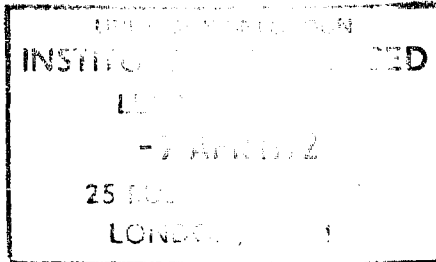


IN THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL

No. 31 of 1970

ON APPEAL FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :



WALTER FLETCHER ON HIS OWN  
BEHALF AND ON BEHALF OF TRUSTEES  
AND COMMITTEE OF DOCTOR'S CAVE  
BATHING CLUB ... ..

Appellant

- and -

THE COMMISSIONER OF INCOME TAX

Respondent

C A S E FOR THE APPELLANT

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1. This is an appeal from a Judgment and Order of the Court of Appeal of Jamaica (Luckhoo J., Shelley J.A. and Moody J.A.) dated 28th March, 1969, allowing an appeal by the Respondent from the Judgment of Edun J. dated 19th December, 1966, under which the Respondent's appeal against a decision of the Income Tax Appeal Board dated 20th April, 1966 was dismissed. By its decision the Income Tax Appeal Board unanimously allowed the Appellant's appeal against the decision of the Respondent to include certain receipts in the computation of the Appellant's income subject to income tax in the year of assessment 1964.

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2. The Appellant is the Chairman of the Board of Trustees and Committee of Doctor's Cave Bathing Club (hereinafter referred to as "the Club") which is a members' club consisting of ordinary, honorary, hotel and temporary members. Annual membership fees for ordinary members are £1.10.0. for each single person, and £3. 0. 0. for ordinary family membership. An entrance fee of £ 3. 3. 0. is payable by every person on his election as an ordinary member and, in the case of family memberships, £3. 3. 0. by the applicant plus £1. 1. 0. for each additional member of the family registered as a user of the Club. Hotel members, being the owners or operators of hotels in Montego Bay, pay to the Club in addition to an annual subscription of £1. 10. 0. an aggregate amount based on the "audited house count" of their guests or such other amount as may from time to time

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be agreed by the Committee of the Club; and the resident guests of such hotels are entitled to the use and amenities of the Club.

3. (i) There is a preliminary question in this appeal as to whether the Court of Appeal rightly granted the Appellant leave to appeal under Section 110(1)(a) of the Constitution of Jamaica, and, if it did not, whether the Appellant is entitled to bring this appeal under any other provision of Section 110. 10
- (ii) Copies of the provisions of Section 110 and of the relevant provisions of the Income Tax Law No.59 of 1954 are included with this case.
- (iii) The Appellant bring this appeal by leave of the Court of Appeal given in a unanimous judgment delivered on 31st July, 1969. Moody J.A. held that the Appellant was entitled as of right to bring this appeal by the provisions of Section 110(1)(a). The question in dispute was not whether the Appellant should pay income tax of £145 but whether a sum of £1,720 received from hotel members pursuant to the Club Rules was to be brought into account in computing the chargeable profits of the Appellant. The matter in dispute involved directly a right of the Appellant to have it determined how the sum of £1,720 should be treated for income tax purposes, and also a question respecting personal property, i.e. the sum of £1,720, of the value of upwards of £500. Accordingly, the conditions of Section 110(1)(a) were satisfied, and an appeal lay as of right. 20 30
- (iv) The Appellant submits that the decision of the Court of Appeal on this point was rightly made for the following reasons:- 40
- (a) It is submitted that the sum of £1,720 received from hotel members constitutes property within the contemplation of Section 110(1)(a). The primary question in this appeal is how this sum should be treated for tax purposes. Therefore,

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this appeal directly involves a question concerning property of a value of upwards of £500 and lies as of right under Section 110(1)(a).

10 (b) In the alternative, it is submitted that the right of the Club to receive subscriptions from hotel members constitutes either a right or property within the contemplation of Section 110(1)(a). The value of that right or property in view merely of the sums received under it in the year in question in this appeal (apart from sums received in subsequent years) is clearly of a value of upwards of £500. This appeal, therefore, for the reason given in sub-paragraph (a) above indirectly involves a question concerning a right or property of a value of upwards of £500 and lies as of right under Section 110(1)(a).

20 (c) In the further alternative, since the liability to tax in future years of assessment of sums received from hotel members will, in principle, be determined by the result of this appeal, and since it appears from the affidavit of Mr. Downer included in the Record as Document No. 14 that tax well in excess of £500 in respect of such sums is in dispute for subsequent years of assessment, it is submitted that the value of the matter in dispute is in excess of £500. Therefore, an appeal lies as of right under Section 110(1)(a).

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30 (d) In the further alternative, in so far as it involves a consideration of the principle of mutuality, this appeal involves a matter of great general and public importance. It is submitted that had the Court of Appeal found it necessary to consider whether this appeal could be brought under the provisions of Section 110(2)(a), it would have allowed the appeal to be brought under those provisions. Therefore, if the Court of Appeal decided wrongly under Section 110(1)(a), their decision should, it is submitted, be upheld under  
40 Section 110(2)(a).

(e) Should the decision of the Court of Appeal not be upheld on any of the foregoing grounds, the Appellant will beg leave to submit a petition for special leave to appeal.

4. The primary questions for determination in the main appeal are (i) whether in so far as it received subscriptions from hotel members the Club was

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carrying on any trade or business and (ii) if it was, whether such subscriptions are to be left out of account in computing the chargeable profits of the Club because of the application of the mutuality principle.

5. The facts of the case are set out in the Statement of Facts and in the judgment of Edun J. In addition to the facts summarised in paragraph 2 above, the following facts are material:

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- (i) Only ordinary and hotel members have voting rights in the Club, each ordinary and hotel member having one vote.
- (ii) Ordinary and hotel members have proprietary rights in the Club.
- (iii) Each guest of an hotel member is entitled to enjoy the facilities and amenities of the Club without paying the hotel member or the Club anything
- (iv) The annual subscriptions of £1. 10. 0. of hotel members, unlike the amounts based on the audited house counts, are not brought into charge to tax by the Respondent.

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6. On the 14th March, 1966, the Appellant appealed to the Income Tax Appeal Board against a decision of the Respondent to include in the assessment of the Appellant for the year of assessment 1964 subscriptions paid by hotel members computed on the basis of the "house count". The Board were unanimously of the opinion that the appeal should be allowed

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p.12 1.6 ff.

because "there is no trading based on the hotel" (sic) and "there is a mutuality of interests which entitled us to reach a conclusion that income tax is not chargeable".

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7. On the 5th April, 1966, the Respondent gave notice of appeal to a Judge of the Supreme Court of Judicature of Jamaica. The Respondent

p.14 1.15 ff.

maintained that so far as the annual subscriptions of the hotel members were made up of the "audited house count", they were taxable in the hands of the Appellant. In the alternative the Respondent contended that the transaction, and in particular that amendment to the rules

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and bylaws of the Club, by which the special category of membership known as "hotel members" was created was an "artificial" transaction which reduced or would reduce the amount of tax payable by the Appellant within the intendment of Section 10(1) of the Income Tax Law 59 of 1954.

10 8. The matter came on for hearing in the Supreme Court before Edun J. who delivered his judgment on the 19th December, 1966. The learned Judge dismissed the appeal.

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9. The learned Judge in dealing with the mutuality principle cited the following passage from the judgment of Lord MacMillan in Municipal Mutual Insurance Limited v. Hills, 16 Tax Cas. 430 at page 448:

p.31 1.4 ff.

20 "the cardinal requirement is that all the contributors to the common fund must be entitled to participate in the surplus and that all the participators in the surplus must be contributors to the common fund; in other words, there must be complete identity between the contributors and the participators. If this requirement is satisfied, the particular form which the association takes is immaterial".

30 The learned Judge stated that the facts of the present case showed that the contributions or additional payments based upon the audited house count were borne exclusively by the hotel members and that, in a winding up, the hotel members were entitled to share equally with other members in the surplus or assets of the Club. Further, the guests of hotel members did not contribute anything to the hotel members or to the Club. In the view of the learned Judge the payment by the hotel member of an additional amount based on the audited house count (i) constituted the hotel member a member of the Club (ii) entitles its guests to the use and amenities of the Club and (iii) the rights of those guests were dependent upon the membership of the hotel member. On this footing the additional payments were membership subscriptions and, consequently, the Club could not be said to be trading with non-members. Accordingly the learned Judge was of the view that the mutuality principle was applicable.

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p.37 1.11 ff.

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The learned Judge dismissed the Respondent's

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appeal.

- p.48 1.1 10. Under a Notice of Appeal dated 3rd January, 1967, the Respondent gave notice of appeal to the Court of Appeal of Jamaica on the grounds therein more particularly set out.
- p.58 1.39 By a majority (Mr. Justice Moody dissenting) the Court of Appeal allowed the Respondent's appeal.
- p.53 1.21 11. The substance of the matter, in the view of Mr. Justice Luckhoo, was that instead of each hotel resident guest paying the sum of 3 shillings for each occasion on which he enjoyed the Club amenities, the hotel paid at the rate of 2 shillings per resident guest based on an audited house count over a given period. The former arrangement was a trading transaction in respect of which the proceeds coming to the Club were exigible to tax. The latter arrangement, in the view of the learned Judge, was no less in the nature of a trading transaction. In the view of the learned Judge the contributors were in fact the hotel's resident clientele even though no specific charge was made in respect of the use of the Club's amenities by them, and the participators were the hotel owners or operators. The learned Judge accordingly concluded that the principle of mutuality had no application to the facts of the case. Mr. Justice Shelley concurred with the judgment delivered by Mr. Justice Luckhoo.
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- p.54 1.15 ff. 20
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- p.56 1.40 Mr. Justice Moody said that there was no evidence that hotel members charged guests a specific amount for the use of the facilities of the Club and handed those sums over to the Club. The revenue to the Club was from hotel members and not from the guests at the hotel. Guests paid nothing to the Club. In the circumstances the learned Judge could not agree that there was a making of profit from persons who were non-members. He agreed with the conclusion reached by the learned Judge in Chambers that the payments by the hotel members were membership subscriptions notwithstanding that they were computed in part on the basis of an audited house count. Such payments by the hotel members were not business transactions nor did they constitute a trading so as to render the Club assessable to tax. The
- p.58 1.21 40

contributors were the members of the Club and they were the ones who would participate in the surplus or assets of the Club. The principle of mutuality therefore extended to subscriptions paid by the hotel members so far as the subscriptions were based on the audited house count.

10 12. The Appellant submits that the Doctor's Cave Bathing Club is an ordinary members club of which the members have as their common purpose the preservation of the amenities and the regulation of the use of the beach from which the Club takes its name. The Club does not exist to carry on a trade or business. When the members subscribe to the Club, they are contributing to the upkeep of their own property, hotel members no less than ordinary members. The situation is one to which the "mutuality" principle applies: the necessary identity between contributors and participators is present. The Club's operating surplus constitutes a common fund collected for the common purpose of preserving the beach and maintaining the facilities which the Club exists to provide.

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It has been found as a fact, and there was evidence to support the finding, that the guests of hotel members do not subscribe to the Club. A conclusion is not, therefore, possible that because the hotel guests contributed, the mutuality principle is not applicable. That principle is that where there is identity between contributors to and participators in a common fund, any surplus is not a taxable trading or business profit.

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13. The Appellant humbly submits that the decision of the majority in the Court of Appeal is wrong and ought to be reversed and that this appeal should be allowed with costs here and below for the following amongst other

#### R E A S O N S

- 40 (1) BECAUSE the Club is an ordinary members club which exists to preserve the amenities of Doctor's Cave beach and not to carry on a trade or business;
- (2) BECAUSE an additional amount based on a hotel member's audited house count and paid under amended Rule 8(c) is, like any ordinary member's subscription, a contribution to the

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common fund;

- (3) BECAUSE the guests of a hotel member do not contribute to the common fund;
- (4) BECAUSE there is identity between members who contribute to the common fund and members who are entitled to participate in any surplus;
- (5) BECAUSE the conclusions reached by Mr. Justice Edun and Mr. Justice Moody were correct.

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(Sgd) H. H. MONROE.

(Sgd) STEWART BATES.

(Sgd) A. R. THORNHILL.



110. (1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases -

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- (a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of five hundred pounds or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of five hundred pounds or upwards, final decisions in any civil proceedings;
  - (b) final decisions in proceedings for dissolution or nullity of marriage;
  - (c) final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution; and
  - (d) such other cases as may be prescribed by Parliament.

20 (2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases -

- (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reasons of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and
- (b) such other cases as may be prescribed by Parliament.

30 (3) Nothing in this section shall affect any right of Her Majesty to grant special leave to appeal from decisions of the Court of Appeal to Her Majesty in Council in any civil or criminal matter.

(4) The provisions of this section shall be subject to the provisions of subsection (1) of section 44 of this Constitution.

(5) A decision of the Court of Appeal such as is referred to in this section means a decision of that Court on appeal from a court of Jamaica.

5. Income tax shall, subject to the provisions of this Law, be payable by every person at the rate or rates specified hereafter for each year of assessment in respect of all income, profits or gains respectively described hereunder -

(a) the annual profits or gains arising or accruing -

(i) to any person residing in the Island from any kind of property whatever, whether situate in the Island or elsewhere; and 10

(ii) to any person residing in the Island from any trade, business, profession, employment or vocation whether carried on in the Island or elsewhere; and

(iii) to any person whether a British subject or not, although not resident in the Island, from any property whatever in the Island, or from any trade, business, profession, employment or vocation exercised within the Island; 20

(b) profits or gains accruing in or derived from the Island or elsewhere, and whether received in the Island or not in respect of -

(i) dividends, discounts, interests, annuities, pensions or other annual sums;

(ii) rents, royalties, premiums and any other profits arising from property..... 30

18. - Subject to the provisions of this Law there shall be levied and paid for each year of assessment upon the chargeable income -

(a) of every individual tax at the following rates -

For every pound of the first	£100	...	7d.	
" " " " "	next £100	...	1/2d.	
" " " " "	" £100	...	1/9d.	
" " " " "	" £100	...	2/4d.	40
" " " " "	" £100	...	2/11d.	

11.

For every pound of the next	£100	...	3/6d.
" " " " " "	£100	...	4/1d.
" " " " " "	£150	...	4/8d.
" " " " " remainder		...	7/6d.

- (b) of all other persons, except companies, tax at a rate of 7/6d. in the pound;
- (c) of all companies tax at the rate of 8/- in the pound.

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BEHALF AND ON BEHALF OF  
TRUSTEES AND COMMITTEE OF  
DOCTOR'S CAVE BATHING CLUB  
Appellants

- and -

THE COMMISSIONER OF INCOME  
TAX Respondent

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CASE FOR THE APPELLANT

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DRUCES & ATTLEE,  
82 King William Street,  
London, E.C.4.  
Solicitors for the Appellant.