BELLEISLE LTD. v ATTORNEY GENERAL

Supreme Court
Spry, C.J.
8 December 1977.

Taxation — exempt company — election to pay income tax — whether entitled to refund of annual tax if liability to income tax nil — whether election to pay income tax may be made for a limited period — Companies (Taxation and Concessions) Ordinance, s. 10 (1), (4) and (4A).

An exempt company which has elected, under s. 10 (4) of the Companies (Taxation and Concessions) Ordinance (Cap. 165, 1970 Ed.), to pay income tax is not entitled to the refund of the annual tax paid under s. 10 (1) because it has no liability to income tax.

There is nothing to prevent an exempt company from electing to pay income tax for a limited period, provided that period ends at the end of a year of assessment.

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[1] [1970] 1 All E.R. 1202.

[2] [1977] 2 All E.R. 820.

Interlocutory Summons

This was an application for the determination of three points of law. The facts are set out in the judgment.

A.V. Stagnetto for the plaintiff.
E. Thistlethwaite for the defendant.

16 December 1977: The following judgment was read—

This is an application by way of interlocutory summons for the determination of three questions arising under the Companies (Taxation and Concessions) Ordinance. Before I proceed to the questions, it will, I think, be convenient to set out briefly the facts giving rise to them.

The plaintiff is a limited company incorporated in Gibraltar, which was, on 3 December 1973, registered as an exempt company under s. 5(1) of the Ordinance. It is regarded as ordinarily resident in Gibraltar for the purposes of the Income Tax Ordinance (Cap. 76).

On 4 March 1974, the plaintiff purported to give notice under s. 10(4) of the Companies (Taxation and Concessions) Ordinance of election to pay income tax for the tax year 1973/74, and this was accepted by the Financial and Development Secretary. On 21 August 1975, application was made on behalf of the plaintiff for refund of the proportion of annual tax paid under s. 10 of the Ordinance, on the ground that the plaintiff had had no taxable income and consequently no income tax liability in respect of the year 1973/74. This was refused, and a counterclaim was made for the balance of the tax alleged to be due.

The first question that I am asked to determine is whether an exempt company which has elected under s. 10(4) to pay income tax is entitled to the refund of the annual tax paid under s. 10(1) if no income tax is payable by it, or to the extent of the excess of the annual tax over the income tax liability.

Mr. Stagnetto, who appeared for the plaintiff, based his argument on para. (c) of s. 10(4), which provides that in the case of a company which has elected to pay income tax, the annual tax payable under s. 10(1)

> "shall be treated for all tax purposes as on account of the tax payable by the company under the Income Tax Ordinance for that year of assessment".

This means, according to Mr. Stagnetto's argument, that the annual tax is in the nature of a deposit against the income tax payable and therefore refundable if no income tax is payable, or to the extent that it exceeds the tax payable.

If the matter rested there, I might well accept Mr. Stagnetto's argument. In 1974, however, an amending Bill became law which added a subsection to s. 10 as follows—

> "(4A) For the avoidance of doubt it is declared that where an election has been made under subs. (4) to pay income tax under the Income Tax Ordinance, annual tax shall be payable at the rate specified in para. (b) of that subsection notwithstanding that the amount of income tax payable is nil or is less than the amount of annual tax."

It was on this subsection that Mr. Thistlethwaite, for the Attorney General, based his case.

Mr. Stagnetto argued that this subsection took the matter no further, because it merely reiterated the requirement that the tax be paid, which is not disputed, and did not say, as it might well have done, that the tax was not to be refunded to the extent that it exceeded the income tax liability. He argued further that if the section were ambiguous, as a taxing statute it should be interpreted in favour of the taxpayer.

With respect, I do not think that that argument can be sustained. In the first place, it would mean that subs. (4A) achieves nothing at all. Of course it can happen that a legislative provision is ineffectual, but a court should only so hold if there is no reasonable alternative. Secondly, it gives no value to the opening words of the subsection "For the avoidance of doubt". I think there was never any doubt that an exempt company had to pay the annual tax or that a company which had elected to pay income tax, paid at the rate set out in para. (b). The only doubt, I think, was whether a company not liable to income tax or liable to pay a sum less than the annual tax, was entitled to claim a refund. If the subsection was resolving that doubt, it can only be by excluding such refunds. On no possible reading can subsection (4A) strengthen the case for a refund.

Mr. Stagnetto also put forward arguments based on subss. (2) and (5) of s. 10 but these were merely to reinforce his main argument and cannot stand alone.

My answer to the first question is accordingly No.

As regards the following year, 1974/75, notice of election was again given, but unfortunately out of time and it was accordingly rejected by the Financial and Development Secretary. The plaintiff then adopted the argument that the original election was still effective because the only relevant revocation of it was contained in the election itself and not being a notice subsequent to the election was invalid.

This gives rise to the remaining questions which are, first, whether a company when giving notice of election may by the same notice determine the election at a future date, thus limiting the election to a specific period of time and, secondly, if the answer to that question is negative, whether a notice which purports to do so can operate as a valid election.

On this, I think it is sufficient to say that I accept Mr. Thistlethwaite's argument, that what the plaintiff did was to make an election for a limited period, not to make an election and revoke it. I do not think there is anything in the Ordinance to prevent such an election; it is convenient to both parties and it cannot in any way frustrate the purpose of the Ordinance because, as Mr. Stagnetto concedes, there is nothing to preclude the giving of notice of revocation immediately after the exercise of the right of election. The only qualification is that an election for a limited period must be for a period ending at the end of a year of assessment. I hold, therefore, that the second and third questions do not arise.