an opportunity of reading the judgment of Edun, J.A. I agree with the conclusions he has arrived at in allowing this appeal. I would therefore also allow the appeal, set aside the judgment of the learned trial judge in chambers and restore the decision of the Income Tax Appeal Board.

HERCULES, J.A.:

By a majority the appeal is allowed. The judgment of the learned trial judge in chambers is set aside, the decision of the Income Tax Appeal Board is restored. The appellant shall have his costs in the Court of Appeal and before the judge in chambers to be taxed or agreed upon.