

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 156 of 2003

Tax Appeal No. 129/1999

BETWEEN

British American Insurance
Company (Trinidad) Limited

Appellant

AND

The Board of Inland Revenue

Respondent

CORAM:

R. Hamel-Smith, J.A.

R. Nelson, J.A.

I. Archie, J.A.

APPEARANCES:

Mr. Stephen Singh appeared
for the appellant

Mr. Nassim Mohammed appeared
for the respondent.

DATE OF DELIVERY: October 20th, 2004

JUDGMENT

Nelson, J.A.

1. I have read the judgment of Hamel-Smith J.A and agree with it. However, I wish to add some observations of my own.
2. The appellant taxpayer is a resident company carrying on ordinary life assurance business, industrial life business, annuity business and general insurance.

3. The Revenue conducted an audit of the appellant taxpayer for the year of income 1991. In the course of the audit the Revenue discovered that the sum of \$710,524, which appeared in the taxpayer's profit and loss account and which also formed part of its long-term business account, had been transferred to the shareholders' account. The Revenue brought in the sum of \$710,524 to charge to tax at the prevailing rate of 40% pursuant to paragraph 2 of the First Schedule of the Corporation Tax Act Chap 75:02 ("the Act") as applied by section 3 of the Act.

4. For the purposes of this judgment it is not necessary to rehearse all the events that supervened between the Revenue's adjustment, the objection stage, the refusal of the Revenue to alter its additional assessment and the eventual appeal to the Tax Appeal Board.

5. In response to the Revenue's tax assessment notice dated February 24, 1992 the taxpayer company's adviser, Price Waterhouse, contended (a) that the net income in the Retained Earnings Account did not amount to a transfer pursuant to the First Schedule and (b) that according to the Board's practice the higher rate of corporation tax applied only to profits actually distributed to shareholders: see objection letter dated March 13, 1992.

6. The Revenue after making adjustments for an alleged refund of tax not actually made refused to alter its assessment to additional corporation tax. The taxpayer company appealed to the Tax Appeal Board, which upheld the additional assessment to corporation tax.

7. Before the Tax Appeal Board the Revenue contended that the full amount of \$710,524 transferred from the taxpayer's long-term insurance business to its shareholders' account was taxable at the normal corporation tax rate of 40% pursuant to paragraph 2 of the First Schedule of the Act.

8. The taxpayer company did not contest the fact of the transfer or its amount, but submitted that the \$710,524 comprised two streams of income: premium income and investment income. Accordingly only the investment income portion of the sum transferred should be taxed at 40%; the premium income portion would not therefore be taxable at all. The taxpayer then led evidence in support of two methods of apportioning the said sum of \$710,524: the accounting average valuation of surplus formula, which resulted in an investment income element of \$228,267, and "the classical actuarial analysis of surplus" method which produced an investment income factor of \$94,858.

9. The Tax Appeal Board after a very careful and exhaustive analysis of the evidence and arguments ruled (1) that there was one source of income, i.e, investment income and (2) that there was no legislative basis for apportionment.

10. The Tax Appeal Board accepted the Revenue's contention that the sum of \$710,524 was derived solely from the investment of the assets of the company's Statutory Fund for the year of income 1991.

11. At paragraph 35 the point of law for the determination of this court is stated as follows:

“35. The point of law for the opinion of the Court of Appeal is whether we were correct in holding that in accordance with Section 2 of the First Schedule of the Corporation Tax Act, Chap. 75:01 (sic) the full sum of \$710,524 which represents the “Shareholders’ Share of distributable surplus transferred to Profit and Loss Account” in the Long-Term Business Revenue Account of the Ordinary Life Business of the Appellant company for the year ended December 31, 1991 and which according to our finding of fact had been so transferred to the Profit and Loss Account of the Appellant company for 1991, should be taxed at the rate of 40% as we have found, or, as contended for by the Appellant company, whether 32% thereof should be taxed at the rate of 40% and 68% thereof should be taxed at the rate of 15%.”

The provisions of the Act relevant to the point of law

12. 1. Section 14 of the Act provides for a special regime of taxation for, inter alia, insurance companies (including life insurance companies). That special regime is to be found in the Fourth Schedule of the Act.

2. The Fourth Schedule has a general charging section in paragraph 1 in relation to insurance and other companies.

Paragraph 1 begins with the prefatory words “notwithstanding anything to the contrary contained in Part I of this Act, it is hereby provided that...”

3. Paragraph 1(2) of the Fourth Schedule contains the charge to tax for resident assurance companies such as the taxpayer company:

“(2) in the case of a resident assurance company (other than the long-term insurance business of such company), the profits on which corporation tax is payable shall be the full amount of the profits of the company’s business whenever carried on as ascertained from the revenue account of the company’s business in accordance with the provisions of Part I of this Act;”

13. It is therefore clear that prima facie, apart from their long-term insurance business, insurance companies are chargeable to corporation tax on all their profits as ascertained in accordance with Part I of the Act.

16. 4. As regards the long-term insurance business of an assurance company, the charging section is paragraph 3(1) of the Fourth Schedule.

17. 5. The profits of the long-term insurance business of an assurance company “on which corporation tax is payable shall be profits derived from the investment of its Statutory Fund...”: para 3(1).

18. As counsel for the appellant contended, rightly in my view, the only element of long-term assurance business, that is taxable is the investment income of the Statutory Fund.

19. 6. Indeed para 2 of the First Schedule (dealing with the rate of corporation tax in long-term insurance business) expressly provides, that “where profits (sc. of long-term insurance business) are transferred to the shareholders’ account, a corresponding amount of the profits... shall be

treated as chargeable at the rate of forty percent..."Therefore such transferred amounts are deemed to be taxable at 40%.

14. While I agree with counsel for the appellant that the profits of long-term business are not taxable unless it is profits from the investment of the Statutory Fund, I am firmly of the view that a transfer from that separate business to the company's profit and loss account makes the sum transferred taxable at the 40% corporation tax rate.

The issues on this appeal

15. The Tax Appeal Board was brutally frank: "While we have referred to the ponderous arguments and submissions in support of a rationale for apportionment of the shareholders' surplus, we in our view found that the matter is much simpler than what had been argued before us." I also endorse that view.

16. There is no dispute on the facts that \$710,524 was transferred from the taxpayers' long-term business account to the company's shareholders' account. The taxpayer's statement of income and retained earnings and note 9 thereto reveal that figure. The taxpayer's profit and loss account for the year ended December 31, 1992 describes the profit realized from Ordinary Life Business as \$710,524. The return, long-term Business Revenue Account for 1991 (the statutory Form A1 return), which is a statement of the capital held to meet liabilities and contingent liabilities and of the operations on that account, refers to the same figure of

\$710,524. For ease of reference the said return is attached to this judgment and marked Appendix "A".

17. The Tax Appeal Board analyzed the issues into ten sub-headings and made findings of fact in relation to each sub-head.

18. It is not necessary to recite them all. The critical finding of fact, which in my view was a question of mixed fact and law, was that the surplus on the Long Term Business Revenue Account transferred to shareholders, \$710,524, "was derived solely from the investment of the assets of the Appellant's Statutory Fund in the income year 1991."

19. Section 37 of the Insurance Act Chap 84:01 provides as follows:

"37. (1) Every company registered under this Act to carry on long-term insurance business or motor vehicle insurance business, or both, shall establish and maintain a statutory fund in respect of each such class of business.

(4) Every company carrying on long-term insurance business in Trinidad and Tobago shall place in trust in Trinidad and Tobago assets equal to its liability and contingency reserves with respect to its Trinidad and Tobago policy-holders as established by the balance sheet of the company as at the end of its last financial year.

...
(6) Assets required to be placed in trust pursuant to subsections (4) and (5) shall be so

placed not more than one month after the end of the financial year to which the balance sheet or the revenue account, as the case may be, of the company relates.”

20. It is clear from these provisions that at each financial year end the company’s actuary must calculate what further sum is needed to meet present and contingent liabilities and establish a new commencement figure for the Statutory Fund. In the Long Term Business Revenue Account there are inflows and outflows, but inflows of premium income and investment income are mixed with the start of year statutory fund. However, the net balance on the 1991 operations of the fund produces a notional profit of \$1,234,345. The company’s actuary, however, has certified that only an additional \$523,821 is needed to meet present and future liabilities, thus enabling the company to take out of the policyholders’ account, the balance of \$710,524, and transfer it to the ownership of the shareholders after declaration of a dividend. It is this change of ownership that makes the \$710,524 taxable at the applicable corporation tax rate of 40%.

21. In my judgment in an account where there are inflows of premium income of \$7,901,885 and investment income of \$3,799,638 and outflows of \$10,213,094 for claims, commissions and management expenses, there appears to be little justification for saying that \$710,524 of the balance of \$1,234,345 came solely from the investment income figure of

\$3,799,638. The composition of the sum transferred is, in my judgment, irrelevant to the chargeable event, the conversion of profits of the long-term business account to profits of the company's business to be distributed to shareholders. The charge to tax arises by virtue of section 14 of the Act and paragraph 1(2) of the Fourth Schedule and paragraph 2 of the First Schedule.

22. Counsel for the appellant sought to avoid this conclusion by contending that "profits of that business" in paragraph 2 of the First Schedule meant profits that are brought into charge to tax by paragraph 3(1) of the Fourth Schedule. However, I see no warrant for reading in the word "taxable" before the phrase "profits of that business".

23. In my judgment paragraph 2 of the First Schedule sets out the rate of corporation tax payable on that portion of the profits of long-term insurance business that is subject to tax, and specifies a circumstance in which profits of that business, i.e long-term insurance business, become subject to the 40% rate of corporation tax, namely a transfer from that accounting entity to another accounting entity, the company.

24. Since in my respectful view the key issue is the character of the \$710,524 in the hands of the company and ultimately the shareholders, I do not find it necessary to decide whether two sources of income contributed to the surplus, as the taxpayer contended or one, as the Revenue contended and the Tax Appeal Board found.

25. I agree with counsel for the Revenue and uphold the finding of the Tax Appeal Board that the full amount of \$710,524 is taxable.

26. I reject apportionment for the reasons advanced by the Tax Appeal Board i.e that there is no legislative authority in the Act, a taxing statute, for this course. I further reject apportionment as being irrelevant and, in respect of the proposed methods of apportionment, unreliable in view of the wide discrepancy between the results of the proposed methods.

Conclusion

27. In the result I would uphold the decision of The Tax Appeal Board for somewhat different reasons. I agree with the orders proposed by the learned President Hamel-Smith J.A.

Rolston F. Nelson,
Justice of Appeal.