Appeal No. 13 of 1971

IN 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 RESPONDENT

RECORD

1. This is an Appeal from a Judgment and Order of the Court of Appeal of Jamaica (Eccleston J.A. Fox, J.A., and Smith, J.A.) dated 9th October 1970 dismissing an Appeal by the Appellant from the Judgment of Parnell J. dated 31st October 1968 under which the Respondent's Appeal against a decision of the Income Tax Appeal Board dated 22nd July 1968 allowing an Appeal of the Appellant against an assessment to income tax raised by the Respondent for the year of assessment 1963. — p.41, p.18, p.8

2. The question in issue is whether the salary received by the Appellant in respect of his duties as Ambassador in Washington is, as the Respondent claims, properly assessable to tax for the year of assessment 1963.

3. The facts of the case are set out in the Determination of the Income Tax Appeal Board and in the Judgments and so far as material may be summarized as follows :-

(i) The Appellant is a Commonwealth citizen domiciled in Jamaica, and a Solicitor. From 1926 to 1962 he was a partner in the — pp.44 ll.30-34.

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firm of Milholland, Ashenheim and Stone.

p.44 ll.34-43 (ii) On 30th September 1962 he retired effectively from the practice of law. In a letter from the Governor-General dated 29th August 1962 he was appointed to be "the Jamaican Ambassador to Washington with salary at the rate of £3,500 a year" for an expected period of three years. The letter also stated the allowances and other facilities which accompanied the appointment

p.40 ll.43-46 (iii) The Appellant discharged the duties of Ambassador in Washington from 9th September 1962 until March 1967.

p.9 ll.12-18. (iv) From September 1962 to March 1967, the Appellant lived in Washington in a house owned by the Jamaican Government, but in 1963, he visited Jamaica on two occasions, from the 9th to the 17th May, and from the 19th December to the 31st January 1964. The visit in May 1963 was for official purposes at the request of the Government of Jamaica, while that in December 1965 was partly for private and partly for official purposes.

p.9 ll.27-31. (v) At all material times, the Appellant owned a house at Waterloo Road in Kingston, and his wife owned a house at Mammee Bay in St. Ann, and premises at Hardware Gap in St. Andrew.

p.9 ll.31-41 (vi) During his residence in Washington, the Waterloo Road house was occupied by the Appellant's two adult batchelor sons and his mother-in-law, but the Appellant continued to pay the rates and taxes on the house, and the wages of a gardener, and to pay for the upkeep of his mother-in-law and a disabled maid. During this period the house at Mammee Bay was unlet but looked after by a caretaker, and on one occasion was lent to the New Zealand Ambassador and his wife. The house at Hardware Gap was destroyed by flood rains sometime in the second half of 1963.

p.10 ll.6-8

p.10 ll.9-11

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(vii) During his visits to Jamaica in 1963, the Appellant did not reside at either the Mammee Bay or Hardware Gap house, but did visit the former for a few hours on one day. He lived at the Waterloo Road house as the guest of his sons. During his visit to Jamaica in May 1963, the Appellant attended director's meetings of two companies of which he was still a director. p.10.11.4-6 p.9.11.42-44 p.10.11.21-22

(viii) Throughout the period of his Ambassadorship the monthly salary cheques, less P.A.Y.E. deduction, which the Appellant received were lodged to his account in his bank in Washington. No part of his salary was remitted to Jamaica. From time to time, the Appellant protested to the Ministry of External Affairs, without success, against the P.A.Y.E. deductions. p.44 l.46 - p.45 l.6.

4. The relevant statutory provisions are to be found in the Income Tax Law, Law 59 of 1954, as amended by the Income Tax (Amendment) Law, 1958, Law 42 of 1958 and the Income Tax (Amendment) Act 1963, Act 9 of 1963: as amended the provisions read as follows :-

CHARGEABLE INCOMES

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 - pp.42-44

(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 elsewhere, and

(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;

(iii) any employment or vocation;

(c) all emoluments, including all salaries, 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.

STATUTORY INCOMES

6.(1) - ... .the statutory income of any person shall be the income of that person for the year immediately preceding the year of assessment: p.48.11.23-31.

Provided that in respect of income arising from emoluments (as specified in paragraph (c) of Section 5 of the Law) the statutory income shall be the income of that person for the year of assessment:

.....

EXEMPTIONS

7.- There shall be exempt from tax -

(a) - (r) .....

(s) (inserted by Section 4 (1) ( ) of Act 9 of 1963) any allowance to any person in the service of the Crown which is certified by the Minister to represent compensation for the extra cost of having to live outside the Island in order to perform his duties;

(t) - (v) ....

p.23 ll.26-33

PERSONS NOT DOMICILED OR COMMONWEALTH CITIZENS NOT ORDINARILY RESIDENT IN THIS ISLAND: BASIS OF COMPUTATION

15-(1) Any person who satisfies the Commissioner that he is not domiciled in this Island, or that being a 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.

(2) .....

(3) .....

5. The Appellant was assessed to income tax for the year of assessment 1963 in the sum of £7,945, which sum included the figure of £3,500 being salary paid to him by the Jamaican Government in respect of his duties as Ambassador to Washington. The Appellant

p.4 ll.17-30

objected to the inclusion of this last named sum in his income for tax purposes, on the ground that it was salary paid to him in Washington for duties performed in Washington while he was non-resident in Jamaica, no part of which had been remitted to Jamaica. By Decision dated the 27th January 1967, the Respondent varied the chargeable income of the Appellant to the sum of £7,465.

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6. The Appellant appealed to the Income Tax Appeal Board contending that no part of the said salary of £3,500 was chargeable to income tax. The Appeal Board took the view that only paragraph (c) of Section 5 could apply to the salary of a person employed to another and that paragraph (b) (iii) of Section 5 did not cover the salary payable under a contract of service. Because liability to tax on paragraph (b) income was, unlike paragraph (c) income, ascertained on the previous year basis (by Section 6), a basis not appropriate to the income of persons employed to another, paragraph (b) income did not include emoluments of employment. The Appeal Board did not consider that the Appellant's office was exercised in Jamaica, or that its duties were carried on in Jamaica; accordingly, in their view, paragraph (c) of Section 5 was not applicable. The Appeal Board (at this hearing) expressed no view on the question whether the Appellant was resident in Jamaica during 1963, but reserved the question for further consideration. In a decision made on 4th September 1968 the Appeal Board decided that the Appellant was resident in Jamaica for tax purposes in 1963.

p.4 l.30
p.20 l.42
p.21. l.6
p.45 ll. 10-17
p.15.

7. The Respondent appealed against the decision of the Appeal Board to the Supreme Court of Judicature of Jamaica and the case was argued before Parnell J. on 25th September 1968. On 31st October 1968 Judgment was given in favour of the Respondent, reversing the determination of the Appeal Board.

p.18

8. Before Parnell J. it was conceded by the Respondent that paragraph (c) of Section 5 did not apply to the facts under review. Referring to the Respondent's argument that the Appellant was resident in Jamaica during 1963, the Learned Judge stated that the fact that the Appellant was domiciled in Jamaica made it unnecessary for him to come to any conclusion on the question of where the Appellant was resident when he was discharging the duties of Jamaica's Ambassador to Washington. He observed that it should be remembered that the Appellant was the diplomatic representative of his country and was only residing in Washington as part of the terms of his employment and for the

p.38 ll.34-40
p.21. l.38 - p.22. l.11

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better discharge of his duties. He accepted the fact that a person might reside in two or more places.

p.25 The Learned Judge, having reviewed the principles governing the construction of a taxing statute, stated that he was unable to accept the Appellant's contention that, on the proper construction of Section 5 as a whole, the expression "employment or vocation" in paragraph

pp. 32-33 (b) (iii) meant "casual employment or vocation". There were no grounds, in the context of the relevant legislation, which justified him in reading into the expression "employment or vocation" the word "casual".

To the Appellant's contention that the Respondent was in error in assessing the Appellant's income

p.134 ll. 13-24 p.35. l.1. to tax under Section 5 (c), which allowed for deduction of tax at source, the Learned Judge stated that this factor was irrelevant to the issue of liability to tax. The Appellant's appointment was made pursuant to Section 128 of

p.34 ll.28-35 the Constitution: the contract had its birth in Jamaica and it was immaterial whether the salary was paid to the Appellant's account in Jamaica or into his account elsewhere. No admission, error or miscalculation of a Revenue Office could operate as an estoppel, nor could it

p.35 be relied upon to escape liability where the law itself showed that liability should be attached. Accordingly the Learned Judge allowed the Respondent's Appeal.

p.37 9. By Notice of Appeal dated 12th November 1968 the Appellant appealed against the Judgment of Parnell J. The grounds of appeal are set out in the Notice and in the Judgments of Fox J.A. and Smith J.A.

p.41 10. The case was argued before the Court of Appeal on 17th, 18th, 19th and 22nd June 1970 and on 9th October 1970 the Court of Appeal gave judgment dismissing the Appellant's Appeal.

11. Fox J.A. considered that the Appellant's Appeal should be dismissed. He considered the various meanings of the word employment when used in different contexts, and reviewed the

changes made to the structure of the charging provisions, originally contained in Section 4 of Cap.156 (enacted in 1919), brought about by Law 59 of 1954 (the Income Tax Law 1954) and by Law 42 of 1958 (the Income Tax (Amendment) Law 1958). He considered the meaning of the words "any employment" in Section 5 (b) (iii) of the 1954 Law and concluded that they referred to employment by another not falling within Section 5 (c) of the 1954 Law, i.e.employment not exercised or carried on in the Island. The P.A.Y.E. provisions of Section 60 (2) did not, in the Learned Judge's view, apply to the profits and gains of a person employed by another which did not fall within the scope of Section 5 (c). He referred to the arguments for the Appellant to the effect that the amendments introduced by Law 42 of 1958, (which (i) associated the word employment with vocation in Section 5 (b) (iii) and (ii) removed the matters which were germane to salaried employment from Section 5 (b) (iii) to Section 5 (c)) led to the conclusion that the word "employment" in Section 5 (b) (iii) (as amended) referred to self-employment of a casual nature: the learned Judge felt that, unless a clear direction was found in the words used, he would be unable to conclude that the 1958 amendments had the effect of removing employments of profit carried on outside the Island from the scope of charge to income tax when they had specifically been brought within the scope of charge by the 1954 legislation. He was unable to see that the use of the expression "profits or gains" in Section 5 (b) as opposed to "annual profits or gains" in Section 5 (a) favoured the Appellant's contentions.

p.46

pp. 48-49

He could not agree with the Appellant's contention that the alterations made by the Income Tax (Amendment) Law 1958 to Sections 5 (b) (iii) and 5 (c) had the effect of attaching to the word "employment" in the former provision the exclusive meaning of "self-employment": in his view the legislature wished, by the 1958 amendment, to leave the word "employment" unfettered by the limitation which would have been imposed had that word been

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preceded by the words "trade", "business", "profession".

pp.52-53 Fox J.A. could see no more significance in the transfer to Section 5 (c) of the definitive provisions which had followed the phrase "any employment" in Section 5 (b) (iii) of the 1954 Law than the fact that those provisions defined identifiable perquisites of salaried employment which were more appropriately included with provisions dealing specifically with that subject. The fact that the P.A.Y.E. provisions of the law (introduced in 1954) were confined to

p.54 salaried income described in Section 5 (c) did not assist the Appellant's case, because the 1954 Law also provided that income from employment outside the Island, which was not within the scope of the P.A.Y.E. provisions, should be taxed.

He considered that the two words "employment" and "vocation" were deliberately placed in association with each other for the

p.54 purpose of having a wide sweeping up effect, and catching <u>any</u> employment or vocation, whether self directed, or directed by another which may have escaped the other relevant provisions in Section 5.

Though the Appellant occupied an office,, he was, in the Learned Judge's view, employed for

p.53 purposes of Section 5 (b) (iii). The fact that the P.A.Y.E. deductions had wrongly been made from the Appellant's salary called for adjustment at administrative level and was no ground for allowing the Appeal.

Smith J.A. for dismissing the Appeal, held that the salary paid to the Appellant, though arising from an "office ..... of profit" (which expression is used only in Section 5 (c)) might be taxed under Section 5 (b) if it were clear

p.61 ll. 1-11 that the salary were a profit or gain within that provision: the several heads of charge under Section 5 were not, on the authority of

p.59 l.31 <u>Commissioner of Income Tax v. Hanover Agencies Limited</u>, /1967/ 1 A.C. 681 mutually exclusive.

Taking the circumstances relating to the

Appellant into account, the Learned Judge concluded that, as Ambassador, the Appellant was employed to the Government of Jamaica, notwithstanding that the Constitution (Section 128) described the post as an office. He further concluded that the word "employment" in Section 5 (b) (iii) might mean both self-employment and employment by another. In his view, Section 5 (b) was intended to be, and was, the "sweep up" provision of Section 5 - introduced to catch any income not caught within paragraphs (a) and (c). The word "employment" in Section 5 (b) was not used in the same context in which it appeared in legislation preceding Law 42 of 1958; both "employment" and "vocation" were words of general and wide meaning: they were not associated with the word "profession" which, having a more precise and less general meaning, might otherwise, by virtue of the noscitur a sociis rule of construction, have restricted the word "employment" to "self-employment".

pp. 61-62

p.66

p.67 ll.38-41.

pp. 69-70

The fact that Section 7 (3) of Act 9 of 1963 appeared to have been enacted on the assumption that emoluments from employment carried on outside the Island were taxable, did not support the Respondent's contention that Section 5 (b) (iii) should be construed as charging such emoluments to tax.

p.71

In view of the Learned Judge's conclusion that Section 5 (b) was enacted as a sweeping up provision, the fact that Law 42 of 1958 removed from paragraph (b) (iii) all references to annual value of quarters, leave passage etc. and put them in Section 5 (c) did not in his opinion make it clear as the Appellant had contended, that employments dealt with under Section 5 (c) were of an entirely different kind to the "employment" referred to in Section 5 (b); in the Learned Judge's opinion, the provisions relating to annual value of quarters etc. should more appropriately have been annexed to Section 5 (c) prior to the 1958 amendment.

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To the Appellant's contention that the P.A.Y.E. system, introduced by Section 6 of the

Law of 1954 and made applicable only to income falling within Section 5 (c), necessitated the amendment of Section 5 (b) (iii) in 1958 to make it clear that Section 5 (b) (iii) did not apply to salaried employment, the Learned Judge observed firstly that the P.A.Y.E. provisions, being machinery provisions, provided no valid
p.73 reason for saying that salaried employment could not fall within Section 5 (b), and secondly that the P.A.Y.E. provisions in Section 6 were part of the Law of 1954 since its enactment and during the time up to 1958, when there was no doubt that paragraph (b) (iii) applied to salaried employment.

The Learned Judge concluded that the word "vocation" in Section 5 (b) (iii), rather than restricting the meaning of "employment" to self-employment, widened the scope of Section 5 (b) to embrace any activity which, though not an
p.74 employment, might be a vocation. The word "employment" in Section 5 (b) (iii) was used in its unrestricted sense and included salaried employment. The Appellant's ambassadorial salary was, therefore, liable to taxation under that provision.

If the assessment was excessive the matter would be one for administrative adjustment.

Eccleston J.A. agreed that the Appeal should
p.75 be dismissed.

12. By Order of the Court of Appeal dated 5th March 1971 the Appellant was granted leave to
p.76 appeal to Her Majesty in Council and it was ordered that the costs of that Order and of the Application therein be costs in the cause.

13. The submission of the Respondent may be summarized as follows. The paragraphs of Section 5 of the Income Tax Law are not mutually exclusive. That the Appellant's letter of appointment constituted a contract of employment was found by the Appeal Board, Parnell J. and the Court of Appeal. The words "any employment" in Section 5 (b) (iii) of the Income Tax Law, Law 59 of 1954 as amended are wide enough to embrace the emoluments received by the Appellant from his

office as Ambassador to Washington. The natural meaning of the word employment includes an employer/employee relationship as well as self-employment of a casual nature. There is notling in the context in which the word "employment" is found (in Section 5 (b) (iii)) restricting the meaning of that word to self-employment of a casual nature. Indeed (i) the form of the legislation prior to the 1958 amendment and (ii) the use of the word "any" preceding the word "employment" must lead to the conclusion that the profits or gains in respect of employment of whatever nature are within the scope of Section 5 (b) (iii): and the use of the word "vocation" in association with "employment" in no way confines the meaning of the latter word to self-employment of a casual nature.

14. The Respondent humbly submits that the decisions of the Supreme Court and of the Court of Appeal are correct and should be affirmed and that the Appeal should be dismissed with costs both here and below for the following among other

R E A S O N S

(1) BECAUSE the paragraphs of Section 5 of the Income Tax Law are not mutually exclusive

(2) BECAUSE the salary received by the Appellant from his office as Ambassador which was held under a contract of employment (namely the letter of appointment) comes within the scope of the charging words "profits or gains ..... in respect of .... any employment" in Section 5 (b).

(3) BECAUSE there is nothing in the context in which the word "employment" (in Section 5 (b)) is found restricting the meaning of that word to self-employment of a casual nature and excluding an employer/employee relationship, such as the Appellant's office as Ambassador, from its scope.

(4) BECAUSE the Judgments in the Court of Appeal and in the Supreme Court were correct and ought to be confirmed.

STEWART BATES

S. J. L. OLIVER.

13 OF 1971

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BETWEEN

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AND

THE COMMISSIONER OF INCOME TAX Respondent

CASE FOR THE RESPONDENT

CHARLES RUSSELL & CO.
Hale Court,
21 Old Buildings,
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London W.C.2.