



20 May 2020

PRESS SUMMARY

Fowler (Respondent) v Commissioners for Her Majesty’s Revenue and Customs (Appellant)
[2020] UKSC 22

On appeal from: [2018] EWCA Civ 2544

JUSTICES: Lord Hodge (Deputy President), Lady Black, Lord Briggs, Lady Arden, Lord Hamblen

BACKGROUND TO THE APPEAL

Mr Martin Fowler is a qualified diver who is resident in the Republic of South Africa. During the 2011/12 and 2012/13 tax years he undertook diving engagements in the waters of the UK’s continental shelf.

HMRC says Mr Fowler is liable to pay UK income tax for this period. Whether he is liable depends on the application of a Double Taxation Treaty between the UK and South Africa. Article 7 of the Treaty provides that self-employed persons are taxed only where they are resident (i.e. South Africa), whereas article 14 provides that employees may be taxed where they work (i.e. the UK). For the purposes of this appeal, the parties have assumed that Mr Fowler was an employee.

Mr Fowler claims he is nevertheless not liable to pay tax in the UK. His case centres on a “deeming provision” in section 15 of the UK’s Income Tax (Trading and Other Income) Act 2005 (“**ITTOIA**”). This provides that an employed seabed diver is “treated” as self-employed for the purposes of UK income tax. A previous provision of this kind was originally enacted in the 1970s in order to allow employed seabed divers, who commonly paid for their own expenses, to access the more generous regime tax-deductible expenses which was available to the self-employed.

Mr Fowler argues that, since he is treated as self-employed for income tax purposes, he must be treated as self-employed under the Treaty and is therefore only taxable in South Africa. HMRC, on the other hand, says ITTOIA does not affect whether someone *is* an employee, but only regulates the manner in which an employee is taxed.

The issue has divided the courts below. The First-tier Tribunal (Tax Chamber) was persuaded by Mr Fowler’s arguments but the Upper Tribunal (Tax and Chancery Chamber) allowed HMRC’s appeal. The Court of Appeal was divided on the question, with the majority agreeing with Mr Fowler. HMRC now appeals to the Supreme Court.

JUDGMENT

The Supreme Court unanimously allows HMRC’s appeal, holding that (if the parties’ factual assumptions are correct) Mr Fowler should be treated as an employee and is subject to UK income tax. Lord Briggs gives the only judgment.

REASONS FOR THE JUDGMENT

Expressions in the Treaty such as “salaries, wages and other remuneration”, “employment” and “enterprise” should be given their ordinary meaning unless domestic legislation alters the meaning which they would otherwise have [18; 30].

Section 15 of ITTOIA provides that a person who would otherwise be taxed as an employee is “instead treated” as self-employed for the purposes of domestic income tax. Deeming provisions of this kind create a “statutory fiction” which should be followed as far as required for the purposes for which the fiction was created. The courts will recognise the consequences of that fiction being real, but not where this will produce unjust, absurd or anomalous results [27].

Although section 15 uses the expressions “income”, “employment” and “trade”, it does not alter the meaning of those terms but takes their ordinary meaning as the starting point for a statutory fiction [31-32]. Properly understood, it taxes the income of an employed diver in a particular manner which includes the fiction that the diver is carrying on a trade. That fiction is not created for the purpose of rendering a qualifying diver immune from tax in the UK, or for adjudicating between the UK and South Africa as potential recipients of tax, but to adjust the basis of a continuing UK income tax liability [33].

Since the Treaty is not concerned with the manner in which taxes are levied, it would be contrary to the purposes of the Treaty to redefine its scope by reference to ITTOIA. It would also be contrary to the purpose of ITTOIA and would produce an anomalous result [33-34].

References in square brackets are to paragraphs in the judgment.

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<https://supremecourt.uk/decided-cases/index.html>