
ATTORNEY-GENERAL v. MIFSUD

COURT OF APPEAL (Fieldsend, P., Davis and O'Connor, JJ.A.):
September 13th, 1996

Taxation—income tax—recovery of tax—jurisdiction—by Crown Proceedings Ordinance, s.10(1) and Income Tax Ordinance, s.86(1), Crown has choice of forum in which to recover arrears—may proceed by writ in Supreme Court or by summons in magistrates' court

The appellant brought proceedings by writ in the Supreme Court against the respondent to recover income tax arrears. The respondent obtained an order setting aside the writ on the ground that the Supreme Court had no jurisdiction to hear a claim under the Income Tax Ordinance, the trial judge holding that since s.86(1) of the Ordinance stated that tax due under the Ordinance was “recoverable summarily,” the magistrates’ court had exclusive jurisdiction to hear the appellant’s claim.

On appeal, the appellant submitted that (a) under the Crown Proceedings Ordinance, s.10(1), the Crown was required to institute civil proceedings in the Supreme Court, with the proviso that if any other enactment permitted or required it to commence proceedings in the magistrates’ court, that court would have jurisdiction as provided; (b) since the phrase “shall be recoverable” was used in s.86(1) of the Income Tax Ordinance, rather than “shall be recovered,” as appeared elsewhere in the Ordinance, the sub-section was permissive and gave the Crown a choice of forum; (c) accordingly, the trial judge had erred in setting aside the Attorney-General’s writ for lack of jurisdiction.

Held, allowing the appeal:

The Supreme Court had jurisdiction to hear a claim for the recovery of income tax, since by s.10(1) of the Crown Proceedings Ordinance, the

Supreme Court was the primary forum for instituting civil proceedings, and s.86(1) of the Income Tax Ordinance did not deprive the Supreme Court of that jurisdiction. The phrase "shall be recoverable" chosen by the legislature was permissive, contrasting with the mandatory phrase "shall be recovered" used elsewhere in the Ordinance, and operated to provide an additional route by which income tax could be recovered. Accordingly the Attorney-General had properly proceeded by writ in the Supreme Court (page 362, lines 8–35).

Legislation construed:

Crown Proceedings Ordinance (1984 Edition), s.10(1): The relevant terms of this sub-section are set out at page 362, lines 13–20.

Income Tax Ordinance (1984 Edition), s.86: The relevant terms of this section are set out at page 361, lines 32–38.

R.K. Mathew, Q.C., S.V. Catania and T.J. Rocca for the appellant;
The respondent did not appear and was not represented.

20 **O'CONNOR, J.A.:** This is an appeal against a decision of the Supreme Court in which it was held that the only forum in which the Crown could recover tax due from a person liable to pay it was the magistrates' court.

25 The writ issued in the name of the Attorney-General claimed some £99,000 with interest of some £42,000. This was said to be money that the defendant had collected or should have collected from its employees under the provisions of the Income Tax (Pay As You Earn) Regulations, 1989 over the period from July 1st, 1989 to December 23rd, 1992, and the interest due on it. The defendant obtained an order setting aside the writ on the ground that under s.86(1) of the Income Tax Ordinance, the court had no jurisdiction in respect of the claim.

30 The section reads:

"(1) Tax due under this Ordinance shall be recoverable summarily by the Commissioner as a civil debt.

35 (2) In any suit under subsection (1) the production of a certificate signed by the Commissioner giving the name and address of the defendant and the amount of tax due by him shall be sufficient evidence of the amount so due and sufficient authority for the magistrates' court to give judgment for such amount."

40 The learned judge held that the Income Tax Ordinance is, in effect, a code with its own method of recovering tax which is provided for by the above section, and that proceeding by way of action in the Supreme Court is thereby excluded, as it has no jurisdiction in the matter.

45 The respondent did not appear before us but Mr. Mathew, Q.C. pointed to submissions that he might have made if he had appeared. The main ground of appeal is that the learned judge misdirected himself by

misconstruing the section, failing to have regard to the clear meaning of the words and the constitutional position of the Crown. It is said that the clear meaning of the words in the section is to *extend* the routes by which tax can be recovered. Instead of confining the Crown to proceeding in the Supreme Court, which would be the position if s.86 were not there, the provisions of the section give a discretion to proceed either in the Supreme Court or in the magistrates' court. 5

As a matter of first impression, the word "recoverable" in sub-s. (1) means "able to be recovered" not "recovered." Looking at the matter apart from the Income Tax Ordinance, the position of the Crown in relation to civil proceedings appears in s.10(1) of the Crown Proceedings Ordinance which reads as follows: 10

"All civil proceedings by or against the Crown shall be instituted and proceeded with in the Supreme Court and in accordance with rules of court and not otherwise: 15

Provided that where any enactment now or at any time hereinafter in force requires or permits civil proceedings to be taken in the magistrates' court or the Court of First Instance such court shall have jurisdiction to hear and determine any such proceedings notwithstanding that the Crown is a party thereto." 20

So, the primary forum for litigation in which the Crown is a party is the Supreme Court. The matter for consideration is whether s.86(1) has deprived the Crown of that forum, as the learned judge held, or whether it has given it an additional forum—the magistrates' court—to which it may have recourse. 25

In a number of sections relating to the recovery of the tax, *e.g.* s.83(1), the Ordinance uses the phrase "be recovered" rather than (as in s.86(1)) "be recoverable." It is clear that a distinction is drawn in the Ordinance between these two phrases. The distinction would appear to be that "be recovered" is mandatory whereas "be recoverable" is permissive, leaving a choice as to jurisdictions. In my opinion, s.86(1) does not deprive the Supreme Court of the jurisdiction it otherwise has, nor does it prohibit the Crown from resorting to it. It merely gives the Crown an additional route to the recovery of tax, by resort to the magistrates' court. Which jurisdiction is chosen is a matter for the Crown's discretion. 30

I would allow the appeal. 35

FIELDSEND, P. and **DAVIS, J.A.** concurred.

Appeal allowed.