EMERY -v- COMMISSIONER OF INCOME TAX

High Court of Solomon Islands
(Ward C.J.)
Civil Case No. 125 of 1990
Hearing: 18 June 1991
Judgment: 28 June 1991

J. Sullivan and T. Kama for the Appellant
P. Afeau for the Respondent

WARD CJ: This is an appeal under section 72(4) of the Income Tax Act against a declaration by the Commissioner of Income Tax that the appellant should be the agent of his ex-wife for the purpose of collecting tax on alimony payments made to her by the appellant and seeking an order that the declaration be set aside.

Counsel have prepared an agreed statement of facts which sets out the background to the case.

> "1. *By a decree nisi of the Family Court of Australia made on 23rd May 1977 the Appellant was divorced from Janette Ellen Emery ("the Taxpayer"), such decree becoming absolute on 30th May 1977.*
>
> 2. *By order of the said Family Court of Australia made on or about 23rd May 1977 the Appellant was ordered to pay maintenance to the Taxpayer.*
>
> 3. *The Appellant is an Australian citizen who at all material times has resided in Solomon Islands. The Taxpayer is an Australian citizen, who at all material times has resided in Australia.*
>
> 4. *Since the making of the said orders the Appellant has made regular maintenance payments to the Taxpayer.*
>
> 5. *All such maintenance payments have been paid to and received by the Taxpayer in Australia.*
>
> 6. *By Notices of Assessment Nos. 11017 and 11018 each dated 7th November 1988 the Respondent assessed the Taxpayer to tax in respect of the Appellant's maintenance payments to the Taxpayer for 1986 and 1987.*
>
> 7. *By two further Notices of Assessment No. 3996 dated 21st April 1989 and No. 3872 dated 23rd May 1990 the Respondent assessed the Taxpayer to tax in respect of the Appellant's maintenance payments to the Taxpayer for 1988 and 1989.*

8. *Each of the said Notices of Assessment were issued to "Janette L. Ellen" care of the Appellant. The Respondent in referring to "Janette L. Ellen intended to refer to the Taxpayer.*

9. *On 23rd May 1990 the Respondent declared the Appellant to be the agent of "Janette L. Ellen " pursuant to section 72 of the Income Tax Act. In referring to "Janette L. Ellen" the Respondent intended to refer to the Taxpayer.*

10. *The amounts of maintenance assessed to tax and the tax assessed for each relevant year are as follows:-*

Year	*Maintenance Assessed*	*Tax Assessed*
1986	*$14,574.00*	*$3,774.12*
1987	*$17,710.00*	*$4,086.20*
1988	*$14,812.00*	*$3,869.04*
1989	*$16,834.00*	*$4,718.28"*

11. *The tax assessed has not been paid.*

12. *The Appellant has claimed and the Respondent has allowed in each of the said years a deduction for such maintenance payments in such proportion as the Appellant's Solomon Islands income bears to his world income.*

13. *The Appellant has made some of the maintenance payments from Australian accounts and some from Solomon Islands accounts."*

The grounds of appeal first refer to the mistaken name. It seems clear that, if the appeal fails, the assessments cannot be valid as they stand and will need to be reissued in the name of the taxpayer. However, as will be seen, that does not need to be considered further.

The important issue in this case and the one that counsel have principally addressed is set out in ground 10 -

"10. *The Commissioner has erred in law in that alimony payments received by a non-resident pursuant to an order of a foreign Court are not part of the income of a non-resident which was accrued in or derived from Solomon Islands and accordingly is not chargeable to tax pursuant to section 3(2) or any other provision of the Act."*

The tax on the alimony payments has been based on section 3(2)(d) of the Act. Section 3 provides:

"3 *Tax shall, subject to this Act, be charged for each year upon the income for that year of any person which -*

(1) accrued in, was derived from or was received in Solomon Islands, in the case of a resident person;

(2) accrued in or was derived from Solomon Islands in the case of a non-resident person, in respect of -

(a) gains or profits from -

(i) any business, for whatever period of time carried on;

(ii) any employment or services rendered;

(iii) any right granted to any other person for the use or possession of any property;

(b) dividends, interest or discounts;

(c) any pension, charge or annuity;

(d) any amount received by way of alimony or allowance under a decree of divorce, a judicial order of separation or maintenance or a deed of separation or maintenance.

(e) any amount deemed to be his income under this Act."

The Commissioner has based his assessment on the view that the alimony payments to the ex-wife in Australia form a part of her income that accrued in or was derived from Solomon Islands because the person actually paying was resident here. The appellant's main argument is that, in deciding the derivation of income, it is necessary to go to the source.

This was considered by the Privy Council in *Commissioner of Taxation -v- Kirk* (1900) AC 588. The question then was whether profits or products of iron ore extracted and processed in New South Wales but sold and paid for elsewhere were income that arose or accrued or were derived from New South Wales?

The New South Wales Supreme Court in that case and in an earlier case (*In re Tindal* 18 NSWLR 378) had held that the profits were derived from the sales and so were income which arose in the country of the sale.

The Privy Council held that was not the correct interpretation. They pointed out at page 592 -

"Their Lordships attach no special meaning to the word "derived," which they treat as synonymous with arising or accruing. It appears to their Lordships that there are four processes in the earning or production of this income -

(1) the extraction of the ore from the soil;

(2) the conversion of the crude ore into a merchantable product, which is a manufacturing process;

(3) the sale of the merchantable product;

(4) the receipt of the moneys arising from the sale.

All these processes are necessary stages which terminate in money, and the income is the money resulting less the expenses attendant on all the stages."

The Board concluded that the first two stages were clearly in New South Wales within the terms of the Act and therefore it was from New South Wales that the income was derived.

With respect, I agree with that conclusion. It is rarely sufficient simply to look at the immediate source of the money that makes up the income as it is often no more than the last link of a longer chain. As was stated in *Kirk's* case at page 593 -

*"The fallacy of the judgment of the Supreme Court in this and in **Tindal's case** is in leaving out of sight the initial stages, and fastening their attention exclusively on the final stage in the production of the income."*

In this case the alimony payments were received by the taxpayer in Australia but the money itself was paid by the appellant who is resident in Solomon Islands. It is an oversimplification to say that the appellant's residence, as the immediate source of the money, determines where the income accrued or was derived. It is only one part of a process which started with the court order in Australia. That court order is the source from which the alimony is derived.

Mr Afeau has sought to urge that the words "accrued" and "derived" are no longer normal English words here and should be taken to have a special technical meaning in this context. He is able to cite no authority in support of that contention and I cannot accept it. I take the usual meaning of those words. The suggestion in *Kirk's case* that accruing and derived have the same meaning has been adopted in a number of authorities since and I see no reason to differ.

The respondent also suggests the section can be interpreted in two possible ways and asks the Court to find in favour of the Commissioner's decision.

Lord Simonds stated the principle of interpretation of tax provisions in *Russell - v- Scott* (1948) 2 All E.R. 1 @ 5 -

"There is a maxim of income tax law which, though it may some times be overstressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax on him."

Thus had I found the provision could reasonably be considered to have alternative meanings, I should prefer that more favourable to the subject. However, as I have said, I find no ambiguity in the words used in section 3.

The alimony paid to the taxpayer, Janette Ellen Emery is not income accruing in or derived from Solomon Islands and is not taxable in Solomon Islands. That has been the point argued by counsel and it effectively settles the matter for the appellant.

However the appeal was against the declaration by the Commissioner that the appellant be the agent of his former wife for the purposes of collecting tax due and payable by her. Whilst the whole purpose of that declaration was to collect tax on the alimony payments and I have ruled they do not amount to income liable to tax in Solomon Islands, I have been shown no basis on which the declaration itself is incorrect. I cannot set aside that order and so the appeal in fact fails. However if, as I have said, the only basis for the declaration is to collect tax on the alimony payments, the Commissioner will no doubt himself cancel the declaration.

In all the circumstances I feel the appellant should have his costs.

(F.G.R. Ward)
CHIEF JUSTICE