IN THE PRIVY COUNCIL

JCPC/2025/0015

ON APPEAL FROM THE COURT OF APPEAL OF THE EASTERN CARIBBEAN SUPREME COURT (SAINT VINCENT AND THE GRENADINES)

SVGHCVAP 2021/0010

BETWEEN: -

UNICOMER (ST. VINCENT) LTD

Appellant

and

(1) APPEAL COMMISSIONERS

(2) THE COMPTROLLER OF INLAND REVUNUE

Respondents

STATEMENT OF FACTS AND ISSUES

FACTS

1. In Saint Vincent and the Grenadines, income tax is payable by corporations as well as individuals. The main statute is the Income Tax Act (Ch. 435) ('the ITA').

2. The ITA's provisions include the following:

> '7. Charge to tax
>
> (1) […] [T]ax shall be charged for each year of assessment on the chargeable income of every person for that year.
>
> […].'
>
> '9. Income accruing
>
> (1) Subject to this section, income shall accrue to a person for the purposes of this Act—

(a) in the case of income from employment, when it is earned;

(b) in the case of a business, in relation to which the Comptroller is satisfied that a commercially recognised system of accounting other than a cash received basis is regularly followed, when it is credited, or should be credited, in the books of account of such person;

(c) in the case of a business where, pursuant to subsection (2), the Comptroller has accepted the preparation by that person of his accounts on a cash received basis, when it is received by him;

(d) in the case of interest, when it is paid; and

(e) in any other case, when it becomes due and payable to him.

(2) Where any person regularly prepares the accounts of his business on a cash received basis the Comptroller may, on application and in his discretion, accept such method of accounting or may direct that accounts shall be prepared on an accruals basis and the income accrued to such person shall be ascertained accordingly.

[...].'

34. Business income

(1) Subject to this Act, the assessable income of any person for any year of assessment, insofar as it is derived from a business, shall be the gains or profits accrued therefrom during the basis period for that year of assessment. […].'

'23. Transactions designed to avoid liability to tax

(1) Where any transaction, operation or scheme (hereinafter in this subsection referred to as "a transaction") including a transaction involving the alienation of property, which has been entered into or carried out, whether before, on, or after the 1st January, 1979, has the effect of avoiding, reducing or postponing the liability to tax of any person for any year of assessment and the Comptroller is of the opinion that the transaction—

(a) was entered into or carried out by means or in a manner which would not normally be employed in the entering into or carrying out of a transaction of the nature of the transaction in question; or

(b) has created rights or obligations which would not normally be created between independent persons dealing at arm's length under a transaction of the nature of the transaction in question, the Comptroller shall determine the liability to tax as if the transaction had not been entered into, or in such other manner as he deems appropriate to counteract such avoidance, reduction or postponement of liability as would otherwise be effected by the transaction.

(2) Where a resident carries on business with a non-resident and, in the opinion of the Comptroller, by reason of the relationship between such persons, the course of business between them has been so arranged that the business done by the resident produces to him either more or less gains or profits than those which would be expected to arise from that business if such relationship had not existed, the Comptroller may determine in such manner as appears to him to be reasonable—

(a) whether any additional gains or profits should be deemed to be assessable income of the resident person; and

(b) whether any part of the gains or profits of the non-resident person should be deemed to have accrued from a source in Saint Vincent and the Grenadines.

[…].'

'66. Deduction of tax from payments to non-residents

(1) Every person who makes any payments to a non-resident, shall deduct tax from such payments in accordance with and in the manner specified in the Third Schedule, and shall carry out such other obligations as are imposed by that Schedule.

[…]

(4) Where a foreign insurance company, carrying on mercantile or life insurance business, is not registered in Saint Vincent and the Grenadines, the insurance premium accruing or arising in Saint Vincent and the Grenadines shall be deemed to be income and shall be liable to withholding tax under this section.

[…]

Third Schedule

1. Application

(1) This Schedule applies to every person who makes any payment by way of—

(a) . . . . . .

(b) interest or discounts;

(c) rental, lease, premium or licence in respect of real property;

(d) royalties and rentals of moveable property;

(e) management charge

(f) commission or fee, […]

(g) annuities or other periodic payments, including payments by way of alimony or maintenance;

(h) the distribution of income of a trust, being income of the kind specified in subparagraph (a) to (g);

(i) insurance premiums excluding re-insurance premiums;

(j) any other payments of an income nature,

to a non-resident, and […] does not apply to any other payments to a non-resident carrying on business or exercising employment in Saint Vincent and the Grenadines.

[…]

2. Deduction to be made by person making payment

Where any payment is made to which this Schedule applies, then such amount shall not form chargeable income of the person to whom the payment is made, and the person making such payment shall deduct tax from the gross amount of the income from such source at the rate […].'

3. The Appellant is a company registered in Saint Vincent and the Grenadines, which engages in the business of, *inter alia*, selling household furniture and appliances though its 'Courts' branded stores. In furtherance of sales, the Appellant offers credit financing to its customers through a standard-form Hire Purchase Agreement, and provides Credit Protection Insurance ('CPI') to its hire purchase customers. The Appellant acted as an intermediary in connection with the placing and administration of this insurance. Its customers are the assureds under the CPI policy.

4. The insurer under the CPI policy was (and still is) Massy United Insurance Limited (formerly known as United Insurance Company Limited) ('United'), a Barbados-based insurer, permitted by local regulators in St Vincent and the Grenadines to conduct business through its branch in Saint Vincent and the Grenadines.

5. United's liabilities under that primary layer of insurance were, in turn, reinsured with Canterbury Insurance Company Limited ('Canterbury'), an insurer incorporated in and conducting business in Bermuda, on a 100 percent quota share basis (for 5 percent of the original premium). United was the reassured under that policy.

6. Canterbury was in common ultimate ownership with the Appellant within the Unicomer group. Canterbury was not authorised to write insurance business in Saint Vincent and the Grenadines. The Appellant was not authorised to write insurance business at all, in any location.

7. Depending on the type of cover chosen by the customer, the policy protected both the asset acquired and the customer's financial liabilities towards the Appellant under the HP agreement.

8. Regarding the actual (physical) cash movements between the various parties: (i) premiums paid by the customers were collected by the Appellant, (ii) the premium (net of claims and commission) was paid by the Appellant to United and (iii) the reinsurance premium was paid by United to Canterbury. Subject only to the risk of insolvency of Canterbury, United passed on both one hundred percent (100%) of the risk and ninety five percent (95%) of the net premium.

9. The Appellant was assessed to income tax on the sum of the disallowed CPI premiums paid by it (EC$4,450,00) to United during the income tax years 2007 to 2011. The Appellant was assessed to withholding tax on this sum (EC$4,450,00) on the footing that the sum had been paid to a non-resident that did not carry on business in Saint Vincent and the Grenadines. The Appellant was also assessed to additional income tax on the full sale of value of goods purchased on hire

purchase terms from the point in time that the customer executed the hire purchase contract (i.e. the Appellant was effectively subject to tax in the same manner for cash and hire purchase sale transactions). Collectively, the additional assessments were in the amount of EC$12,666,798.23.

10. The basis of the corporate income tax and withholding tax assessments in relation to the CPI premium was that the Second Respondent considered that United was merely a 'conduit' (ie without commercial substance) and that accordingly the substance of the CPI payments was for the benefit of Canterbury, a non-resident of Saint Vincent and the Grenadines. In this connection, the Second Respondent relied *inter alia* on certain of the Appellant's audited financial statements for the relevant period that identified 'CPI expense, net of commission' as being paid to a related party (Canterbury). Concerning this, (i) the Second Respondent disallowed the expense for income tax purposes and cited Section 23 of the ITA; and (ii) raised a withholding tax liability citing Section 66 and the Third Schedule of the ITA in support.

11. Concerning the recognition of hire purchase income, the Second Respondent's position is that Section 9(1)(b) of the ITA required the Appellant to account for the sales income at the time the customer entered into the hire purchase agreement, not (as is the Appellant's position) after the instalments are actually received by the Appellant.

12. The Appellant's appeal against the assessment was dismissed by the First Respondent on 30th November 2018, which conclusion was confirmed respectively by the High Court on 29th April 2021, and the Court of Appeal by an order dated 17th April 2024. Unicomer appeals as of right to His Majesty in Council, with final leave of the Court of Appeal, granted on 10th December 2024.

ISSUES

13. Three main issues arise on this appeal:

a. Whether the Court of Appeal erred in connection with the application of Section 23(1) of the ITA:

b. Whether the Court of Appeal erred in connection with the application of Section 66 of the ITA.

c. Whether the Court of Appeal erred in connection with the application of Section 9 of the ITA.

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