No. 13 of 1971

IN ~~THE JUDICIAL COMMITTEE OF~~ THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL JAMAICA

BETWEEN:

SIR NEVILLE ASHENHEIM — Appellant

AND

THE COMMISSIONER OF INCOME TAX — Respondent

CASE FOR THE APPELLANT

RECORD

1. This is an Appeal from a Judgment and Order of the Court of Appeal, Jamaica (Eccleston J.A., Fox J.A., and Smith J.A.) dated the 9th day of October 1970, dismissing an appeal by the Appellant from an Order made by Parnell J. dated 31st day of October 1968, by which Order the Respondent's appeal against a decision of the Income Tax Appeal Board of Jamaica dated the 22nd day of July 1968, was allowed. By its said decision the Income Tax Appeal Board had allowed an appeal against an assessment to income tax, in respect of the Appellant's salary for the year 1963 as Jamaica's Ambassador to the United States of America. p.75 p.36 p.8

2. The substantial question arising on this Appel is whether the Appellant's salary for the year 1963 as the Jamaican Ambassador to the United States of America is assessable to income tax under the provisions of Section 5 of the Income Tax Law 1954.

3. The facts of the matter appear from the Record and may be summarised as follows :- pp. 8-10 pp.18-19

The Appellant was at all material times domiciled in Jamaica. He is a Solicitor, and

from 1926 to 1962 was a partner in the firm Milholland Ashenheim and Stone. From April 1962 until 6th August of that year he was a member of both the Legislative Council and the Cabinet.

By letter dated the 29th August 1962 he was appointed Jamaica's Ambassador to the United States of America, and arrived in Washington on or about the 9th September 1962 to take up the duties of his office. He performed the duties of Ambassador until March 1967.

The Appellant was not a Government Career Officer, his appointment being a specific one.

The Appellant's monthly salary (less pay as you earn income tax deductions) was included in a cheque which the agent of the Jamaica Government in the United States of America sent to the Embassy. Apart from the Appellant's salary and allowances, this cheque included the salary of the Embassy staff and the sum voted by Parliament for the expenses of running the Embassy. The cheque would be received by the Accounting Officer at the Embassy who would prepare the cheques for the respective recipients. The Appellant's salary cheque would in due course be lodged to his account in the Bank of Washington. None of the proceeds of his salary cheque was ever remitted to Jamaica.

From time to time the Appellant protested to the Ministry of External Affairs against the income tax deductions that were made from his salary, but his protests failed to bear fruit.

From September, 1962 to March, 1967 the Appellant lived in a house owned by the Jamaica Government in Washington. In 1963, the year of assessment in question, he twice visited Jamaica - the first visit was from the 9th to the 17th of May and was made in the course of his official duty. The second visit was from the 19th December to the 31st January 1964, and was made partly for official and partly for private purposes.

At all material times the Appellant owned a house in Kingston, Jamaica, and his wife owned

a house in St. Ann, Jamaica. The Kingston house was the Appellant's home up and until the time of his appointment as Ambassador. During the period of his appointment, the Appellant's two adult bachelor sons kept up the Kingston establishment (the Appellant himself, however, paying for certain items of expenditure - namely rates, taxes, the wages of a gardener, his mother-in-law's up-keep, and provisions for a disabled maid who had been employed by him for many years).

During his visits to Jamaica in 1963, the Appellant stayed at his Kingston house as his sons' guest. He did so in order to be with his sons and incidentally to save the funds of the Ministry.

The St. Anns House was lent, during the period of his Ambassadorship, to various other persons, and the Appellant never resided in it during that period.

Prior to his departure to the United States of America, the Appellant, who was a member of five lodges and four clubs, wrote to them and had his name placed on the non-resident list at a reduced subscription. He was also a director of several companies in Jamaica; and in some cases he resigned, in others he applied for indefinite leave, and in those cases where the Articles of Association permitted an alternate director was appointed. He did, however, attend a director's meeting of two companies in 1963.

The Appellant, and other members of the Embassy staff were unable to have their names registered as voters in Jamaica. The failure to be registered was stated to be on the ground of non-residence.

4. Section 5 of the Income Tax Law, Number 59 of 1954, (as amended) is as follows :-

"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

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

S.9 of 9 of 1963

" (iii) to any person whether a Commonwealth
" citizen 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;

"(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;

S.2 of 42 of 1958

" (iii) any employment or vocation;

"(c) all emoluments, including all salaries,
S.2 of 42 of 1958 " fees, wages and perquisites whatsoever,
" arising or accruing from any office or
" employment of profit exercised or
" carried on in the Island; and
" including the estimated annual value
" of any quarters or board or residence
" or of any other allowance granted in
" respect of employment, whether in
" money or otherwise, and all annuities,
" pensions, superannuation or other

" allowances payable in respect of past services in any office or employment of profit;

" Provided that -

" (i) the said emoluments shall not include the payment for any passage from or to the Island for the purpose of leave granted in respect of the employment;

" (ii) the said emoluments shall not include emoluments of an office or employment of profit held by a person in the course of a trade, profession or business if either -

" (A) any emoluments of that office or employment were taken into account in the case of that person in computing the profits or gains of that trade, profession or business for the purposes of income tax for the year of assessment or;

" (B) the office or employment is such that the emoluments thereof would ordinarily be taken into account in computing the profits or gains of that trade, profession or business;

" (iii) the annual value of any quarters or residence shall , for the purposes of this paragraph, be determined by the Commissioner having regard to such regulations (if any) as may be prescribed by the Minister but, as regards any person, such annual value shall be deemed not to exceed ten per centum of the total emoluments (other than the value of the quarters or residence) paid or payable for the year of assessment to such person."

RECORD

5. Other relevant statutory provisions are as follows :-

S.2 of 11 of 1955

"6 (1) Subject to the provisions of this Section, the statutory income of any person shall be the income of that person for the year immediately preceding the year of assessment: Provided that in respect of income arising from emoluments (as specified in paragraph (c) of Section 5 of this Law) the statutory income shall be the income of that person for the year of assessment: ...

"6 (2) The statutory income of any person from any trade, profession or business for the year of assessment in which he commenced to carry on or exercise such trade, profession or business and for the two following years of assessment (which years are in this subsection respectively referred to as 'the first year', 'the second year', and 'the third year') shall be ascertained in accordance with the following provisions - ....

S.2 of 11 of 1955

"6(4)(a) Where income from any source, other than dividends and any income received under deduction of tax and other than from a source specified in subsection (2) of this section, first accrues to a person the statutory income from that source in respect of the year of assessment in which the income first accrues shall be the amount of the income arising therefrom in that year of assessment; and for the year of assessment succeeding that in which the income first accrues, the statutory income from that source shall be the amount of the income arising therefrom in the first twelve months from the date on which such income first accrued to him; and for subsequent years of assessment, the statutory income from that source shall be the amount of income arising therefrom in the year preceding the year of assessment.

"7. There shall be exempt from tax

" (h) the official salaries and emoluments
" of Consuls, Vice-Consuls and
" members of the permanent Consular
" Services of foreign countries who
" are citizens of the countries they
" represent in respect of their
" offices or in respect of services
" rendered by them in their official
" capacities;

"8. For the purpose of ascertaining the
" chargeable income of any person, there
" shall be deducted all disbursements and
" expenses wholly and exclusively incurred
" by such person in acquiring the income

" (i) Where the income arises from
" emoluments specified in paragraph
" (c) of Section 5 of this Law,
" during the year of assessment; and

" (ii) where the income arises from any
" other source, during such time as
" is provided for in Section 6 of
" this Law,

"15.(1) Any person who satisfies the S.33 of 7 of 1956
" Commissioner that he is not domiciled
" in this Island, or that being a S.9 of 9 of 1963
" Commonwealth citizen, he is not
" ordinarily resident in this Island,
" shall in respect of income derived from
" sources out of this Island be
" chargeable with income tax only on
" such income as is received in this
" Island.

"60.(2) Income tax in respect of emoluments
" specified in paragraph (c) of Section 5
" of this Law shall, subject to and in
" accordance with the provisions of this
" Law and of the Regulations set forth in
" Part I of the First Schedule to this
" Law, be deducted or repaid by the person
" making the payment notwithstanding that
" when the payment is made no assessment
" has been made in respect of the
" emoluments:

"Second Schedule (allowances for certain
"capital expenditure)
" Part II (machinery and plant)

"6. The foregoing provisions of this Part
" of this Schedule shall, with any
" necessary adaptations, apply in relation
" to professions, employments, vocations
" and offices as they apply in relation to
" trade."

6. On the 9th day of February 1967, the Appellant gave notice of appeal to the Income Tax Appeal Board against the decision of the Respondent dated the 27th January 1967, by which decision the Respondent decided that the Appellant was assessable to income tax in respect of his salary as Ambassador to the United States of America for the year 1963.

Before the Income Tax Appeal Board the Appellant submitted that the appropriate
p.10 provision of the Income Tax Law relevant to the Appellant's said salary was to be found in Section 5 (c); but that as the office or employment of the Appellant was not exercised in Jamaica, income tax was not assessable under the provisions of the said Section 5 (c). The Appellant also contended that if (contrary to his first contention) the salary came within the provisions of Sections 5 (a) or 5 (b), he was none the less not assessable in respect of his salary by virtue of being non-resident in Jamaica during the year of assessment in question.

p.11 The Respondent contended that the Appellant was resident in Jamaica during 1963. The Respondent also contended that the salary came within the provisions of Section 5 (a) (ii), 5 (a) (iii), and 5 (b) (iii), and was accordingly assessable to income tax.

On the 22nd July 1968 the Income Tax Appeal Board unanimously decided in favour of the Appellant.

The basis of the Income Tax Appeal Board's decision was that the emoluments of a person employed by another person come within the

provisions of Section 5 (c) and do not come within any of the other provisions contained in Section 5. This followed, in their view, from the provisions of Section 5 itself as a whole, and also from the provisions of Sections 6 and 8 which provide for the ascertainment of the quantum of assessable income. p.12

As regards the Respondent's contention that the Appellant's salary came within the provisions of Section 5 (a) (ii), the Income Tax Appeal Board held that the words "employment or vocation" as used in that sub-section imply self-employment. As regards the Respondent's contention that the said salary came within the provisions of Section 5 (a) (iii), the Income Tax Appeal Board held that "property" as used in that sub-section could not be taken to include an employment. p.13 p.14

As regards the Respondent's contention that the said salary came within the provisions of Section 5 (b) (iii), the Income Tax Appeal Board decided that the word "employment" as used in that sub-section implied self-employment, and did not include employment by another. In view of this decision, the Income Tax Appeal Board did not find it necessary to decide whether the salary was "derived from the Island" within the meaning of that sub-section. Further, in so far as that sub-section applied to profits or gains derived from outside the Island, the Income Tax Appeal Board questioned whether such wide ranging provisions were not ultra vires the constitution of Jamaica.

Having decided that the said salary of the Appellant came within the provisions of sub-section 5 (c), and only that sub-section, the Income Tax Appeal Board held that the office of Ambassador to the United States was not "exercised or carried on in the Island" of Jamaica within the meaning of that sub-section, and that accordingly the said emoluments were not assessable to income tax. p.15

The question whether the Appellant was resident in Jamaica during 1963 was reserved for consideration. Subsequently on the 4th day of

September 1968 the Appeal Board determined that the Appellant was resident in Jamaica during that year.

p.2 7. On the 20th August 1968 the Respondent gave Notice of Appeal to a Judge of the Supreme Court in Chambers. The Grounds of Appeal contained in the Notice were as follows :-

(1) That paragraphs (a) (b) and (c) of Section 5 of the Income Tax Law are not mutually exclusive

(2) That the Income Tax Appeal Board erred in law in holding that paragraph (c) of Section 5 of the Income Tax Law is the only paragraph which is applicable to the salary of a person who is employed by another.

(3) That the salary of £3,500 paid to the Appellant by the Government of Jamaica is a profit or gain derived from the Island in respect of employment within the meaning of Section 5 (b) (iii) of the Income Tax Law.

p.18 8. On the 25th September and 31st October 1968 the Appeal from the decision of the Income Tax Appeal Board came before Mr. Justice Parnell in the High Court of Justice in Chambers. On the latter date Mr. Justice Parnell gave judgment in which he allowed the Appeal against the decision of the Income Tax Appeal Board.

The learned Judge summarised the facts
p.19 found by the Appeal Board, the contentions of
p.20 the parties before the Appeal Board, and stated the grounds of Appeal argued before him.

The learned Judge found the reasoning of the Appeal Board somewhat difficult to follow, but extracted the following three propositions from their decision: (1) that the Appellant as Jamaica's Ambassador to Washington was in the position of "a person employed to another"; (2) that paragraph 5 (c) of the Income Tax Law is the only portion of the "charging section" of that Law which covers the salary of the person employed to another, and that no other paragraph of the charging section applied to the facts of

the present case; and (3) that Section 5 (b) (iii) is not applicable.

The learned Judge noted that the Appeal Board considered it unnecessary to come to any conclusion on the question of the Appellant's residence in 1963, and reserved for further consideration that question. Parnell J. commented that the fact that at all material times the Appellant was domiciled in Jamaica made it unnecessary for him to come to any conclusion as to whether or not the Appeal Board directed itself properly or at all to the question of residence. p.21

The learned Judge then set out the appropriate portions of Sections 5 and 15 of the Income Tax Law, commenting that Section 15 merely repeated the well established income tax principle (as expressed by Lord Herschell in Colquhoun v. Brooks, [1889] 14 A.C. 493 at 504) that "the Income Tax Acts ... themselves impose a territorial limit; either that from which the taxable income is derived must be situated in the United Kingdom or the person whose income is to be taxed must be resident there". p.22 p.23

Reading Sections 5 and 15 together, Parnell J. concluded that liability to pay income tax arises in five separate cases (of which the fourth and fifth were relevant to the present case): p.24

(1) Where a resident enjoys annual profit or gain from any property situate in the Island or elsewhere;

(2) Where a resident enjoys annual profit or gain arising from any trade business profession employment or vocation whether carried on by him in the Island or elsewhere;

(3) Where a non-resident enjoys annual profit or gain either from any trade profession employment or vocation exercised within the Island or from property in the Island;

(4) Where any Commonwealth citizen domiciled or resident in the Island has accruing to

him some profit or gain which is derived from the Island or elsewhere and whether received in the Island or not in respect of the matters enumerated in paragraph (b) of Section 5;

(5) Where emoluments arise or accrue to any person from any office or employment of profit exercised or carried on in the Island

p.25 The learned Judge then discussed the canons of construction applicable to a taxing statute.

Turning to the contentions of the Revenue, Parnell J. noted that it was argued that
p.26 paragraphs (a) (b) and (c) of Section 5 are not mutually exclusive and that Section 5 is an
p.27 omnibus section. He further noted that the Revenue conceded that paragraph (c) did not apply the facts under review, and that the term "employment" as used in paragraphs (a) (ii) and (a) (iii) of Section 5 referred to self-employment.

The Revenue contended that the expression "any employment or vocation" as used in paragraph (b) (iii) was wide enough to cover the salary paid to the Appellant as Ambassador to Washington. The Appellant, however, contended that that expression was confined to employment by a person on a casual basis.

p.28 In deciding the present issue, Parnell J. considered it relevant that the United Kingdom income tax code was divided into five Schedules, each of which uses certain terms in a certain context, and which are mutually exclusive. In the view of the learned Judge, the Privy Council had shown (in the case of Commissioner of Income Tax v. Hanover Agencies Limited, /1967/ 2 W.L.R. 565 at page 568), that the United Kingdom division of charge into various separate and distinct Schedules is not paralleled in the provisions of the Income Tax Law of Jamaica. He also noted that in the case of Davies v. Braithwaite, (1933) 18 Tax Cas. 198, Rowlatt J.
p.29 had held that the word "employment" when used in the expression "profession, employment or vocation" under Schedule D meant the way a man busies himself.

The word "employment" simpliciter in the learned Judge's view, envisaged a relationship between an employer and employee under some agreement engagement or contract express or implied. This was the meaning of the word "employment" as used in Section 5 (b) (iii). To add to the word "casual" before "employment" in the sub-paragraph was, in the view of Parnell J., to take on the role of Parliament by legislating which no tribunal or judge in Jamaica is permitted to do. p.31

On this basis, the learned Judge construed Section 5 (b) (iii) as meaning the following: if there is profit or gain accruing to any person from a source within the Island or outside the Island in respect of any employment or vocation, then whether or not that person receives the profit or gain in the Island he is liable to pay income tax on that profit or gain. But where the person receiving the profit or gain from a source out of the Island is not domiciled or being a Commonwealth citizen is not ordinarily resident in the Island he shall not be liable to pay income tax on such portion of his profit or gain which has its source out of the Island. p.30

It was also relevant to note that the sub-paragraph was intended by Parliament to have a roving and wide ambit, so that no profit or gain derived from the Island from any employment or vocation and accruing particularly to a Jamaican or other person domiciled within the shores could escape liability from income tax. p.31 p.32

The onus was on the Appellant to show that his salary as Ambassador was not chargeable to income tax. In seeking to discharge this onus, the Appellant had sought to qualify the ordinary and natural meaning of the expression "any employment or vocation" in sub-paragraph 5 (b) (iii) by the word "casual". If this were right, the expression "employment or vocation" in that sub-paragraph would have to be expanded to read "any casual employment or casual vocation". The learned Judge could not envisage an activity which would be referred to as a casual vocation. p.33

The learned Judge noted that the salary had been taxed under the provisions of Section 5 (c), p.34

which provisions were rightly conceded to be inapplicable to the present case. The error of the Commissioner of Income Tax in suggesting that the salary was caught by Section 5 (c) was irrelevant to the issue of whether that salary should bear income tax. The appointment as Ambassador having originated in Jamaica, and the salary being paid from public money having its source in Jamaica, the Appellant was liable to pay income tax in Jamaica on the profits or gains accruing to him in respect of that salary.

p.35 Accordingly, Parnell J. held that the Appeal Board had erred in reversing the determination of the Commissioner of Income Tax.

p.37 9. On the 12th November 1968 the Appellant gave Notice of Appeal to the Court of Appeal. The main Grounds of Appeal contained in the Notice were as follows :-

pp.38-40 (1) That the Appellant's office of Jamaican Ambassador to Washington is an office or employment within the meaning of Section 5 (c) of the Income Tax Law

(2) That the office or employment in question was not exercised or carried on in Jamaica.

(3) That since the office or employment in question was not exercised or carried on in Jamaica income tax and surtax are not attracted to the emoluments of the office.

(4) That the honourable Mr. Justice Parnell erred in concluding that the office in question was an employment falling within the meaning of the words "any employment or vocation" as used in Section 5 (b) (iii) of the Income Tax Law. Further or in the alternative the post of Jamaican Ambassador to Washington is an office which expression is used only in Section 5 (c) of the Income Tax Law and is not an employment within any portion of Section 5 of the Income Tax Law.

(5) That the Appellant was in fact assessed under Section 5 (c) of the Income Tax Law, using as a yard stick the current income of the calendar year 1963, and tax was deducted from his salary in spite of his protest. The Respondent

conceded that the Income Tax Appeal Board was correct in its finding of fact that the office or employment was not exercised or carried on in Jamaica and in its conclusion of law that the income would not therefore fall for assessment under Section 5 (c) of the Income Tax Law. This concession in fact results in the admission that the assessment was wrongly made

. . . . . .

(8) The learned Judge was clearly in error in his conclusion that because the money which paid the Appellant's emoluments originated from the Jamaican Treasury the source of the income was Jamaican. The source was the office and not the nationality of the paymaster and the office was clearly in the United States in which country - and not in Jamaica - the Appellant was clearly taxable but for his diplomatic immunity.

(9) If the ruling of the learned Judge is correct that the Respondent has an option in each year of assessment to charge the taxpayer on his emoluments either under Section 5 (c) on his current years emoluments or under Section 5 (b) on the amount of his income earned during the previous year it would follow that a person in employment who during the year (say 1963) earned extra emoluments as a result of acting in a higher post and then reverted to his substantive post could be taxed in the year of assessment 1963 under Section 5 (c) on his higher emoluments of that year and be taxed again in the year of assessment 1964 on the same higher income earned in 1963 by electing to use Section 5 (b) in the later year. The law did not contemplate placing so unjust a power in the Respondent's hands.

10. The Appellant's Appeal to the Court of Appeal was argued before Mr. Justice Eccleston, Mr. Justice Fox, and Mr. Justice Smith on the 17th, 18th, 19th and 22nd June 1970. On the 9th October 1970 the Court of Appeal gave judgment unanimously dismissing the Appeal. p.41

The first judgment was given by Mr. Justice Fox.

RECORD

pp.42-44 Having recited the issued facts and legislation relevant to the present case, Mr. Justice Fox considered the meaning of the word

p.45 "employment" as used in Section 5 (b) (iii). In his view, "employment" was a word which may be used in several senses. The particular sense in which it is to be understood depends upon its context. When it occurs in conjunction with the words "trade, business, profession or vocation", as in Section 5 (a) (ii) and 5 (a) (iii), it means the way in which a man employs himself so as to make profits, that is to say self-employment. On the other hand, when the word is used to describe the activities of the holder of an "employment of profit", as in Section 5 (c), it describes a situation in which a man is set to work by another.

p.46 Turning to the meaning of the words "any employment" in Section 5 (b) (iii), Mr. Justice Fox noted the difference between the expression "any employment or vocation" used in that subsection, ahd the expressions "trade business profession employment or vocation" or "office or employment of profit".

p.47 In considering the legislative history of the provisions now contained in Section 5 of the Income Tax Law 1954, Mr. Justice Fox found it helpful to bear in mind the permissible scope of all income tax legislation. In his view income tax may be charged only upon (i) income which is in, or is derived from the island, or (ii) income of a person domiciled or resident in the

p.48 Island. In its original form, Section 5 (b) (iii) referred to profits or gains accruing in or derived from the Island or elsewhere in respect of any employment, which expression clearly referred to employment by another. Mr. Justice Fox further noted that the P.A.Y.E. procedure was applicable only to emoluments arising or accruing from any office or employment of profit exercised or carried on in the Island (which were covered by Section 5 (c)).

p.49 The learned Judge then considered whether the restructuring of Section 5 (effected by the Income Tax (Amendment) Law 1958) whereby the word "employment" in subsection 5 (b) (iii) was coupled with "vocation" had the effect contended

for by the Appellant, namely that "employment" as now used in the amended subsection meant self-employment instead of employment by another. In this respect, the Appellant had contended that the governing expression "profits or gains" in subsection 5 (b) indicated that the "employment or vocation" referred to in subsection 5 (b) (iii) was the fitting description of income derived from self-employment of a casual nature.

In the learned Judge's view, however, the casually self-employed person was covered by the provisions of subsection 5 (a) (ii) and (iii), and that it would be strange if the 1958 amendments were intended further to cover the position of the casually self-employed person in such a way that the position of a person employed by another outside the Island would be left uncovered. The learned Judge further considered that the expression "annual profits or gains" meant profits or gains in any one year as the succession of years come round, and was wide enough to cover the casual earnings of the person in any one year as well as his regular earnings from year to year. The expression "profits or gains", on the other hand, as used in Section 5 (b) was appropriate in that the types of income specified in that subsection were of a more direct and ascertainable nature, without requiring calculation during a relevant period. p.50 p.51

When the three words "trade" "business" and "profession" precede the word "employment", the latter takes on the meaning of a self-directed type of activity. When, however, the word "employment" stands alone apart from being coupled with the word "vocation", the word "vocation" does not control the meaning of "employment" but takes its own colour from the meaning of the word "employment" which comprehends employment by another. This conclusion was not effected by transferring from the original subsection 5 (b) (iii) certain provisions to subsection 5 (c). This transfer was simply one of the constant changes and amendments that are necessary so long as p.52 p.53

RECORD

the present system which supports a free self-respecting community endures. Nor was the conclusion affected by the fact that the P.A.Y.E. procedure applied only to employments within the
p.54 Island. It was irrelevant that the Appellant's salary was itself conveniently susceptible to P.A.Y.E. deductions.

Mr. Justice Fox then dealt with the contention that the emoluments which the Appellant received arose from an office of profit within the meaning of Section 5 (c) and did not arise from an employment. In the learned Judge's view, while the post of Ambassador was described in the Constitution of Jamaica as an office, it was clear that both the Income Tax Appeal Board and Mr. Justice Parnell
pp.54/55 had concluded that the emoluments which the Appellant received arose from a contract of employment which was evidenced by the letter
p.55 from the Governor General appointing him, and that the Appellant was therefore in the employment of the Government of Jamaica. Mr. Justice Fox considered that conclusion to be reasonable inference from the circumstances. The phrase "office or employment of profit" described, in the learned Judge's view, positions which may overlap. On the one hand, a person may occupy an office of profit exclusively, so that his remuneration by way of fees or other premiums are perquisites attached to the office itself and are receivable by whomsoever happens to occupy that office. On the other hand remuneration of a person who occupies an office and is paid a regular salary and allowances as a consequence of contractual arrangements between himself and an employer is not an incident of the office which he occupies but the consideration flowing from the contract of employment; and accordingly such remuneration is properly described as a profit or gain accruing from employment.

Mr. Justice Fox then dealt with the contention that the Appeal should succeed because the P.A.Y.E. deductions which had been made from the Appellant's salary were unauthorised. The learned Judge held that the real question of the Appeal was whether the Appellant was liable for payment of tax on the salary which he received during the year 1963 as Ambassador

for Jamaica in Washington. In his view the question should be answered in the affirmative. Tax having been paid in excess of the proper amount by way of P.A.Y.E. deductions, the matter required adjustment at the administrative level and not further judicial pronouncement.

11. Mr. Justice Smith after rehearsing the facts, issues and legislation relevant to the present case, said that he had no doubt that as Ambassador the Appellant did hold an office. Accordingly, there was no doubt but that the salary paid in 1963 would have fallen within the provisions of Section 5 (c) were it not for the fact, conceded by the Respondent, that the office was not exercised within the Island. p.56-57 p.58

This being so, the learned Judge considered whether the fact that the salary would have fallen within the provisions of Section 5 (c) precluded the Revenue from seeking to assess the salary under some other provision in Section 5. On this point, Mr. Justice Smith decided that the case of Commissioner of Income Tax v. Hanover Agencies Limited, /1967/ 2 W.L.R. 565 supported the contention first that the several heads of charge under Section 5 are not mutually exclusive, and secondly that the Revenue is free to elect between one or other of two heads of charge within Section 5 in a case where income falls prima facie to be included within both. p.59 p.60

Mr. Justice Smith then considered whether the salary was chargeable under the provisions of Section 5 (b) (iii). On this question, Mr. Justice Smith rejected the Appellant's contention that the salary was the fruit of an office alone and could not be considered to be income payable under a contract of employment. In the learned Judge's view, the terms and p.61

RECORD

nature of the appointment of the Appellant as Jamaican Ambassador to the United States of America were such that his salary was to be regarded as payable under a contract of employment.

p.62 Having decided this, Mr. Justice Smith turned to what he considered the really difficult question of whether the Appellant's employment was "employment" within the meaning of that word in Section 5 (b) (iii). He noted that

p.63 "employment" when used in the context "trade business profession employment or vocation" was conceded by the Revenue to mean self-employment. This was so, in the learned Judge's view, because of previous judicial decisions of the word in similar contexts in United Kingdom Tax cases.

p.65 While the word "employment" may not have a plain meaning, in that it is a word of wide meaning, Mr. Justice Smith considered that it certainly has an ordinary meaning which includes both self-employment and employment to another.

The learned Judge then examined the

p.66 legislative antecedents of the present Section 5, and noted that under the statutory provisions in force until the Income Tax Law of 1954 the salary of the Appellant would clearly have been liable to tax. As regards the provisions of

p.67 Section 5 in their present form, it was plain that subsection 5 (b) was intended to be and is the sweep up provision of Section 5 intended to catch any income not caught within paragraphs (a) and (c). In one respect, further, it appears that the present provisions are wider than the earlier provisions in that they purport to tax a non-resident on income derived from sources out of the Island once the non-resident is domiciled in the Island.

pp. 68, 69. In the learned Judge's view, there was no canon of construction based on previous legislation or United Kingdom legislation which required the word "employment", as used in Section 5 (b) (iii), to be construed as meaning self-employment. In Section 5 (b) (iii) (but not in United Kingdom legislation) "employment

p.69 or vocation" appeared in isolation. Those words, so used, had not been the subject of prior

judicial interpretation. In the expression "profession employment or vocation", "employment" took the meaning of self-employment because it was governed by the word "profession". "Vocation", however, was itself a word of wide significance. Accordingly, both being general words of wide significance, neither "employment" nor "vocation" is capable of restricting the meaning of the other. Each may mean both self-employment and employment by another. p.70

Mr. Justice Smith did not consider that any assistance could be drawn from an amendment to the Income Tax Law of 1954 introduced by Act 9 of 1963, whereunder allowances paid to any person in the service of the Crown representing compensation for the extra cost of living outside the Island were exempted from taxation. While the Revenue had contended that this amendment presupposed the allowances to have been taxable under Section 5 (b) (iii), the learned Judge thought that the legislature may have mistakenly assumed in 1963 that the allowances were so taxable. It was a principle of construction that the beliefs or assumptions of those who frame acts of Parliament cannot make the law. p.71

Turning to the amendment made in 1958, whereunder subsections 5 (b) (iii) and 5 (c) were given their present form, the learned Judge considered that this was a tidying up exercise and nothing more. For reasons given earlier, he did not consider that the coupling of "employment" with "vocation" changed the meaning of "employment" to self-employment. p.72

Mr. Justice Smith then dealt with the contention that the legislature in 1958 amended subsection 5 (b) (iii) in order to make it clear that the P.A.Y.E. procedure provided by Section 6 applied only to employments within Section 5 (c), and that Section 5 (b) (iii) was no longer to apply to salaried employment. In the learned Judge's view, however, Section 6 was merely a machinery and not a charging section, and was not to be so construed as to defeat a charge which is clearly imposed. The fact that the P.A.Y.E. procedure would not apply to a case p.73

of salaried employment falling within Section 5 (b) (iii) was not a valid reason for saying that salaried employment could not fall within that paragraph.

p.74 For the above reasons, therefore, the learned Judge considered that "employment" in Section 5 (b) (iii) was used in its unrestricted sense and included salaried employment; and accordingly it covered the Ambassadorial salary of the Appellant.

Mr. Justice Smith then dealt with the Appellant's contention that the assessment was wrong in that, coming within the provisions of subsection 5 (b) (iii), it should have related to the previous years salary (i.e. approximately four months' salary) instead of the whole of the salary for 1963. In the learned Judge's view, the contention was correct. However, since the point had not been taken before the Income Tax Appeal Board, nor before Mr. Justice Parnell, and was not included in the Notice of Appeal, he held that the question of excessive assessment was a matter for administrative adjustment alone.

p.75 12. Mr. Justice Eccleston stated that he agreed with the conclusions in the judgments delivered by Mr. Justice Fox and Mr. Justice Smith.

p.76 13. An Order granting to the Appellant leave to appeal from the decision of the Court of Appeal was made on the 29th December 1970.

14. The Appellant humbly submits that Mr. Justice Parnell and the Court of Appeal, Jamaica, misdirected themselves in law in holding that the salary paid to the Appellant in his capacity as Ambassador to the United States of America in the year 1963 was assessable to income tax within the provisions of Section 5 (b) (iii).

The income tax law of Jamaica is subject to the normal canons of construction, namely that a particular statutory provision should be construed in such a way as gives meaning and effect to other neighbouring statutory provisions, and should also be construed in a way that is consistent with other related statutory provisions.

The interpretation given to Section 5 (b) (iii) by Mr. Justice Parnell and the Court of Appeal (that the word "employment" includes both self-employment and employment by another) does not satisfy the normal canons of construction, in that it would rob of effect the provisions of Section 5 (a) (ii), 5 (a) (iii) and 5 (c). Such an interpretation is also inconsistent with related provisions in the Income Tax Law, whereunder the emoluments of an office or employment are taxable under the P.A.Y.E. procedure as applied to the profits of the year of assessment itself, and are not assessable on the yard stick of the previous year's earnings.

Properly construed, the word "employment" as used in Section 5 (b) (iii) refers to self-employment of a casual kind. This construction gives effect to the distinction between "profits or gains" as used in Section 5 (b) and "annual profits or gains" as used in Secrion 5 (a), which latter expression comprehends income of a recurrent nature.

Even if the word "employment" as used in Section 5 (b) (iii) could properly be construed as including employment by another as well as self-employment, it would not extend to the holding of an office. The Income Tax Law contemplates the distinct nature of offices (as for example in Section 7 (h)). Where emoluments from an office are intended to be covered the word "office" is expressly used (as in paragraph 6 of Part II to the Second Schedule). The only place in Section 5 where the word "office" is used in Section 5 (c).

On the facts of the present case, the Appellant was the holder of an office simpliciter. His duties and remuneration arose from his appointment by the Governor-General as Ambassador: they were not governed by a contract of service or employment. For this reason alone it is plain that his remuneration could only be taxed (if at all) under Section 5 (c), which is agreed to be inapplicable in the present case.

If it be said, however, that the Appellant's post as Ambassador fell within the possible scope

of the word "employment", then it was an employment analogous to an office. It was not an employment analogous to a vocation. Again, therefore its emoluments could only be taxed (if at all) under Section 5 (c). They did not fall within the charge under Section 5 (b) (iii).

The Court of Appeal appear to have taken the view that the word "employment" bears the same meaning in both Section 5 (b) (iii) and Section 5 (c). Having regard to the quite different character and quantum of the liabilities imposed by the two provisions, the Appellant respectfully submits that this is an impossible view to sustain.

Even if, contrary to the Appellant's submission, the emoluments of an employment in the nature of an office are in principle assessable under either subsection 5 (b) (iii) or subsection 5 (c), the Revenue is not entitled to assess the salary in one year under one subsection and in the same or a following year under the other subsection. Under the provisions of Section 6, the statutory incomes for the purposes of assessments under the two subsections are computed differently, and it would lead to intolerable injustice if the Revenue were free to vary the method of computing the statutory income for any year by seeking to assess the income for that year under a different subsection. From the outset of the Appellant's Ambassadorship, 1962, the Revenue deducted income tax under the P.A.Y.E. procedure appropriate for emoluments assessable under subsection 5 (c).

Further, the assessments in question for the year 1963 were made under subsection 5 (c), so that if the Revenue does have the power of selection between subsections 5 (b) (iii) and subsection 5 (c), the Revenue exercised that power by assessing the Appellant's salary under subsection 5 (c). Since the assessments were not made on the alternative basis of subsection 5 (b) (iii), the present assessments under subsection 5 (c) should be discharged - it being conceded that the emoluments are not taxable under that subsection.

15. As to the question of the Appellant's residence in the year 1963, the Appeal Board

misdirected itself in law in finding (on the 4th September 1968) that the Appellant was resident in Jamaica in the year 1963. On the primary facts as found by the Appeal Board, the house in Waterloo Road kept up during the period of the Ambassadorship was the home of the Appellant's adult bachelor sons, and did not support the Appeal Board's conclusion that the Appellant himself continued to reside in Jamaica. Nor was such a conclusion justified by the Appellant's visits to Jamaica in the period, having regard to the purpose and extent of such visits as found by the Appeal Board. It is further to be noted that the Appellant was refused registration as a voter in Jamaica on the grounds of non-residence. Moreover, on the facts of the present case, the duties of the Appellant as the Ambassador to the United States of America were exercised in that country, where also the payment for such services was made. The source of the salary was, therefore, the United States of America and not Jamaica. Accordingly, neither the source of the Appellant's emoluments, not the Appellant's residence, was situate in Jamaica in the year 1963, so that under the principles set out in Colquhoun v. Brooks /1889/ 14 A.C. 493, the emoluments were not liable to taxation in Jamaica. On this point, the Appellant's domicile, relied upon in the Courts below, is irrelevant.

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

R E A S O N S

(1) BECAUSE the Court of Appeal misdirected themselves in law in deciding that the Appellant's salary as Ambassador to the United States of America was assessable under the provisions of Section 5 (b) (iii).

(2) BECAUSE Section 5 (b) (iii) does not cover emoluments from an office where

neither the appointment to the office nor the duties of the office are governed by a contract of employment or service; the Appellant, as Ambassador to Washington, being the holder of such an office simpliciter.

(3) BECAUSE "employment" as used in Section 5 (b) (iii) does not cover employment by another, or alternatively employment in the nature of an office by another.

(4) BECAUSE the salary of the Appellant would be assessable, if at all, only under the provisions of Section 5 (c), which provisions are on the facts of the present case agreed to be inapplicable.

(5) BECAUSE tax cannot be charged under Section 5 (b) (iii) in one year if income of the same nature was assessed in the previous year under Section 5 (c)

(6) BECAUSE the Revenue have chosen to issue assessments for the year 1963 under Section 5 (c) and not under Section 5 (b) (iii), it being agreed that the income for that year is not assessable under the provisions of Section 5 (c).

(7) BECAUSE the territorial principles laid down by the House of Lords in Colquhoun v. Brooks, /1889/ 14 A.C. 493 apply to the income tax law in Jamaica, and the tests there laid down were not satisfied in respect of the Appellant's salary in question.

(8) BECAUSE the reasoning of the judgments in the Court of Appeal is erroneous and the decision ought to be reversed.

MICHAEL NOLAN

GRAHAM AARONSON

13 OF 1971

IN ~~THE JUDICIAL COMMITTEE OF~~ THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL JAMAICA

BETWEEN:

SIR NEVILLE ASHENHEIM Appellant

AND

THE COMMISSIONER OF INCOME TAX Respondent

CASE FOR THE APPELLANT

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