

ZAMBIA PRINTING AND PUBLISHING PRESS LIMITED v COMMISSIONER OF TAXES (1969) ZR 13 (CA)

COURT OF APPEAL 30

BLAGDEN CJ, DOYLE JA, PICKET J

14th JANUARY 1969

Flynote and Headnote

[1] Revenue - Income tax - Company - Deduction from income of assessed loss - Income Tax Act (Cap. AL 31) section 13 (3) (iv) - Intention of 35 legislation.

The intention of the legislature in framing section 13 (3) (iv) of the Income Tax Act (Cap. AL 31) was to prevent a tax advantage being gained by a company taking over another company with known tax losses and reorganising it so that it earns a profit, such 40 profit being tax free until the tax losses are extinguished.

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[2] Revenue - Income tax - Company - Deduction from income of assessed loss - Income Tax Act, section 13 (3) (iv) construed.

An assessed loss which is not deductible under proviso (iv) to section 13 (3) of the Income Tax Act does not include any trading 5 loss incurred in the current tax year up to the date of the change in ownership of shares.

[3] Statutes - Interpretation of statutes - Meaning of phrase - May vary within act or section.

An expression used in an Act of Parliament does not necessarily 10 have the same meaning throughout the Act or even throughout a section in that Act.

[4] Revenue - Income tax - Company - Deduction from income of assessed Loss - "Assessed loss" - Meaning.

The phrase "assessed loss" used in section 13 (3) of the Income 15 Tax Act has a different meaning in proviso (v) from that in proviso (iv).

[5] Revenue - Income tax - Company - Deduction from income of assessed loss - Income Tax Act, section 13 (3) (v) construed.

An assessed loss which is deductible under proviso (v) to section 20 13 (3) of the Income Tax Act includes a trading loss incurred in the current tax year up to the date of the winding up of the old company.

Cases cited:

- (1) *Gowers v Walker* [1930] 1 Ch.262; [1929] All ER Rep.710.
- (2) *Commissioner for Inland Revenue v Louis Zinn Organisation (Ply) Ltd* 25 1958 (4) SA 477.
- (3) *Doe d Angell v Angell* (1846), 9 QB 328; 115 ER 1299.
- (4) *National and Grindlays Bank & Co. v Kentiles & Co.*, (1966) EA 17.

Statute construed:

- (1) Income Tax Act, (Cap. AL 31), ss.2, 8, 13 (3) (iv), 13 (3) (v). 30

Cave, for the appellant.

Ryan, Senior State Advocate, for the respondent.

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The Income Tax (Amendment) Act, 1970 (No.26 of 1970), repeals sections 95 (2) and 31 of the Income Tax Act, 1966, and replaces them.

Section 8 of the 1970 Act replaces section 31 of the 1966 Act (i.e. Cap. AL 31), w 13 (3) (v) with effect from April 1, 1966 (sic), but the 40 decisions in paragraphs [4] and [5] above appear not to be affected.

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Section 35 of the 1970 Act replaces section 95 of the 1966 Act (i.e. Cap. AL 31), s.13 (3) (iv) with effect from April 1, 1969. This enactment reverses the main decision in this case, noted in paragraph [2] above, in which the point at issue was decided against the Revenue.

[Editorial Note] Sections 13 (3) (iv) and 13 (3) (v) of the Income Tax Act (Cap. AL 31), which were construed in this case, were repealed and substantially re-enacted by sections 95 (2) and 31 respectively of the Income Tax Act, 1966, (No.32 of 1967), with effect from April 1, 1966.

Judgment

Doyle JA: The appellant company, hereinafter called the 5 company, was a company incorporated in and carrying on business in Zambia. Its accounting year ended on 31st December each year, and this period was treated as its income tax year. On 1st January, 1964, the company had an assessed loss of £42,086. During the year ended December, 1964, the company incurred a trading loss of £170,595. On 15th

December, 1964, 10 Lonrho Ltd acquired the ownership of an amount exceeding one third of the issued shares of the Heinrichs Syndicate Ltd. a company having a controlling interest in the company. The trading loss of £170,595 for the year was accepted by the Commissioner of Taxes as an assessed loss at the end of that year so that the total assessed loss ordinarily to be carried 15 forward was £42,086 plus £170,595, namely, £212,281. The Commissioner issued an assessment accordingly. On 6th September, 1966, the Commissioner issued an amended assessment disallowing a sum of £204,735 from the assessed loss. This sum was made up of the assessed loss for the year 1963, £42,086, together with a portion of the assessed loss for the 20 year 1964. This portion was the sum of £162,647, which represented that part of the trading loss for that year which occurred prior to 15th December. The company objected and the objection was disallowed. The company appealed to the High Court and the High Court dismissed the appeal and confirmed the Commissioner's assessment. The company now 25 appeals to this court.

The determination of the appeal depends on the construction of subsection (3) of section 13 of the Income Tax Act (Cap. AL 31) hereinafter called the Act and in particular proviso (iv) of that subsection. It is agreed by the parties that the assessed loss of £42,086 was correctly 30 disallowed and the sole dispute is in relation to the sum of £162,629. Subsection (3) of section 13 reads as follows:

"(3) From the amount of income remaining after the deductions referred to in subsection (2), in section twenty - six, and in section thirty, have been made, there shall be deducted any 35 assessed loss, whether determined under this Act or any previous law, incurred by the taxpayer in any previous year not being earlier than the year of assessment, which commenced on the first day of April, 1945, to the extent to which such assessed loss had not been allowed as a deduction from 40 his income of a previous year of assessment:

Provided that -

(i) a deduction under this subsection shall be made as far as possible in the first year of assessment after that in which the assessed loss was incurred and, in so far as it cannot be 45 so made, then in the next year of assessment and so on;

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(ii) no person who -

(a) has been adjudged or otherwise declared or become bankrupt; or

(b) has made -

(A) a conveyance or assignment of his property or estate for the benefit of his creditors; or

(B) an arrangement with his creditors releasing him, wholly or partially, from his debts;

shall be entitled to carry forward an assessed loss incurred 10 before the date he was adjudged or otherwise declared or became bankrupt or made the conveyance, assignment or arrangement, as the case may be;

(iii) an assessed loss shall be reduced by the amount or value of any benefit received by or accruing to a person resulting 15 from a concession granted by, or a compromise made with any of his creditors whereby his liabilities have been reduced or extinguished, if such liabilities arose in the ordinary course of trade;

(iv) where after the commencement of the Taxes Charging and 20 Amendment Ordinance, there is a change in the ownership of a third or more in the shares of a company with an assessed loss, or there is a like change in regard to any company which directly or indirectly controls that company, the assessed loss incurred prior to that change shall 25 not be deductible, save where the change has occurred because of the death of a shareholder, and is for no valuable consideration, or because a shareholder has transferred his shares to a company in which he holds a controlling interest;

(v) If the Commissioner decides that a company with an assessed 30 loss (hereinafter called the old company) -

(a) was incorporated outside Zambia; and

(b) carried on its principal business within Zambia; and

(c) is about to be wound up voluntarily in its country of incorporation for the purpose of the transfer of the whole 35 of its business and property wherever situate to a company which will be or has been incorporated under a law (hereinafter called the new company) for the sole purpose of acquiring the whole of the business and property wherever situate of the old company, and 40

(d) the sole consideration for the transfer referred to in sub paragraph (c) will be the issue to the members of the old company of shares in the new company in proportion to their shareholdings in the old company; and

(e) no share in the new company will be available for issue 45 to any persons other than members of the old company;

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the new company shall be allowed as a deduction after the transfer referred to in sub-paragraph (c) has been effected the assessed loss of the old company to the extent to which that assessed loss has not been allowed as a deduction to the old company in a previous year of assessment." 5

"Assessed loss" is defined in section 2 of the Act as follows:

"Assessed loss means any amount by which the amounts allowed to be deducted under subsection (2) of section thirteen, section twenty - six and, section thirty, from the income (as defined in Part II) of any person exceed such income;" 10

"Gross income" is defined in section 8 as the total amount of specified income "received by or accrued to or in favour of a person in any year or period of assessment from a source within or deemed to be within Zambia . . ."

"Taxable income" is defined in section 8 and determined in 15 accordance with the provisions of section 13. In effect it amounts to the income less certain deductions specified in the section. These deductions relate to the year of assessment, the period of assessment, or, in some cases, to subsequent years or periods of assessment.

Income Tax is imposed by section 6 of the Act on taxable income 20 received by or accrued to or in favour of any person during the year of assessment ended 31st March, 1964, and each succeeding year of assessment thereafter.

"Year of assessment" is defined in section 2 as follows:

"Year of assessment" - 25

(a) means any period of twelve months beginning on the first day of April in any year subsequent to the year 1962 in respect of which tax is chargeable under this Act; and

(b) included for the purposes of the charging, levying and 30 collection of tax in respect of any period of twelve months referred to in paragraph (a), any period of twelve months ended on the thirty - first day of March in any year previous to the year 1964 in respect of which tax was chargeable under this Act;" 35

It is clear therefore that income tax is not only, as Lord McNaghten said in another context, a tax on income. It is a tax on income received In a year or period of assessment.

It is argued for the company -

(a) that the assessed loss referred to in the proviso (iv) to 40 subsection (3) of section 13 is an assessed loss referred to in the substantive provision of subsection (3) namely an assessed loss in a previous year;

(b) that even if this is not so, no assessed loss had occurred on 15th December because it could not be ascertained until the 45

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year was completed and that the Commissioner had no authority under the Act to split an assessed loss into two.

It was argued on behalf of the Commissioner that the intention of the legislature was to exclude all losses incurred prior to the date when, 5 what I may term, a national take-over occurred by reason of the acquisition by one person of more than one third of the shares; and that the construction urged by the company would make proviso (v) meaningless and that the expression "assessed loss" in that proviso must have the same meaning as in proviso (iv). 10

In the High Court the learned judge accepted the construction of the Commissioner. He held that the intention of the proviso was to prevent evasion of tax and that "it would be simple evasion of tax for anyone otherwise obliged to pay tax to have reduced in whole or in part the tax payable by purchasing for a song a company which might be 15 hopelessly insolvent and then set off that company's losses, with which the purchaser has had nothing to do, against his own quite possibly substantial profits." In this he was not correct. [1] The object of the legislature was not to prevent evasion of tax but to prevent someone obtaining a tax advantage by acquiring control of a tax loss company and, 20 through reorganising it or by the putting in its way of favourable business, making the company earn a profit, that profit being free of tax until the tax losses had been extinguished. However, the tenor of the judge's finding was substantially correct.

He went on to find that it was not necessary for a loss actually to be 25 assessed before it became an assessed loss and was satisfied that the adverbial expression "prior to such change" in the proviso qualified the word "loss" only and not the word "assessed" as well. He found support for this in *Gowers v Walker* [1] and *CIR v Louis Zinn Organisation (Pty.) Ltd*, [2]. 30

He also agreed that the expression "assessed loss" must have the same meaning in proviso (iv) as in proviso (v) and that to restrict the meaning of assessed loss in proviso (v) to assessed loss in a previous year would stultify its clear intention.

If one takes subsection (3) of section 13 solely in relation to proviso 35 (iv) the meaning is, in my view, plain. The first part of the subsection enables assessed losses to be deducted and proviso (iv) provides that on a specified change in share ownership assessed losses incurred prior to that change shall not be deductible. An assessed loss is a loss assessed in relation to an income tax year's trading. It is in my view not necessary 40 that an assessed loss should have been assessed by the Commissioner before it becomes an assessed loss. Although this was argued for the company before the judge on appeal, the argument was abandoned in this court. An assessed loss must, however, be capable of assessment. The learned judge got around this difficulty by holding that the words 45 "assessed loss incurred prior to that change" meant the "loss incurred prior to that change". In effect he held that the provision was not referring to assessed losses but to trading losses. In this court counsel for the Commissioner has also argued that the Commissioner was entitled to

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split an assessed loss and in effect calculate one assessed loss as at 15th December, 1964, and another assessed loss for the remainder of the year. There are provisions in the Act, e.g. section 41, where the

Commissioner can make an assessment estimating taxable income or assessed loss for part of the year: these circumstances do not apply here. Counsel was driven to arguing that the provisions for splitting the assessed loss for the purposes of section 13 are to be found in proviso (iv) itself. His argument was circular because the legislature intended that all losses prior to the change should be non-deductible, therefore the Commissioner must have power to split an assessed loss and therefore a portion of the assessed loss was non-deductible. A company which in each of the first three months of a trading year makes a loss of £1,000 and subsequently makes a monthly gain of £14,000 for the remainder of the year does not have an assessed loss of £3,000 after three months. One must ordinarily wait until the end of the year to find out if it has an assessed loss. In the instant case if the company had by some miracle of trading made a profit of £165,000 in the last fortnight of December, 1964, could anyone seriously have put forward that it had an assessed loss of £162,647 on 15th December, 1964? The company on 15th December, 1964, was exactly the same company as on 1st January, 1965. All that had happened was that the ownership of some of its shares had changed.

The cases cited by the learned judge on appeal do not appear to me to be helpful in this context. *Gowers v Walker* [1] merely demolished the argument, abandoned in this court, that a loss had actually to be assessed before it became an assessed loss. *Zinn's case*, [2] which was concerned with provisions similar to proviso (iii) to section 3, decided that the benefit of a composition in a current year could be deducted from the assessed loss for that year, in that an assessed loss is determined in a current year though it only has effect in a future year. I see no reason to doubt the validity of *Zinn's case* [2] but it is no authority for the proposition that an assessed loss may be determined for part of a year.

The learned judge was driven to do violence to the ordinary meaning of proviso (iv) by -

(a) his view of the intention of the legislature, and

(b) his view that the expression assessed loss in proviso (iv) must have the same meaning as in proviso (v) and that in order to make sense of proviso (v), the assessed loss must refer to a trading loss over part of the year.

[1] As to the intention of the legislature, the object clearly was to avoid tax advantage by taking over a company with known tax losses. These would ordinarily have occurred in previous years and be apparent from the accounts of the company. [2] I see nothing unreasonable or unlikely in the legislature disregarding for this purpose part of a current year. Such would fit into the scheme of income tax as a yearly tax. The control of a company can be notionally obtained at any time by the acquisition of more than one third of the shares and I see no reason why

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the legislature should be taken to have intended an assessed loss to be computed at times when it would be impossible to know whether or not the company would in fact have an overall loss in the year. No doubt in the instant case anyone in the know of the company's affairs could reasonably estimate that

the company must make a loss in the current year and no doubt this may have been a factor in determining the date of acquiring the shares, but it does not follow that such an estimate could be made when the change in ownership of shares occurs in the early part of the year. The argument in relation to the legislature's 10 intention does not seem to me to be sufficiently certain as to require doing violence to the ordinary grammatical sense of proviso (iv).

[3] As to the reasoning based on proviso (iv), I would say that in the first place it is not an ineluctable rule that an expression has the same meaning throughout an Act or even throughout a section; see for example 15 *Doe v Angell* [3] and *National & Grindlay's Bank v Kentile & Co.* [4]. It does not therefore in my view follow that if a strained meaning has to be given to the words "assessed loss" in proviso (v) that that strained meaning must therefore be imported into the otherwise clear words of proviso (iv). However, I do not think that it is unnecessary to put a 20 strained meaning, or at least an unduly strained meaning, on the words "assessed loss" in proviso (v) to make them accord with the ordinary and clear meaning of proviso (iv). The object of proviso (v) is evident where a company is formed with the sole intention of taking over the business and property of another company which is to be wound up for 25 that purpose, proviso (v) puts the new company into the shoes of the defunct company for the purpose of assessed losses. Clearly assessed losses for years previous to the take over year are covered. [5] I would agree that the intention of the proviso is also to include an assessed loss for the year of take over. This must on the wording of proviso (v) be an 30 assessed loss prior to the winding up. Where a company becomes defunct in the course of an income tax year, its trading loss and therefore its assessed loss can be ascertained at the time of the occurrence although the income tax year has not expired. The assessed loss will in the ordinary case have no effect as the company will not be trading in future years. 35 In the case postulated by proviso (v) a trading loss of the defunct company can however be carried forward in a future year of trading by the new company. At some time prior to the legal act in the winding up which extinguishes the old company, that company will have ceased trading, and its trading loss for the year in which it is wound up can be ascertained. 40 Its assessed loss can therefore also be ascertained. It does not seem to me to be an abuse of English to say that the loss ascertained in the year of winding up is an assessed loss and that it occurs when the company is about to be wound up. Indeed this seems to accord with *Zinn's case*. It is an assessed loss in presenti though it can only operate in futuro. 45

For these reasons I consider that the assessment of the Commissioner was incorrect and that on the 15th December, 1964, there was no assessed loss for that year in existence which could be made non-deductible by proviso (iv) to subsection (3) of section 13 of the Act. I would allow this appeal.

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Judgment

Blagden CJ: I agree with the judgment which has been delivered. I have nothing to add. I would allow this appeal.



Judgment

Pickett J: I have had the opportunity of reading the judgment delivered by my brother Doyle. I entirely agree with the judgment and the reasons expressed therein. I would allow this appeal. 5

Appeal allowed

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