



Michaelmas Term

[2015] UKPC 48

Privy Council Appeal No 0054 of 2014

JUDGMENT

**The Director General, Mauritius Revenue Authority (Appellant) vChettiar and others
(Respondents) (Mauritius)**

From the Supreme Court of Mauritius

before

Lord Mance

Lord Clarke

Lord Wilson

Lord Reed

Lord Hodge

JUDGMENT GIVEN ON

21 December 2015

Heard on 28 October 2015

Appellant

Philip Baker QC

Rajesharma Ramloll

Michael Firth

(Instructed by Royds LLP)

Respondents

Sir Hamid Moollan QC

Salim Moollan

Nandkishore Ramburn

Bishan Ramdenee

Peter Webster

(Instructed by Mr Omar Bahemia)

LORD WILSON:

1.

The question is whether the pension payable to a retiring Vice-President of the Republic of Mauritius pursuant to section 4 of the President's Emoluments and Pension Act 1992 ("PEPA") is exempt from tax.

2.

Mr Angidi Chettiar began to serve as Vice-President on 1 July 1997. When, on 17 February 2002, he ceased to hold office, a pension began to be paid to him pursuant to section 4 of PEPA. But the Commissioner of Income Tax ("the Commissioner") caused income tax to be deducted from it and, when challenged on behalf of Mr Chettiar, he confirmed his decision that the pension was not exempt from income tax. Mr Chettiar asked the Assessment Review Committee ("the Committee") to review the Commissioner's decision but on 13 October 2005 the Committee upheld it. Thereupon Mr Chettiar filed notice of appeal to the Supreme Court. He again served as Vice-President from 25 August 2007 until his death on 15 September 2010. His appeal had remained pending throughout that period and, following his death, his heirs were substituted as the appellants. Equally the Mauritius Revenue Authority ("the Authority") had by then assumed the functions of the Commissioner and had become the respondent to the appeal. On 9 September 2013 the Supreme Court (Domah and Mungly-Gulbul JJ) allowed the appeal and declared that Mr Chettiar's pension had been exempt from tax. Against this decision the Authority appeals to the Board.

3.

The British took control of Mauritius in 1810 and it remained a colony until 12 March 1968. During that period it had a Governor, who was appointed by the British government. On 12 March 1968 it became independent. A constitution was enacted under which The Queen was the Head of State and the Crown was to appoint a Governor-General. On 12 March 1992 Mauritius became a republic. The constitution was amended accordingly. Since that date ("Republic Day") the President has been the Head of State and he has been assisted by a Vice-President.

4.

Among the amendments to the constitution which took effect on Republic Day was the replacement of its original Chapter IV by a chapter entitled "The President and the Vice-President of the Republic of Mauritius". The replacement was achieved by section 5 of the Constitution of Mauritius (Amendment No. 3) Act 1991 ("the 1991 Amendment Act"). Within the new Chapter IV was the following section:

"30A. Privileges and immunities.

(1) Subject to section 64(5) no civil or criminal proceedings shall lie against the President or the Vice-President in respect of the performance by him of the functions of his office or in respect of any act done or purported to be done by him in the performance of those functions.

(2) Subject to section 64(5), no process, warrant or summons shall be issued or executed against the President or the Vice-President during his term of office.

(3) The President or the Vice-President shall be entitled –

(a) without payment of any rent or tax, to the use of his official residence;

(b) to such emoluments, allowances and privileges, exempt from any tax thereon, as may be prescribed.

(4) No alteration to any of the entitlements specified in subsection (3) which is to the disadvantage of the President or the Vice-President shall have effect without his consent."

5.

So section 30A(3)(b) of the Constitution, the terms of which have remained unchanged since Republic Day, provides that such of the Vice-President's "emoluments ... as may be prescribed" shall be "exempt from any tax thereon".

6.

The first task is to ascertain the meaning which should be given to the word “emoluments”. It is not defined in the Constitution. Is the solution therefore to be found in the ordinary law about income tax?

7.

The Income Tax Act 1974 (“the 1974 Act”) was in force on Republic Day and remained in force until 1 July 1996, when it was replaced by the Income Tax Act 1995 (“the 1995 Act”).

8.

Section 7(1) of the 1974 Act provided as follows:

“The following income shall be exempt from income tax –

the emoluments of the Governor-General, whether or not he is on leave ...”

With effect from Republic Day the word “Governor-General” above was replaced by the word “President”: see section 23(2)(a) of the 1991 Amendment Act. It is irrelevant for present purposes that for some reason the constitutional exemption from tax of the Vice-President’s emoluments (which on any view included his salary) was not reflected in the ordinary law about income tax until the coming into force of the 1995 Act.

9.

So what was the meaning of the word “emoluments” in relation to the President under the amended section 7(1)(a) of the 1974 Act? Happily it was defined in the Act itself. Section 2(1), which was the interpretation section, provided:

“In this Act –

...

‘emoluments’ means any advantage referred to in section 11(1)(b) ...”

Section 11(1)(b) referred to “any advantage in money or money’s worth” which was:

“(i) salary, wages ...;

(ii) superannuation, compensation for loss of office, pension”

10.

It is therefore clear that under the 1974 Act the word “emoluments” included “pension”. It is unsurprising, therefore that, according to evidence accepted by the Committee, at least one Governor-General had not been charged to income tax on his pension; nor is there reason to think that the other Governors-General had been treated differently. More importantly there seems at first sight no reason to doubt that, in inserting section 30A(3)(b) into the Constitution to the effect that the prescribed “emoluments” of the President and Vice-President should be exempt from tax, Parliament in 1991 intended that the word “emoluments” should bear the meaning which it bore in the 1974 Act itself.

11.

But where were the emoluments of the President and Vice-President “prescribed”?

12.

They were prescribed in PEPA.

13.

PEPA had its second reading in the National Assembly on 26 May 1992 (as to which see para 25 below); it became law on 29 May 1992 and was given retrospective effect back to Republic Day. It described its purpose as being to “provide for the emoluments of the President and the Vice-President and for pension to retiring Presidents”. There was clearly a deliberate decision at that time not to pay a pension to retiring Vice-Presidents. Section 3, which was headed “Emoluments of the President and Vice-President”, provided, by subsection (1), that the President should be paid “by way of emoluments” a salary of Rs 35,000 per month and a duty allowance of Rs 10,000 per month; and, by subsection (2), that the Vice-President should be paid “by way of emoluments” a salary of Rs 24,000 per month and a duty allowance of Rs 10,000 per month. Section 4, which was headed “Pension and other benefits to retiring Presidents”, provided, by subsection (1), that a retiring President should be paid a monthly pension equivalent to two-thirds of his salary for the remainder of his life; by subsection (2), that he should not undertake any remunerative employment during the remainder of his life; and, by subsection (3), that he should for the remainder of his life also be entitled to the service of a clerk-typist and an office attendant free of charge and to the use of a state motor-car with chauffeur.

14.

In 1997, by the President’s Emoluments and Pension (Amendment) Act 1997, Parliament decided to provide for the payment of a pension to retiring Vice-Presidents. By section 5(b), section 4(1) of PEPA was replaced by a provision which entitled a retiring Vice-President, as well as a retiring President, to a pension equivalent to two-thirds of his salary; and, by section 5(c), section 4(2) and (3) of PEPA was enlarged so as also to impose upon a retiring Vice-President the prohibition against undertaking remunerative employment and to entitle him to the service of a clerk-typist and of an office attendant and to the use of a chauffeur-driven car.

15.

Since 1997 PEPA has been amended on four further occasions but, on each occasion, only in order to increase the amount of the salaries and duty allowances of the President and the Vice-President.

16.

It is important to note that PEPA says nothing in respect of the liability or otherwise of the President and Vice-President to income tax on the salaries, duty allowances, pensions and retirement perquisites for which it provides. Apart from in the Constitution itself, their liability or otherwise to tax in these respects has remained governed first by the 1974 Act and latterly by the 1995 Act.

17.

The structure of the 1995 Act is different from that of the 1974 Act but at first sight it seems as clear under the 1995 Act that the pensions of the President and Vice-President are exempt from income tax as it was clear under the 1974 Act that the President’s pension was exempt from income tax. There are terminological differences but at first sight they seem insignificant. Within the 1995 Act there are, in this respect, the following four provisions around which to navigate:

(a)

First, section 7(2) provides:

“Any income specified in Part II of the Second Schedule shall be exempt from income tax.”

(b)

Second, item one of the second schedule specifies:

“Emoluments derived from the office of the President or Vice-President.”

These words are to be contrasted with the words “the emoluments of the President ...” in section 7(1) (a) of the 1974 Act as amended.

(c)

Third, section 2, which, as in the 1974 Act, is the interpretation section, provides:

“In this Act, unless the context otherwise requires –

...

‘emoluments’

(a) means any advantage in money or in money’s worth referred to in section 10(1)(a) ...”

These words are to be contrasted with the words in section 2(1) of the 1974 Act, in which there was no clause which allowed for a different meaning if the context otherwise required.

(d)

And fourth, section 10(1)(a) refers, just as section 11(1)(b) of the 1974 Act referred, to:

“(i) salary, wages ...;

(i)

superannuation, compensation for loss of office, pension ...”

18.

How, then, does the Authority seek to dispute what so far seems the inescapable conclusion that under the Constitution, and for that matter also under the 1995 Act, Mr Chettiar’s pension was exempt from tax?

19.

The Authority makes four submissions. The first applies to the Constitution. The second and third apply to the 1995 Act. The fourth, albeit based on material which may be inadmissible, applies to both.

20.

Its first submission is that, properly construed, section 30A(3) of the Constitution, set out in para 4 above, does not relate to pensions. The Authority

(a)

points out that the subsection refers only to “[t]he President or the Vice-President” and not also to “the retiring President or the retiring Vice-President”;

(b)

relies on the fact that the exemption from tax on the use of an official residence in para (a) of the subsection clearly relates to the enjoyment of an exemption only during the period of office and contends that para (b) of the subsection should be similarly construed; and, in particular,

(c)

stresses that the reference in para (b) to such emoluments, allowances and privileges “as may be prescribed” makes a direct link with the statute in which they are indeed prescribed, namely PEPA,

and that, not only in its heading but more importantly in sections 3 and 4, PEPA draws a distinction between “emoluments” and “pension”.

21.

It is fair to say that the view of the Supreme Court may have been that the Constitution did no more than to leave open the taxability of the pensions of retired Presidents and Vice-Presidents, with the result that recourse should be had to the ordinary law, namely to the 1995 Act. Nevertheless the Board rejects the first submission. In inserting section 30A into the Constitution by the 1991 Amendment Act, Parliament understood that on retirement a President was to be entitled, like a Governor-General before him, to a pension. In providing in section 30A(3)(b) that his “emoluments” should be exempt from tax, Parliament also knew that the Income Tax Act then in force, namely the 1974 Act, defined the word “emoluments” so as to include a pension. Indeed, by section 23(2)(a) of that same 1991 Amendment Act, Parliament was providing that the Governor-General’s exemption from income tax on his emoluments under the 1974 Act should thenceforth apply instead to the President. Parliament was hardly likely to be taking away from the President part of what, by that amendment, it was in the course of giving to him. If, for some reason unexplained to the Board, it had intended that, unlike the retirement perquisites which the Authority has never contended to be taxable, the pension of the President and, if ever later prescribed, of the Vice-President was to be taxable, Parliament would never have expressed itself as it did in section 30A. The role afforded under section 30A(3)(b) to what was to become PEPA was to prescribe the emoluments, allowances and privileges of the President and the Vice-President. It was given no role, nor did it claim any role, in relation to their exemption from tax, which by para (b) of the subsection was unqualified. The distinction drawn in PEPA between “emoluments” and “pension” is irrelevant.

22.

The Authority’s second submission, not made to the Supreme Court, is based upon the new clause, introduced in section 2 of the 1995 Act, which allows for a different meaning of the word “emoluments” if the context otherwise requires. The context, says the Authority, does indeed otherwise require. What context? The Authority again points to the distinction drawn in PEPA between “emoluments” and “pension”. Again it relies on the provisions of section 30A of the Constitution which limit enjoyment of specified benefits to the period when the President and Vice-President are in office.

23.

The Authority links this last point with its third submission, being the submission which found favour with the Committee. It is based upon the new words, introduced in item one of the second schedule to the 1995 Act, to the effect that only emoluments “derived from” the office of the President and the Vice-President are exempt from tax. The argument is that an office-holder derives emoluments from an office only if his entitlement to receive them arises during his period in office. Yet again the Authority seeks support from the provisions which limit enjoyment of specified benefits to the period when the President and Vice-President are in office, for example section 30A(2) of the Constitution, which gives each of them immunity from process, warrant or summons “during his term of office”. The difficulty for the Authority, exemplified by that subsection, is that, when Parliament wishes to limit a benefit to enjoyment during the period of office, it says so.

24.

Based, as they are, on new words introduced by Parliament in the 1995 Act, the Authority’s second and third submissions appear to require it to concede that between 1992 and 1996 any pension enjoyed by a retiring President would have been exempt from tax and that, in passing the 1995 Act, Parliament for some opaque reason saw fit to remove the exemption from the President’s pension and

from any pension which might in the future be prescribed for the Vice-President. In the light of the Board's conclusion (subject to the fourth submission) that section 30A(3)(b) of the Constitution required the continuing exemption of their pensions from tax, any inconsistent provision in the 1995 Act would have been void: see section 2 of the Constitution. But the second and third submissions are invalid. The context does not require that in the 1995 Act the pensions of the President and Vice-President should, exceptionally, fall outside the ambit of the word "emoluments". For they are "derived from" an office if, irrespective of the time at which entitlement to receive them arises, the office is the source of them.

25.

The Authority's fourth submission was, like the second, not made to the Supreme Court. It is based on the recent discovery by its Mauritian counsel of a statement made by the Prime Minister to the National Assembly on 26 May 1992 when he was in the course of moving the second reading of the Bill which became PEPA. He said:

"It is to be noted that whilst the emoluments and allowances of the President and the Vice-President will be tax free, the [President's] pension will not be so exempt."

26.

The Authority applies to the Board pursuant to Practice Direction 6.3.3 for permission to introduce the Prime Minister's statement into the material before it. It cites the decision of the Supreme Court in *Madelen Clothing Co Ltd v Termination of Contracts of Service Board* [1981] MR 284 for the proposition, at p 288, that, where (but only where) the law is ambiguous or self-contradictory, reference may be made to travaux préparatoires but that even then they must be used only with the utmost circumspection.

27.

The Board refuses to grant permission to the Authority to introduce the Prime Minister's statement before it. It does so for the following reasons:

(a)

The law exempting the pensions of the President and the Vice-President from tax is neither ambiguous nor self-contradictory.

(b)

The Prime Minister was moving the second reading of a bill which did not purport to address the subjection or otherwise to tax of the pension of a retiring President. So this statement is not therefore part of the travaux préparatoires of any of the enactments which the appeal requires the Board to construe.

(c)

The Authority itself appears to be constrained to concede that, at the time of the Prime Minister's statement and for the four years which followed it, the President's pension was indeed exempt from tax: see para 24 above.

(d)

In any event, with all due respect to the Prime Minister, his observation, for which he cited no authority, was incorrect.

28.

The Authority brings an appeal which not even Mr Baker QC on its behalf can render arguable. Its appeal is dismissed with costs. Its application to introduce the Prime Minister's statement should never have been made and is also dismissed with costs. The entitlement of the President and the Vice-President to exemption from tax on their prescribed pensions and other emoluments, allowances and privileges is clearly provided for in the 1995 Act. Overarchingly, however, their entitlement to exemption is entrenched in the Constitution, no doubt in order to confer upon them an extra level of protection against hypothetical executive pressure.