Judgment 13 of 1972

(13)

IN THE PRIVY COUNCIL No. 13 of 1971

ON APPEAL
FROM THE COURT OF APPEAL JAMAICA

B E T W E E N :

SIR NEVILLE ASHENHEIM Appellant

- and -

THE COMMISSIONER OF INCOME TAX Respondent

RECORD OF PROCEEDINGS

LINKLATERS & PAINES,
Barrington House,
59-67, Gresham Street,
London, EC2V 7JA

Solicitors for the Appellant

CHARLES RUSSELL & CO.,
Hale Court,
Lincoln's Inn,
London, WC2A 3UL

Solicitors for the Respondent

IN THE PRIVY COUNCIL No. 13 of 1971

ON APPEAL
FROM THE COURT OF APPEAL JAMAICA

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RECORD OF PROCEEDINGS

INDEX OF REFERENCE

E X H I B I T S

LIST OF DOCUMENTS NOT TRANSMITTED TO THE PRIVY COUNCIL

No.	Description of Document	Date
	Respondent's Exhibits	
1.	Exhibit 2. Letter Commissioner of Income Tax to Neville Ashenheim	4th September 1962
2.	Affidavit of Service of Notice and Grounds of Appeal.	

No.	Description of Document	Date
3.	Notice of Motion on Application for Leave to Appeal to Her Majesty in Council.	
4.	Affidavit in Support of Notice of Motion on Appeal for Leave to Appeal to Her Majesty in Council.	
5.	Order for payment into Court.	
6.	Notice of Security.	
7.	Application for Appointment to settle Record on Appeal to Her Majesty in Council.	

LIST OF DOCUMENTS TRANSMITTED TO THE PRIVY COUNCIL BUT NOT REPRODUCED

No.	Description of Document	Date
1.	Affidavit of ULETT JAMES DALEY Sworn	17th November 1970
2.	Order granting Conditional Leave to Appeal to Her Majesty in Council	20th November 1970

IN THE PRIVY COUNCIL No. 13 of 1971

ON APPEAL
FROM THE COURT OF APPEAL, JAMAICA

B E T W E E N :

SIR NEVILLE ASHENHEIM Appellant

- and -

THE COMMISSIONER OF INCOME TAX Respondent

RECORD OF PROCEEDINGS

No. 1

SUMMONS ON HEARING OF APPEAL DATED 20th AUGUST

Suit No. M 52 of 1968

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE HIGH COURT OF JUSTICE
IN CHAMBERS

BETWEEN: THE COMMISSIONER OF INCOME TAX Appellant

AND SIR NEVILLE ASHENHEIM Respondent

LET ALL PARTIES CONCERNED attend the Judge in Chambers on the 25th day of September, 1968 at 10 o'clock in the forenoon on the hearing of an Appeal by the Appellant against a decision made on the 22nd day of July, 1968 of the Income Tax Appeal Board constituted under the Income Tax Law 1954, (Law 59 of 1954).

DATED the 20th day of August 1968

In the Supreme Court of Judicature of Jamaica.
In the High Court of Justice in Chambers

No. 1

Summons on Hearing of Appeal.

20th August 1968.

In the Supreme Court of Judicature of Jamaica.
In the High Court of Justice in Chambers

No. 1

Summons on Hearing of Appeal.

20th August 1968.

(continued)

To: The Clerk to the Income Tax Appeal Board
40 Duke Street, Kingston.

and

To: Sir Neville Ashenheim,
c/o Milholland, Ashenheim & Stone,
11 Duke Street, Kingston.

This Summons is taken out by the Crown Solicitor of 134-140 Tower Street (Upstairs), Kingston, Solicitor for and on behalf of the above named Appellant whose address for service is that of its said Solicitor. 10

Copy Left
Milholland, Ashenheim & Stone
Per M.B.
Date 20.8.68
Time 2.40

No. 2.

Notice of Appeal and the Grounds of Appeal.

20th August 1968.

No. 2

NOTICE OF APPEAL AND THE GROUNDS OF APPEAL DATED 20th AUGUST 1968.

INCOME TAX APPEAL 20

Suit No. of 1968

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE HIGH COURT OF JUSTICE
IN CHAMBERS

BETWEEN: THE COMMISSIONER OF INCOME TAX Appellant

AND SIR NEVILLE ASHENHEIM Respondent

NOTICE OF APPEAL

This is an appeal against a decision of the Income Tax Appeal Board dated the 22nd day of July 1968, allowing the appeal of the above named Respondent against the decision of the above named Appellant dated the 27th day of January, 1967, and holding that the salary paid to the Respondent for the exercise of his duties 30

as Jamaican Ambassador to the United States of America, is not liable to taxation in Jamaica.

FACTS

The Respondent, a Commonwealth Citizen, at all material times domiciled in Jamaica, is a solicitor of the Supreme Court of Jamaica. By letter from the then Governor-General, dated 29th August, 1962, he was appointed Jamaican Ambassador to the United States of America, arriving in Washington on or about the 9th day of September, 1962. He held that post until March, 1967.

The Respondent was not a Government career officer but was appointed specifically to Washington.

The Respondent's net monthly salary was paid to him by the Embassy accountant, on the monthly receipt of advices from the Ministry of External Affairs, and out of moneys supplied to the Embassy by the agent in the United States of America of the Jamaican Government, on the advice of the Accountant General.

From September, 1962 to March 1967, the Respondent lived in Washington in a house owned by the Jamaican Government, but in 1963, 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.

At all material times, the Respondent owned and still owns a house at Waterloo Road in Kingston, and his wife owned and still owns a house at Mammee Bay in St. Ann, and premises at Hardware Gap in St. Andrew.

During his residence in Washington, the Waterloo Road house was occupied by the Respondent's two adult batchelor sons and his mother-in-law, but the Respondent continued to pay the rates and taxes on the house, and the wages of a gardner, and to pay for the upkeep of

In the Supreme Court of Judicature of Jamaica.
In the High Court of Justice in Chambers.

No. 2

Notice of Appeal and the Grounds of Appeal.

20th August 1968.

(continued)

In the Supreme Court of Judicature of Jamaica.
In the High Court of Justice in Chambers.

No. 2

Notice of Appeal and the Grounds of Appeal.

20th August 1968.

(continued)

his mother-in-law and a disabled maid who had been employed by him for a number of years. 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.

During his visits to Jamaica in 1963, the Respondent 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 Respondent attended director's meetings of two companies of which he was still a director.

The Respondent was assessed to income tax for the year 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 Respondent 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 Appellant varied the Chargeable Income of the Respondent to the sum of £7,465. Against this Decision the Respondent appealed to the Income Tax Appeal Board.

The Income Tax Appeal Board allowed the appeal of the Respondent, holding that the salary of £3,500 was not taxable in Jamaica because,

(a) Section 5(c) of the Income Tax Law was the only section which was applicable to the salary of a person employed by another; and

(b) the Respondent's duties as Ambassador to Washington had not been performed, during the year 1963, in Jamaica.

Against this decision, the Appellant, the Commissioner of Income Tax, now appeals.

GROUNDS OF APPEAL

TAKE NOTICE that the following are, inter alia, the Grounds of Appeal on which the Appellant will rely at the hearing of the Appeal:-

(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 Respondent 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.

RELIEF SOUGHT

1. That the decision of the Income Tax Appeal Board made on the 22nd day of July, 1968, and referred to above, be set aside.

2. That the decision of the Appellant dated the 27th January, 1967, varying the Chargeable Income of the Respondent to £7,465, be restored.

3. That the Respondent do pay the Appellant the costs of an incident to the hearing of the appeal to this Honourable Court.

4. Such further or other relief as this Honourable Court may deem just.

DATED the 20th day of August, 1968.

(Sgd) Marjorie A. Dale
for CROWN SOLICITOR
Solicitor for and on behalf of the Appellant.

To: The Clerk of the Income Tax Appeal Board,
40 Duke Street,
Kingston

AND

In the Supreme Court of Judicature of Jamaica.
In the High Court of Justice in Chambers.

No. 2

Notice of Appeal and the Grounds of Appeal.

20th August 1968.

(continued)

To: Sir Neville Ashenheim,
c/o Milholland, Ashenheim & Stone,
11 Duke Street,
Kingston.

FILED by the Crown Solicitor of 134-140 Tower Street (Upstairs), Kingston, Solicitors for and on behalf of the Appellant, the Commissioner of Income Tax, whose address for service is that of its said Solicitor.

No. 3

Statement setting forth the facts and the determination of the Income Tax Appeal Board.

27th August 1968.

No. 3

STATEMENT SETTING FORTH THE FACTS AND THE DETERMINATION OF THE INCOME TAX APPEAL BOARD dated 27th August, 1968.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE HIGH COURT OF JUSTICE

Suit No. M 52 of 1968

BETWEEN: THE COMMISSIONER OF INCOME TAX Appellant

AND SIR NEVILLE ASHENHEIM Respondent

On the 9th day of February, 1967, the Respondent gave Notice of appeal to the Income Tax Appeal Board against the decision of the Appellant dated the 27th January, 1967.

2. The matter came on for hearing before the Appeal Board on the 21st and 29th February, 6th March and 22nd May, 1968, the Board being comprised of Sir Alfred Rennie (Chairman) and Messrs. Samuel Hart and I.G. Brandt. The Respondent was represented by Mr. Richard Ashenheim and the Appellant by Mrs. A.C. Hudson-Phillips of Counsel.

3. Oral evidence was given by two witnesses and

three exhibits tendered by the Respondent were received in evidence.

4. Upon the conclusion of the arguments the Appeal Board reserved its decision.

5. The facts in the appeal, the arguments of the parties and the decision of the Appeal Board are contained in a written judgment which was delivered on the 22nd July, 1968. A copy of the judgment is attached hereto.

6. The judgment was unanimous.

Certified that the foregoing contains a statement of the facts and determination of the Income Tax Appeal Board.

Dated this 27th day of August, 1968.

(Sgd.) G. McGeachy
Actg. Clerk to the Income Tax Appeal Board.

To: The Registrar of the Supreme Court, Kingston.

and

The Commissioner of Income Tax,
c/o The Crown Solicitor,
134-140 Tower Street,
Kingston.

and

Sir Neville Ashenheim,
c/o Messrs. Milholland, Ashenheim & Stone,
11 Duke Street,
Kingston.

Copy Left
Milholland, Ashenheim & Stone

Per S. Day

Date 27/8/68

Time 3.00

Filed by the Clerk to the Income Tax Appeal Board, 40 Duke Street, Kingston.

In the Supreme Court of Judicature of Jamaica.
In the High Court of Justice in Chambers.

No. 3

Statement setting forth the facts and the determination of the Income Tax Appeal Board.

27th August 1968.

(continued)

In the Supreme Court of Judicature of Jamaica.
In the High Court of Justice in Chambers.

No. 4

Determination of the Income Tax Appeal Board attached to Statement setting forth the facts

22nd July 1968.

No. 4

DETERMINATION OF INCOME TAX APPEAL BOARD ATTACHED TO STATEMENT SETTING FORTH THE FACTS
Dated 22nd July 1968.

Sir Neville Ashenheim — Appellant

v.

Commissioner of Income Tax — Respondent

Mr. Richard Ashenheim appeared for the Appellant

Mrs. Hudson-Phillips for the Respondent

This appeal is in respect of the income tax assessed on the Appellant's salary for the year 1963 as Jamaica's Ambassador to the United States of America.

The Appellant a Commonwealth citizen was at all material times domiciled in Jamaica. He is a solicitor and from 1926 to 1962 was a partner in the firm of Milholland Ashenheim and Stone. By arrangement with the then partners he went on pre-retirement leave on the 31st March, 1962 and retired effectively from the practice of law on the 30th September, 1962. From April, 1962 until 6th August of that year he was a member of both the Legislative Council and the Cabinet. By letter dated 29th August, 1962 he was appointed Jamaica's Ambassador to the United States and in due course of time 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 was 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 in 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 he was twice in Jamaica - from 9th to 17th May and from 19th to 31st December - the latter visit extended to 31st January, 1964. The first visit was on official duty. The Jamaica Government paid for his transport to and from Jamaica and his leave entitlement was not debited with any portion of the period he was away from Washington. The second visit was partly official and for this reason the Government paid half the cost of the transport of his wife and himself but the whole of the period of time he was in Jamaica was counted as leave.

The Appellant at all material times owned and still owns a house on Waterloo Road in Kingston and his wife owned and still owns a house at Mammee Bay in St. Ann and premises at Hardware Gap in St. Andrew. The house at Waterloo Road was the Appellant's home up to the time of his taking up the appointment as Ambassador. On taking up the appointment the Appellant left his two adult bachelor sons and his mother-in-law in the Waterloo Road house. His sons kept up the establishment except that the Appellant paid the rates and taxes and the wages of a gardener and paid for his mother-in-law's upkeep and made provisions for a disabled maid who had been employed to him for many years.

During his visits to Jamaica 1963 the Appellant stayed at his Waterloo Road house as his sons' guest in that he ate at their expense. In so far as his visit in May was concerned, he could have gone to an hotel and sent the bill to

In the Supreme Court of Judicature of Jamaica.
In the High Court of Justice in Chambers.

No. 4

Determination of the Income Tax Appeal Board attached to Statement setting forth the facts.

22nd July 1968

(continued)

Government for payment. He did not do so because he wanted to be with his sons and incidentally to save the funds of the Ministry.

During 1963 the Appellant never resided in the house at Mammee Bay, he merely visited it on one occasion returning at tea time. He however lent it to the New Zealand Ambassador with his wife's permission. His wife also lent it to school friends of hers. The House at Hardware Gap was destroyed some years ago in the flood rains that are known as Flora.

Prior to his departure to the United States the Appellant who was a member of five lodges and four clubs wrote in 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. In some cases he resigned, in others he applied for indefinite leave and in those cases where the articles of association permitted it, an alternate director was appointed. He however attended a director's meeting of two companies in 1963.

In the case of one company the meeting was scheduled for the week before he was to be in Jamaica but on hearing of his intended visit the meeting was postponed for two weeks so as to make it possible for him to attend it. It is worthy of note that the Appellant along with other members of the Embassy staff failed to have their names registered as voters in Jamaica. The failure to get their names on the register was stated to be on the ground of non-residence.

All matters of fact set out in the foregoing portion of this judgment are found by us.

It was submitted by the Appellant that the appropriate provision of the Income Tax Law is paragraph (c) of section 5, but as the office or employment was not exercised in Jamaica income tax is not attracted to the emoluments of the office. The Appellant also submitted that if the provisions of paragraph (a) and or (b) of section 5 could possibly apply to the employment of an Ambassador then it is contended that during the material time he was not resident in Jamaica and therefore not liable to income tax in respect of his emoluments.

It was submitted for the Respondent that the Appellant was resident in Jamaica during 1963 and the case falls within the provisions of paragraph (a) (ii) of section 5 of the Income Tax Law and therefore profits or gains arising or accruing from the employment attract income tax. Alternatively it was further submitted that the salary had its source in Jamaica and therefore falls within paragraphs (a) (iii) and (b) (iii) of section 5.

The relevant portions of section 5 of the Income Tax Law reads :-

"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 -

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

(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 -

(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....."

In our view there is no room for doubt that paragraph (c) of section 5 and only that paragraph

In the Supreme Court of Judicature of Jamaica.
In the High Court of Justice in Chambers.

No. 4

Determination of the Income Tax Appeal Board attached to Statement setting forth the facts.

22nd July 1968

(continued)

can apply to the salary of a person employed to another. The words "emoluments including salaries, fees, wages and perquisites arising or accruing from any office or employment" indicate the employment of a person by another, And we are further of the opinion that no other paragraph of section 5 can apply to such an appointment. We say this because section 6 of the Income Tax Law provides -

> "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."

This section draws a clear distinction between income falling within the terms of paragraph (c) of section 5 and income that comes within any other provision of that section. In the case of income other than that under paragraph (c) the yardstick for taxation is the previous year's income whereas income caught by paragraph (c) is taxed as it is earned - taxed in the year that it is earned. The reason for the distinction is easy to see. Emoluments of a person employed to another are certain and can be ascertained without difficulty within the year they are earned but not so are the profits or gains arising or accruing from any trade, business, profession, employment or vocation. Such profits or gains cannot be ascertained until after the close of the year hence the necessity to provide a yardstick. The effect of section 6 as we see it is to create two distinct classes of income for income tax purposes - classes with boundaries that do not permit overstepping. If one could overstep from one boundary to another there would be no certainty as to one's liability to income tax. The facts in the instant case provide a good example of the point we are endeavouring to make. If all the elements of liability could be found to exist in this case and paragraph (c) is the relevant provision the Appellant would be liable to pay income tax on the whole of his salary for 1963 whereas he would be liable to income tax on only salary from September, 1962 to

December, 1962 if paragraph (c) is not the provision to be applied. The distinction we have already pointed out is also repeated in section 8 of the Income Tax Law. This section provides :-

"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;

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

It is worthy of note that pay as you earn deductions were made from the Appellant's salary during the year 1963 and it is because of these deductions that this appeal is brought. These deductions can only be made as we had already shown from emoluments to which paragraph (c) of section 5 applies.

The matter is so clear to us that it seems hardly necessary to deal with the other paragraphs of section 5, but they were canvassed and we will deal with them.

The words "profits or gains arising or accruing to any person from any trade, business, profession, employment or vocation" do not suggest to us the employment of a person by another. Employment in the neighbourhood of trade, business, profession or vocation would seem to suggest self-employment and this is emphasized by the words profits or gains as the fruit of such employment. And the fact that such "profits or gains" need the yardstick of the previous years income to make them assessable to income tax suggests the uncertainty that flows from self-employment.

It was also contended for the Respondent that paragraph (a) (iii) of section 5 could apply on the ground that the employment is property and it had its source in the Island.

In the Supreme Court of Judicature of Jamaica.
In the High Court of Justice in Chambers

No. 4

Determination of the Income Tax Appeal Board attached to statement setting forth the facts.

22nd July 1968

(continued)

We find it impossible to accept the view that employment is property.

Lastly it was submitted by the Respondent that the Appellant's salary comes within the provisions of paragraph (b) (iii) of section 5. This paragraph gives rise to two sets of circumstances, the first where the profits or gains are derived from the Island and the other where they are derived from outside the Island. In relation to the first we have not found it necessary to consider whether any profit or gain was derived from the Island for it is clear to us that what we have said in respect of paragraph (a) (ii) applies to the paragraph under consideration even though there is only one neighbour. In the case of profits or gains derived from elsewhere the provision is so wide that one wonders if it is not ultra vires the constitution. If employment in that paragraph can give rise to liability to pay Jamaican income tax then every member of the universe who is employed within the meaning of the paragraph would incur that liability subject only to the provisions of section 15 of the Income Tax Law. This cannot be right but the Board will not arrogate to itself the power of declaring the provision ultra vires. In any event employment in the context in which it appears in the paragraph cannot in our view embrace a contract of service.

Having arrived at the conclusion that paragraph (c) of section 5 is the relevant provision there remains for consideration the question of whether or not the employment was exercised or carried on in Jamaica. The office of the Ambassador is in Washington and the evidence is that the Appellant was out of Jamaica for all of 1963 except that he came to Jamaica for consultations on the 9th May and remained to the 17th and he returned on the 19th December and remained on to the 31st January, 1964. His second visit was partly for consultations and partly for leave but in fact the whole period was reckoned as leave but half the cost of the transport of his wife and himself was paid by the Government. Can it be said that the office of Ambassador to the United States was exercised or carried on in Jamaica because the Ambassador was brought to Jamaica for consultations between

the 9th and 17th May and again on the 19th December and after the consultations he went on leave to the 31st January? We think not.

Arguments were addressed to us on the question of whether the Appellant was resident in Jamaica during 1963. We have not overlooked those arguments but the view we have taken of the appeal makes it unnecessary for us to come to any conclusion on this question.

10 For the above reasons the appeal will be allowed.

On further consideration the question whether the Appellant was resident in Jamaica during 1963 is reserved for consideration.

Dated this 22nd day of July, 1968.

(sgd.) A.B. RENNIE

(sgd.) SAMUEL HART

(sgd.) I.G. BRANDT

In the Supreme Court of Judicature of Jamaica.
In the High Court of Justice in Chambers.

No. 4

Determination of the Income Tax Appeal Board attached to Statement setting forth the facts.

22nd July 1968 (continued)

In the Supreme Court of Judicature of Jamaica.
In the High Court of Justice in Chambers.

EXHIBITS

Respondent's Exhibits

Exhibit 1. Letter Governor General to Neville Ashenheim 29th August 1962.

EXHIBITS

RESPONDENT'S EXHIBITS

EXHIBIT 1 - LETTER GOVERNOR GENERAL TO NEVILLE ASHENHEIM DATED 29th AUGUST 1962.

King's House

Jamaica

29th August, 1962.

Sir:

Under Section 128 of The Constitution of Jamaica, 1962, and in accordance with the advice of the Prime Minister, I hereby appoint you to be the Jamaican Ambassador to Washington, the United States of America, with effect from the date of your departure from Jamaica, with salary at the rate of £3,500 a year.

2. The appointment is normally expected to be for a period of three years, but its duration is, of course, subject to the provisions of Section 128(1) of The Constitution of Jamaica.

3. In addition to salary, you will eligible for allowances as set out below :

Overseas allowance (including element of entertainment)	£7,000 a year
Maids' allowance	£1,000 a year
Children's allowance up to a maximum of three (children to be under eighteen years)	£150 - first child £120 - second " £100 - third "
Initial outfit allowance	£ 500

You will be provided with a free house, fully furnished. You will also be entitled to a free car with free maintenance thereof and the services of a Chauffeur.

4. You will be eligible for free first-class passages to Washington for yourself, your wife and children, not exceeding five persons in all,

children to be under eighteen years of age and dependent on you, and free first-class passages back to Jamaica at the end of the period of your engagement. You will also be eligible for the transport of your baggage and personal effects as in the attached statement.

If you so wish, Mr. M.D. March of the Office of the Services Commissions will be pleased to make your travel arrangements.

5. You will be eligible for vacation leave at the rate of forty-five days a year accumulative to one hundred and thirty-five days and departmental leave at the rate of twenty-four days a year.

There is no fixed period of sick leave, but sick leave in excess of three days will be granted when supported by a medical certificate. (Sick leave of three days or less will be charged against your departmental leave.)

I am, Sir,
Your obedient servant,

(sgd.) K.W. Blackbourne

GOVERNOR-GENERAL

Mr. N.N. Ashenheim, C.B.E., M.A. (OXON),
11 Waterloo Road,
Kingston 10.

EXHIBITS

Respondent's Exhibits

Exhibit 1. Letter Governor General to Neville Ashenheim

29th August 1962

(continued)

In the Supreme Court of Judicature of Jamaica.
In the High Court of Justice.

No. 5

Judgment of Parnell J.

31st October 1968.

No. 5

JUDGMENT DATED 31st OCTOBER, 1968.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE HIGH COURT OF JUSTICE

BETWEEN The Commissioner of Income Tax — Appellant

AND Sir Neville Ashenheim (Appeal from a decision of the Income Tax Appeal Board) — Respondent

Mrs. A.C. Hudson-Phillips and with her Mrs. R. Feurtado for the appellant, 10

Richard Ashenheim for the respondent.

September 25 and 31st October, 1968.

This is an appeal by the Commissioner of Income Tax from a decision of the Appeal Board dated the 22nd day of July, 1968 allowing the appeal of the respondent against an assessment made by the appellant on the respondent's salary for the year 1963 as Jamaica's Ambassador to the United States of America. 20

The material facts placed before the Appeal Board and which were not challenged at the hearing before me may be summarised as follows :

The respondent, a Jamaican citizen who at all material times was domiciled in Jamaica, is a solicitor of the Supreme Court of Jamaica and was a partner in the firm of Milholland, Ashenheim and Stone from 1926 to 1962. At all material times, he was, and presumably still is, a director of several Companies registered in Jamaica. He 30 was also a member of five lodges and four clubs in Jamaica.

By letter dated the 29th August 1962 (Exhibit 1), the respondent was appointed Jamaica's Ambassador to Washington by the then Governor-General under and by virtue of Section 128 of the Constitution and on the advice of the Prime Minister. The appointment stipulated to be -

"normally for a period of three years, but

its duration is of course subject to the provisions of Section 128 (1) of the Constitution of Jamaica."

was effective from a date on or about the 9th September, 1962 to a date in March, 1967.

The salary and allowances which the post of Ambassador to Washington carried are mentioned in the letter of appointment. The respondent's salary was paid monthly (along with other members of the Embassy staff) from funds provided by Parliament for the maintenance of the Embassy staff. The salary was paid to him in Washington less income tax deductions. The respondent's protest in respect of the income tax deductions was not sustained by the appellant.

During the period that the respondent was Ambassador, he owned and still owns a house at Waterloo Road, and he paid the rates, and taxes for these premises and also the wages of a gardener.

In 1963, the respondent paid two visits to Jamaica and during one of those visits, he attended the director's meeting of two Companies. While in Washington, the respondent occupied a house owned by the Government of Jamaica. The contention of the respondent and that of the appellant before the Appeal Board is summarised at page 3 of the decision of the Board and is stated thus:

"It was submitted by the appellant that the appropriate provision of the Income Tax Law is paragraph (c) of Section 5, but as the office or employment was not exercised in Jamaica income tax is not attracted to the emoluments of the office.

The appellant also submitted that if the provisions of paragraph (a) and or (b) of Section 5 could possibly apply to the employment of an Ambassador then it is contended that during the material time he was not resident in Jamaica and therefore not liable to income tax in respect of his emoluments."

The answer of the appellant to the respondent's

In the Supreme Court of Judicature of Jamaica.
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arguments before the Appeal Board is stated as follows :

> "It was submitted for the respondent that the appellant was resident in Jamaica during 1963 and the case falls within the provisions of paragraph (a) (ii) of section 5 of the Income Tax Law and therefore profits or gains arising or accruing from the employment attract income tax. Alternatively, it was further submitted that the salary had its source in Jamaica and therefore falls within paragraphs (a) (iii) and (b) (iii) of Section 5."

The grounds of appeal argued before me are 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 respondent 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.

The reasoning of the Appeal Board in accepting the main submissions of the respondent and rejecting those of the appellant is outlined in pages 4 to 6 of the decision. I find the reasoning of the Board somewhat difficult to follow. However, I extract the following propositions from the decision. They are :

(1) That when the respondent was Jamaica's Ambassador to Washington, he was in the position 'of a person employed to another.' Presumably this means that (Exhibit 1), letter of appointment, shows that he was employed to the Executive Government of Jamaica.

(2) That paragraph 5(c) of the Income Tax Law (Law 59/54) is the only portion of the

"charging section" of that Law which covers the salary of a person employed to another, and that the facts outlined by the respondent are not caught by any other paragraph of the charging section.

(3) That Section 5(b)(iii) is not applicable and "cannot in our view embrace a contract of service", and further that "the provision is so wide that one wonders if it is not ultra vires the Constitution."

It is clear that the Appeal Board was pre-occupied with a detailed consideration of Section 5(c) of the charging section. It gave a cursory glance to section 5(b)(iii) and even put forward a view which does not appear to have been canvassed by the appellant and which was not advanced before me - that Section 5(b)(iii) of the Income Tax Law could be construed as being in conflict with the Constitution.

One of the arguments of the appellant before the Appeal Board was that the respondent "was resident in Jamaica during 1963." Up to the 22nd July, 1968, when the decision of the Board was delivered the question of residence was not determined. The Board states this at p.6 of its decision :

"Arguments were addressed to us on the question of whether the appellant was resident in Jamaica during 1963. We have not overlooked those arguments but the view we have taken of the appeal makes it unnecessary for us to come to any conclusion on this question
.....
On further consideration the question whether the appellant was resident in Jamaica during 1963 is reserved for consideration."

Of course the fact that at all material times the respondent was domiciled in Jamaica makes it unnecessary for me to come to any conclusion whether or not the Appeal Board directed itself properly or at all on this aspect of the appellant's arguments before the Board. But in passing, I must say that I am unable to see any difficulty which the Board could have encountered in coming to a conclusion to the simple question,

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namely - where was the respondent resident when he was discharging the duties of Jamaica's Ambassador to Washington? Apart from the main facts found, it must be remembered that the respondent was the diplomatic representative of his country and was only residing in Washington as part of the term of his employment and for the better discharge of his duties. A person may reside in two or more places. In the same way, a man may have a home in Washington and one at Waterloo Road, St. Andrew.

The chargeable incomes for Income Tax purposes are outlined in Section 5 of the Law which came into force on January 1, 1955. This section was amended by Law 42/58 and Act 9/63. The amendment made by Law 42/58 is to substitute a new sub-paragraph in place of sub-paragraph 5(b)(iii) of the original sub-paragraph and substituting a new paragraph (c) in place of the old.

The appropriate portions of Section 5 (for the purposes of this appeal) now read as follows:

"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 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."

It is to be observed that the sub-paragraph (iii) in Section 5(b) "any employment or vocation" appeared for the first time after the Income Tax Law was amended by Law 42/58.

Whether or not a person is liable to pay Income Tax in Jamaica depends on whether he is caught by any portion of the charging section aforementioned. In testing any assessment of the Commissioner of Income Tax in any particular case, Section 15 of the Income Tax Law should be observed.

Section 15(1) states:

"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."

This section is only repeating a principle which is well established in income tax cases. Lord Herschell puts the point clearly in Colquhoun v. Brooks (1889), 14 Appeal Cases 493, 504:

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"The Income Tax Acts.....themselves impose a territorial limit; either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there."

It seems to me that in construing Section 5 and 15 of the Income Tax Law, one comes to the conclusion that liability to pay income tax arises in the following cases:

(1) Where any person is resident in the Island, and enjoys annual profit or gain arising or accruing to him from any property situate in the Island or elsewhere.

(2) Where any person is resident in the Island, and 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 any person although not resident in the Island exercises any trade, profession, employment or vocation within the Island or has property in the Island and where he can in either case show an annual profit or gain.

(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 of the Law.

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

I have, therefore, to examine whether or not the Appeal Board approached the matter according to the well known rules laid down for construing a taxing or fiscal statute.

Before I examine the submissions which were urged by Mrs. Hudson-Phillips for the appellant and Mr. Ashenheim for the respondent, I should state as I understand them, the well known rules which I consider should guide a Court or Tribunal which has to consider an appeal arising from a taxing statute.

Approach to a Taxing Statute

(a) A subject should not be asked to pay a tax unless there is clear language of the Legislature to this affect and the enactment must be read according to the ordinary and natural construction of the words used.

The words of Lord Halsbury L.C. in Tennant v. Smith [1892] A.C. 150 at page 154 may be quoted:

"My Lords, to put this case very simply, the question depends upon what is Mr. Tennant's income. This is an Income Tax Act, and what is intended to be taxed is income. In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe they may be all reduced to this, that inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed."

(b) Once the words of the statute are clear and the subject matter to be taxed is ascertained, then the Court must give effect to the intention of the Legislature and it should not cut down, abridge or modify the words used under the pretext of construction. Lord Russell of Killowen C.J. puts the point in robust language in Attorney General v. Carlton Bank [1899] 2 Q.B. 158 at p. 164:

"I see no reason why special cannns of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely to give effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed. The Court must no doubt ascertain the subject matter to which the particular tax is by the statute intended

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to be applied, but when once that is ascertained, it is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardship or of business convenience or the like. Courts have to give effect to what the Legislature has said."

(c) The principle of the equitable construction of a statute - if such a principle exists today - has no application to a taxing statute inasmuch as there is no room for what may be called "legislation by construction " whether in considering a fiscal enactment or any other enactment.

Collins, M.R. repeats and adopts the language of Lord Cairns in Partington v. Attorney General L.R. 4 H.L. 100 at p.122.

In Attorney General v. Selborne (Earl of) /1902/ 1 K.B. 388 at p. 396 in quoting Lord Cairns the Master of the Rolls says in part :

"If the person sought to be taxed comes within the letter of the Law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

Mrs. Hudson-Phillips has argued that paragraphs (a), (b) and (c) of section 5 of the Income Tax Law are not mutually exclusive and that Section 5 is an omnibus section and each paragraph must be examined to ascertain whether any income, emolument or other sum is caught by the charging section.

Mrs. Hudson-Phillips further argued that paragraph (b)(iii) of Section 5 - relating to

"any employment or vocation" is wide enough to cover the salary paid to the respondent as Ambassador to Washington. It was conceded that paragraph (c) does not apply to the facts under review.

On the other hand, Mr. Ashenheim argued that the term "employment" in paragraphs (a), (b) and (c), refers to a different kind of activity and that "employment" in paragraph (b)(iii) means "employment by a person on a casual basis" and does not cover the type of employment as interpreted in the English Income Tax Acts, and in particular by Rowlatt, J. in Davies v.Braithwaite (1933), 18 T.C. 198.

It was further argued by Mr. Ashenheim - and this point was conceded by Mrs. Hudson-Phillips - that the term "employment" as used in sub-paragraphs (a)(ii) and (a)(iii) of Section 5 refers to self-employment but the concession stopped there. She argued that the new sub-paragraph (b)(iii) referring to profits or gains accruing in or derived from the Island or elsewhere in respect of "any employment or vocation" opens up a wide field and covers any employment whether self-employment or employment to another.

I shall examine the term "employment" as used in Davies v. Braithwaite to which Mr. Ashenheim referred. Before doing this, however, I should make a few observations:

The first is this:

The Income Tax Act of England is quite different from the Jamaican counterpart. In England one's liability to pay income tax is governed by a schedule. As Harman, L.J. said in Mitchell and Edon v. Ross [1960] 2 W.L.R. 766 at p. 790:

> "Now it is notorious - and is, indeed, a long-standing injustice - that the scale of the tax payer's allowances under Schedule E are on an altogether more niggardly and restricted scale than under Schedule D. Indeed, it has been said that the pleasures of life depends nowadays upon the schedule under which a man lives."

It is clear, therefore, that liability for Income

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Tax in England, depends on the force of one of five schedules A to E, each of which uses certain terms in a certain context. In discussing the relevance of the argument advanced concerning an English case under the English Income Tax Act, Lord Guest in delivering the judgment of the Privy Council in Commissioner of Income Tax v. Hanover Agencies Ltd. /1967/ 2 W.L.R. 565 at p.568 G says this:

> "The real ratio decidendi is contained in the speech of Lord Atkin, when he says that annual income from the ownership of land can only be assessed under Schedule A and that the option of the Revenue to assess under whatever schedule they prefer does not exist. The schedules are mutually exclusive. In their Lordship's opinion the decision in the Salisbury's House case has no bearing on the construction of the provisions of the Income Tax Law of Jamaica where there is no parallel to the division of the charge to income tax into various separate and distinct schedules. Section 5 already referred to, is an omnibus section etc."

Secondly, the schedules are mutually exclusive and these schedules afford a complete code for each class of income dealing with allowances exemptions, and the mode of assessment. This point is fully made in the speech of Viscount Simonds in Mitchell and Edon v. Ross /1961/ 3 W.L.R. 411 at p. 422.

> "I regard it is fundamental and well settled law that the schedules to the Income Tax Acts are mutually exclusive, and that the specific schedules A, B, C, E and the rules which respectively regulate them, afford a complete code for each class of income, dealing with allowances, deductions and exemptions relating to them respectively."

In Davies v. Mitchell (supra) the question which Rowlatt, J. had to decide was whether Miss Braithwaite, an actress should have her earnings over a three year period assessed either under Schedule D or under Schedule E. The actress who resided in England exercised her activities on the stage in England and the United States; she also performed on the Wireless for the B.B.C. and

gave performances for reproduction by gramophone companies. The question therefore whether she was faithfully following the profession of an actress or she was only exercising certain employments under particular engagements called for a ruling.

Schedule D had a paragraph -

"Tax in respect of any profession, employment or vocation not contained in any other schedule."

Rowlatt, J. who admitted that the question before him was one

"of difficulty because of the want of precision in the term employment as it comes into this controversy."

says this at p. 203 of the report (see 18 T.C. 202 at p. 203):

"When employment is used in connection with a profession or vocation it means the way a man busies himself, and when you get it into schedule E you are beginning to use the word with a different value and you use it as something more or less analogous to an office and conveniently amenable to the scheme of taxation which is applied to offices as opposed to the earnings of a man who is making what he can,"

The learned judge is trying to give a sensible meaning to "employment when used in connection with a profession or vocation." He was not dealing with the term "employment" simpliciter.

In this case, the respondent as Ambassador to Washington was not in employment as Ambassador by virtue of his calling as a solicitor. Every Ambassador is not a professionally trained man before he takes up that post, And no Ambassador is required to be a solicitor. When one speaks of "employment" one's mind envisages a relationship between an employer and employee under some agreement, engagement or contract express or implied. This fact is important since it may be relevant to ascertain - as is indicated in paragraph (b) of Section 5 of the Income Tax

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Law - the answer to this question namely : Where is the source of income which is to accrue to the employee who is employed?

Lord Green M.R. brings out this point in Bennett v. Marshall T.C. 73 at p. 86; (1938) 1 K.B. 591 at p. 603 where he says :

> "But in the case of employment different considerations arise. Employment arises from a contract of employment, and, therefore, there is not in the other cases, some definite contract to which to look when inquiring into the source of the income which it is sought to charge. I should have thought, therefore, that in the case of employment the contract is the first thing which must be looked at to find out the answer to the question raised in any particular case of employment. Is it or is it not income derived from a source out of the United Kingdom?"

The learned Master of the Rolls was considering the ordinary and natural meaning of the term "Employment", its genesis and its consequences in relation to the source of the income, emolument or wages to be paid to the person employed.

Section 5(b)(iii) which was relied on by the appellant and which appeared to have received very little consideration by the Appeal Board, when reduced to simplicity appears to disclose the following result.

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.

The suggestion of the Appeal Board that this sub-paragraph be ultra vires the constitution or that every member of the universe who is employed within the meaning of the paragraph would incur

liability under the Income Tax Law of Jamaica completely ignores a few fundamental elements. Firstly, income tax law, if it does not directly prescribe its territorial limits, is generally confined to persons domiciled or ordinarily resident in the country where the law operates. Secondly, in most of the Commonwealth Countries provision is made in the Income Tax Law granting relief against double income tax.

The man from Timbukto cannot be called upon to pay income tax in Jamaica on income derived from his investments in Iceland. But the man from Timbukto who is domiciled here and residing at Beverly Hills would have to pay income tax whether or not his dividends, profits or gains derived from Iceland are paid in his bank account in Geneva or in his account at a branch of Barclay's in Kingston.

The argument of Mr. Ashenheim that "employment or vocation" in paragraph 5(b)(iii) of the Income Tax Law means "casual employment or vocation" cannot be supported. The further argument that it is only Section 5(c) which is applicable to the facts is, with respect, unsound. The term "any employment or vocation" means what it says. To add the word "casual" before employment in the sub-paragraph is to take on the role of Parliament by legislating which no Tribunal or Judge in Jamaica is permitted to do. Where, however, adequate grounds exist to justify the inference that there has been what I may call a "Parliamentary Ellipsis", it may be permissible to read into an enactment some word or phrase so as to carry out the main object and intention of Parliament. Let me quote the words of Lord Loreburn L.C. in Vickers v. Evans (1910), 79 L.J.K.B. 954 at p. 955 and which are cited in Maxwell on Interpretation of Statutes, 9th Edition p.14.

> "We are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself."

One must not ignore the history of the sub-paragraph. It made its first appearance in 1958 and Parliament's intention - ex abundanti cautela - was to put in this sub-paragraph with its roving and wide ambit, so that no profit or gain derived

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from the Island from any employment or vocation and accruing particularly to a Jamaican or other person demiciled within the shores should escape liability from income tax. The fasciculus formulated by sub-paragraphs (i) and (ii) of paragraph (b) is given a wide and general adjunct with the addition of (iii).

Where a person appeals against the decision of the Commissioner of Income Tax, the burden is on him to satisfy the Appeal Board that the Commissioner's decision or ruling had been wrongly made. Section 54(5) of the Income Tax Law states as follows :

> "The onus of proving that the assessment complained of is excessive shall be on the objector."

If the objector's contention rests on a point of law alone - as in this case - that is to say, whether on the admitted facts and on a fair construction of the charging section any liability to pay income taxarises, the onus of demonstrating the error, if any, on the part of the Commissioner in his coming to the wrong conclusion rests on the objector. Similarly, the same duty arises where the objection refers to a question of fact alone or to one of mixed law and fact. As I have tried to show, one of the arguments on which Mr. Ashenheim has strongly relied, is to endeavour to persuade me - as he had apparently persuaded the Appeal Board- to read the epithet 'c a s u a l' immediately before the word "e m p l o y m e n t' in sub-paragraph (iii) of paragraph (b) of Section 5. That was part of the burden which he undertook before the Appeal Board. With the addition of this word, the sub-paragraph now reads as follows:

> "any casual employment or vocation."

If the ejusdem generis rule of construction is prayed in aid, the expanded sub-paragraph now becomes

> "any casual employment or casual vocation."

In Jamaica one hears of a 'casual labourer'. For one to see a 'casual solicitor', a 'casual medical practitioner' or a 'casual teacher', is to encounter a rara avis. In the field of diplomatic practice

one does not know of a "casual Ambassador." But to deal further with Mr. Ashenheim's argument, if he is correct, the net result would be this: the term 'employment or vocation' whenever it occurs in paragraph (a) of the charging section refers to self-employment, but that the term is restricted to "casual employment or vocation" in paragraph (b)(iii). I will test the argument with a simple example. M, a Jamaica Solicitor retires from the practice of Law and is sent to the Cayman Islands under a contract of service by a Company registered in Jamaica. He goes to take up the duties of Public Relations Officer at the subsidiary Company's office for a period of three years at an attractive salary. M's salary and allowances are to be paid into his current account at the Duke Street branch of Barclay's bank or alternatively into his account in Georgetown. On the argument of Mr. Ashenheim, M cannot be called upon to pay income tax in Jamaica on his profits or gains (with or without considering any double-taxation arrangement) because: although M's emoluments accrue in Jamaica:

(1) M is employed to another;

(2) M is not exercising any employment or vocation within the island;

(3) M's employment or vocation is of a 'casual' nature.

Mr. Ashenheim cited certain other English authorities namely: Mitchell and Edon v. Ross, 40 T.C. 11; and Robinson v. Corry, 18 T.C. 411, all dealing with the English Income Tax Acts. I have looked at all of them. None of these cases, in my opinion, has any direct relevance to the issue raised in this appeal; namely - what is the ordinary and natural meaning to be given to the term "any employment or vocation" in the context in which it is used in sub-paragraph (iii) of paragraph 5(b) of the Income Tax Law. A further question raised in the appeal is not whether the respondent was liable to pay income tax for 1963 under paragraph (c) of section 5, but whether he was liable to pay income tax at all under the charging section.

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dated September 4, 1962 (Exhibit 2), informed the respondent before he assumed duties as Ambassador that the salary "will be liable to Jamaican tax by virtue of the provisions of Section 5(c)."

It has been conceded - and in my opinion rightly conceded - that on the facts, the salary of the respondent paid to him in Washington would not be caught by paragraph (c) of Section 5 for the simple reason that the respondent was required to exercise his duties as Ambassador out of the Island and this was what he did.

Pay-as-you-earn deductions may only be made in respect of emoluments to which paragraph (c) of Section 5 applies. (See Section 73 of the Law). The respondent complains that deductions were made as if his salary was assessable under Section 5(c). I think his complaint in this respect has merit, but as I have already pointed out the issue is not whether any deductions should have been made under Section 5(c) but whether he should have been assessed on his salary and thereupon required to pay the sum found to be due and owing on his profits or gains.

It is common knowledge that all the Jamaican Embassies abroad are financed and run by funds provided by Parliament and appearing in the Estimates. The appointment of every Jamaican Ambassador is made pursuant to Section 128 of the Constitution. The appointment, therefore, originates in Jamaica and if the letter of appointment is to be regarded as evidence of a contract of service, then whether or not the appointee is a career diplomat or otherwise, the contract has its birth in Jamaica. When the Ambassador is paid his salary abroad, he is being paid from public money having its source in Jamaica. He is therefore liable to pay income tax here on the profits or gains accruing to him in respect of the salary paid for the duties performed by him abroad as Ambassador, and it is immaterial whether the salary or part thereof is paid into his current account in Jamaica or into his account elsewhere. The Ambassador's salary is not exempt from income tax under Section 7 of the Law.

The error of the Commissioner of Income Tax

suggesting that the respondent's salary was caught by Section 5(c) is irrelevant to the issue of liability to pay tax. No admission, error or miscalculation of a Revenue Official can operate as an estoppel nor can it be relied on by the respondent to escape liability where the law itself shows that liability should be attached.

It is my opinion that the Appeal Board erred in reversing the determination of the Commissioner of Income Tax. The appeal is allowed. The order of the Appeal Board must be set aside and the decision of the Commissioner of Income Tax restored in the light of the judgment herein.

The respondent must pay the costs of this appeal which I fix at Twenty-Five Guineas.

U.N. PARNELL

Puisne Judge.

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Order allowing Appeal.

31st October 1968.

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ORDER ALLOWING APPEAL DATED 31st OCTOBER 1968.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE HIGH COURT OF JUSTICE

Suit No. M52 of 1968

BETWEEN The Commissioner of Income Tax Appellant

AND Sir Neville Ashenheim Respondent

IN CHAMBERS

Before the Honourable Mr. Justice Parnell

The 31st day of October, 1968. 10

THIS APPEAL coming on for hearing on the 25th day of September, 1968 before the Honourable Mr. Justice Parnell and in the presence of Mrs. Angela Hudson-Phillips for Counsel for the Appellants and Mr. Richard Ashenheim Solicitor for the firm of Milholland, Ashenheim & Stone for the Respondent

IT IS HEREBY ORDERED that this appeal be allowed with costs in the sum of £26.5.0. to the Appellant. Stay of Execution for 6 weeks granted. 20

REGISTRAR

ENTERED by the Crown Solicitor, Crown Solicitor's Office, Nos. 134-140 Tower Street, Kingston, Solicitor for and on behalf of the above-named Appellant whose address for service is that of his said Solicitor.

In the Court of Appeal Jamaica

No. 7

Notice of Appeal

12th November 1968.

No. 7

NOTICE OF APPEAL DATED 12th NOVEMBER 1968

Suit No. M 52 of 1968

C.A. of 1968

IN THE COURT OF APPEAL

BETWEEN SIR NEVILLE ASHENHEIM Appellant

AND THE COMMISSIONER OF INCOME TAX Respondent

TAKE NOTICE that the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the abovenamed Appellant on Appeal from the Judgment herein of the Honourable Mr. Justice Parnell given on the 31st day of October 1968 at the hearing of the Respondent's Appeal from a decision of the Income Tax Appeal Board whereby the Learned Judge adjudged

1. That the Income Tax Appeal Board had erred in reversing the determination of the Respondent and in allowing the Appellant's Appeal to the Income Tax Appeal Board.

2. That the Appeal of the Respondent be allowed.

3. That the Order of the Income Tax Appeal Board be set aside and that the decision of the Respondent be restored

4. That the Appellant should pay the costs of the Appeal before the Honourable Mr. Justice Parnell fixed at Twenty-five Guineas.

FOR AN ORDER

1. That the decision of the Honourable Mr. Justice Parnell be set aside.

2. That the decision of the Income Tax Appeal Board be restored.

3. That it be determined that the salary paid to the Appellant as the Jamaican Ambassador to Washington during the calendar year 1963 does not fall for assessment to income tax or

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sur tax in Jamaica either in the year of assessment 1963 or at all.

4. That the Appellant's Appeal be allowed with costs in this Court and before the Honourable Mr. Justice Parnell.

5. That there be such further or other relief as may be just.

AND FURTHER TAKE NOTICE that the grounds of Appeal are :-

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 Sur Tax 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 yardstick 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.

6. (a) The Respondent conceded before the Honourable Mr. Justice Parnell - and correctly conceded - that since the Legislature must be taken to be aware of the construction previously placed by the English Courts on the form of words used in Section 5(a) of the law, it was not possible to construe the word "employment" as therein appearing as embracing more than self employment.

(b) The same canons of construction would also result in the word "employment" in Section 5(b) being limited to self employment and the entire machinery of the Income Tax Law indicates that "employment" in Section 5(b) bears the same meaning as it does in Section 5(a) and that Section 5(c) is the only provision in the statute that seeks to tax the "emoluments" of an employment in a post as contrasted with the "income" of a self employed person.

7. The Income Tax Laws of both the United Kingdom and the United States have never sought to tax the salary or emoluments of a person holding employment to another in Jamaica and the tax treaties between Jamaica and the United Kingdom and the United States respectively clearly show an intention that the emoluments of such a person are taxable only in the country in which the post is exercised or carried on.

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 year's 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

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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. That the Honourable Mr. Justice Parnell erred or misdirected himself (inter alia) in the following parts of his Judgment:-

(i) It was incorrect to hold that the office or employment in this case comes within the meaning of the word "employment or vocation" in Section 5(b)(iii) of the Income Tax Law because the decided cases establish that when the word "employment" is used in connection with the word "vocation" it means the way a man busies himself and therefore applies to a self employed person and does not apply to the type of occupation which is an office or analogous to an office.

(ii) It was incorrect to reject the interpretation placed by decided cases on the meaning of the words "office or employment". The Learned Judge was not here dealing with the word "employment" simpliciter.

(iii) The Honourable Mr. Justice Parnell erred in holding that the cases of Mitchell and Eldon vs: Ross 40 T.C. 11 and Robinson vs. Corry 18 T.C. 411 had no direct relevance to the issue raised in the Appeal.

(iv) The Honourable Mr. Justice Parnell misdirected himself on the effect of the Judgment of the Privy Council in Commissioner of Income Tax vs: Hanover Agencies Ltd. (1967) 2 W.L.R. 565 at page 568.

DATED the 12th day of November 1968

Milholland, Ashenheim & Stone
Solicitors for the above named Appellant

To: The abovenamed Respondent
or his Solicitor,
The Crown Solicitor,
Tower Street,
Kingston.

AND To:

The Clerk of the Income Tax Appeal Board,
40 Duke Street,
Kingston.

Filed by MILHOLLAND, ASHENHEIM & STONE of No. 11 Duke Street, Kingston, Solicitors for and on behalf of the abovenamed Appellant, and whose address for service is that of his said Solicitors.

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JUDGMENT OF THE COURT OF APPEAL DATED 9th October 1970.

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IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 35 of 1968

BEFORE: The Hon.Mr.Justice Eccleston, Presiding
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Smith, J.A. (ag.)

Sir Neville Ashenheim — Appellant

vs.

The Commissioner of Income Tax — Respondent

Mr. David Coore, Q.C. and Mr. W. Waters-McCalla for the Appellant.

Mrs. Hudson Phillips for the Respondent.

June 17th, 18th, 19th, 22nd, 1970

FOX J.A.

This is an appeal from a judgment of Parnell,J.

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reversing a decision of the Income Tax Appeal Board and restoring a determination of the respondent which assessed the appellant for the payment of Income Tax on his salary for the year 1963 as the Ambassador for Jamaica to the United States of America. The questions for decision are whether the appellant was in the "employment" of the Government of Jamaica during the year of assessment, and whether this "employment" is within the provisions of section 5(b)(iii) of the Income Tax Law. For the appellant it was contended firstly, that he was the occupant of an office of profit; and secondly, if he was to be regarded as an employed person, that the word "employment" as it occurred in the provisions of section 5(b)(iii) meant "self employment" and was not applicable to him. The respondent submitted that the appellant was an employed person and that in its grammatical and ordinary sense, the word "employment" in section 5(b)(iii) described an employer employee relationship, and should be so understood since this would not result in any absurdity, or lead to inconsistency with other provisions of the law.

The answer to the questions in this appeal will entail a consideration of the provisions of section 5 of 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, - Law 9 of 1963. These provisions describe the incomes which are chargeable to income tax in Jamaica, and are 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 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 Ialand; 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

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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."

The facts are not in dispute. The appellant is a commonwealth citizen domiciled in Jamaica, and a Solicitor. From 1926 to 1962 he was a partner in the firm of Milholland, Ashenheim & Stone. On March 31st, 1962, he went on pre-retirement leave. On 30th Septemner, 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. The appellant discharged the duties of Ambassador in Washington from 9th September, 1962, until March, 1967. During this period, the monthly salary cheques, less PAYE deductions, 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 PAYE deductions. On 22nd July, 1968, the Income Tax Appeal Board set aside a decision of the respondent made on 27th January, 1967, which included the appellant's salary as Ambassador within his chargeable income. The Board was of the view that the duties of the appellant as Ambassador in Washington were not "exercised or carried on in the Island." Consequently, his salary did not fall within the provisions of section 5(c) of the Law. Parnell, J. affirmed this view, and the point has been conceded by Counsel for the respondent. But Parnell J. disagreed with the further finding of the Board that the salary of the appellant as a person employed by the Government of Jamaica was only chargeable to income tax by virtue of the provisions of section 5(c), and he held that the salary was also chargeable to tax as a profit or gain derived from the Island, and whether received in the Island or not, in respect of the appellant's employment by the Government of Jamaica, and so within the scope of the provisions of section 5(b)(iii).

The word "employment" 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 (iii), it means the way in which a man employs himself so as to make profits; or as Rowlatt J. puts it in Davies v. Braithwaite 18 T.C. 198 at 203 "the way a man busies himself" for the purpose of gain. Such a man is "self employed", and is charged with the payment of income tax on "the annual profits or gains arising or accruing from" his "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 is meant to describe a situation in which a man is set to work by another. Such a man puts himself at the disposal of an employer by virtue of a contract of service, and whether he is a professional man or not, he is in the 'employment' of his employer, as distinct from being 'self-employed'. His

remuneration is described as "emoluments, including all salaries, fees, wages, and perquisites whatsoever." These words are wide enough to cover, and are an appropriate description of all the monetary rewards received by an employee in return for services rendered under a contract of employment.

In section 5(b)(iii) the activity described is "any employment or vocation." The difference between this context and that described by the words "trade, business, profession, employment or vocation," or by the words "office or employment of profit" is at once apparent. Section 5(b)(iii) first appeared as a distinct provision, but not in its present form, in the Income Tax Law, 1954, Law 59 of 1954. This Law repealed and replaced Cap. 156, which was the first Income Tax Law enacted in Jamaica in October, 1919. Section 4 of Cap. 156 provided for the payment of income tax in respect of incomes falling within five defined categories, namely, the income of persons;

(a) residing in the Island;

(b) not residing in the Island;

(c) whether residing in the Island or not and "derived from any public office or employment of profit,"

(d) residing in the Island "and derived from any pension",

(e) (i) residing in the Island and "derived from any source whatever in or out of this Island,"

(ii) not residing in the Island and "derived from any source whatever in this Island."

It is interesting to note that in categories (a) and (b) the word "employment" was used in association with the words "trade or vocation." When this context is compared with that in which the word was used in category (c), it is clear that, even at that early stage, not only was the legislature aware of the different meanings of "self employment" and "employment by another" which could be conveyed by the word "employment,"

but also the verbalism which ensured expression of these different meanings had already been developed and was well understood by the draftsman. Of particular significance also is category (e) the omnibus provisions of which were designed to catch any income which may have escaped the meshes of the previous categories.

The charging provisions of the Income Tax Law, 1954, are in section 5. Structurally, this section differs noticeably from section 4 of Cap. 156. Nevertheless, it is not difficult to see that the provisions of section 5(a) (i) (ii) (iii) cover the same area as categories (a) and (b) in section 4(1) of Cap. 156, and that in 5(c) the same sort of income is contemplated as in 4(1)(c). There was left to be covered the area described by categories (d) and (e) in section 4 of Cap. 156. It is at this point that the structural changes which were made in section 5 of Law 59 of 1954 are likely to obscure the intention of the legislature. The relevant provisions are in 5(b), the opening words of which describe "profits or gains accruing in or derived from the Island or elsewhere and whether received in the Island or not." This is as wide a description of a source of income as that in category (e). The types of "profits or gains" to which these opening words applied were specified in three sub-paragraphs - (i) was concerned with "dividends.....pensions or other annuam sums." The neat way in which category (d) Cap. 156 was disposed of should be observed. (ii) dealt with rents..... and any other profits arising from property" and (iii) referred to "any employment, 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 but not including the payment for any passage from or to the Island for the purpose of leave granted in respect of the employment."

In arriving at the meaning of the words "any employment" in section 5(b)(iii) or the 1954 Law, it will be helpful to bear in mind the permissible scope of all income tax legislation. Income tax may be charged only upon,

(1) income which is in, or is derived from the Island, or

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(2) income of a person domiciled or resident in the Island.

In section 5(a)(ii) and (iii) it would seem that the legislature had exhausted its taxing powers with respect to the incomes of self employed persons. On the other hand, with respect to the income of persons employed by another, the provisions of section 5(c) applied only if the employment was "exercised or carried on in the Ialand." The area left uncovered by section 5(c) is obvious, and the need to bring persons employed by another within the sweeping ambit of the opening words of section 5(b) would have been clear. This was effected by use of the simple phrase "any employment" in section 5(b)(iii). The definitive provisions which follow put it beyond question that the type of employment which was meant was employment by another. It should be noticed that PAYE was introduced into the Island for the first time by Law 59 of 1954. The statutory incomes were defined in section 6. Subsection (1) provided that :-

> "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 the Law) the statutory income shall be the income of that person for the year of assessment."

The provisions for the collection of PAYE deductions are in section 60(2). It will therefore be seen that PAYE was intended to apply only to emoluments arising or accruing from "any office or employment of profit exercised or carried on in the Island," and that the profits or gains of a person employed by another which did not fall within the scope of 5(c), but which were caught by section 5(b)(iii) were unaffected by this new machinery for the collection of tax. The combined effect of section 5(c) and section 6 made a distinction not only as between the income of self employed persons, and that of persons employed by another, but also in the latter category, it differentiated further between the

worker outside the Island who was not.

In July, 1958, the Income Tax (Amendment) Law, 1958, Law 42 of 1958, was enacted. Section 5(b)(iii) of the principal law was amended so as to read "any employment or vocation." Section 5(c) was also amended by transferring to it the definitive provisions which had followed the phrase "any employment" in section 5(b)(iii) of the principal law. Section 5(c) now read as it has been set out in paragraph 2 above. These amendments are the cause of the whole controversy in this case. Counsel for the appellant contended that by associating the word 'employment' with the word 'vocation' in section 5(b)(iii), and by removing those matters which were germane to salaried employment from that section to section 5(c), the legislature intended it to be understood that the employment to which section 5(b)(iii) now referred was "self employment." The difference between the self employment in section 5(a)(ii) and (iii) and the self employment in section 5(b)(iii), suggested counsel, was indicated by the phrase "annual profits or gains" in (a) and "profits or gains" in (b). The former was the appropriate phraseology with respect to self generated earnings of a <u>regular</u> nature, while the latter was a fitting description of income derived from self employment of a <u>casual</u> nature. The word employment in section 5(b)(iii), argued counsel, therefore referred to self employment of a casual nature, as distinct from the self employment of a regular nature in section 5(a)(ii) and (iii). As to the reason why the other three words "trade, business or profession" were not also associated with the two words "employment or vocation" in section 5(b)(iii), Counsel submitted that the three words implied the regular continuous activity which was contemplated in section 5(a)(ii) and (iii) and would have been incongruous in section 5(b)(iii) which was meant to deal with activity of an intermittent or irregular character.

The objection which immediately presents itself to these extremely able arguments of Mr. Coore is in terms of the history of the previous legislation. There has never been the need to make separate provision for the casually self employed person. In 1954, the legislature obviously thought that he was caught by the

provisions of section 5(a)(ii) and (iii) which were unaffected by the amendments in 1958. On the other hand, as I have endeavoured to show, in 1954 the legislature appreciated the limitations of section 5(c), and recognizing the necessity for provisions with respect to the person employed by another in an employment outside the Island, it enacted 5(b)(iii). It would be strange if in 1958 the legislature became so anxiously preoccupied with the casually self-employed person as to lose sight of those employments of profit outside the Island which fell within its taxing jurisdiction, and which it had been at pains to bring within the ambit of the legislation in 1954. The Statute as a whole was designed to be workable. It should therefore be construed so as to avoid this strange result unless, in the language used, a clear direction to this effect emerges.

I turn first to deal with the suggestion that by use of the phrase "annual profits or gains" in section 5(a) as distinct from the phrase "profits or gains" in section 5(b), the legislature intended to indicate a difference between the self employed person in section 5(a)(ii) and (iii) and his counterpart in section 5(b)(iii). I find this suggestion unacceptable. A person engaged in a trade, a business, or a profession is taxed on the net profits of his enterprise whether this is 'regular or 'casual' in nature. These net profits are the product of his labour and his capital. They must be ascertained during a relevant period by reasonable business methods, and in accordance with proper accounting practices, however rudimentary, and the directions of the law. In Ryall v. Hoare /1923/ 2 K.B. 447, Rowlatt J. held that a commission paid to a person in consideration for the guarantee of an overdraft at the bank was properly assessed to income tax as an annual profit or gain even though the transaction was an isolated one and represented a casual profit only. At p.455 the learned judge said - "The word 'annual' here can only mean 'calculated in any one year ' and 'annual profits or gains' mean 'profits or gains in any one year or in any year as the succession of years come around." This definition was approved by Viscount Cave L.C. in Martin v. Lowry /1927/ A.C. 312 at 315. It is wide enough to cover the 'casual' earnings of a

person in any one year, or his 'regular' earnings from year to year. On the other hand, the income specified in section 5(b)(i) and (ii) and the earnings of a person employed by another are of a more direct character. They are the product of property alone, or of labour alone, and inasmuch as they are ascertainable without 'calculation' during a relevant period, are aptly differentiated from the net profits envisaged in 5(a)(ii) and (iii) by the phrase "profits or gains." In my view, therefore, the difference adverted to by Mr. Coore between the opening words of sections 5(a) and 5(b) does not favour, but is against his contention that the language in these provisions point a distinction between "regular" and "casual" self employment. If anything, they point a distinction between "self employment" and "employment by another."

Neither am I able to agree with the reasoning which maintains that the alterations made by the Income Tax (Amendment) Law, 1958, to sections 5(b)(iii) and 5(c) have had the effect of attaching to the word "employment" in the former provisions the exclusive meaning of "self employment." In section 5(a)(ii) and (iii) the word employment takes its meaning and colour from the words with which it is associated. More precisely, the three words 'trade,' 'business', 'profession' which precede the word 'employment' indicate particular self directed types of operations with a view to making a profit or earning an income, and the more general words "employment or vocation" which follow, must be treated as referring to operations of a similar nature. This is the reason why "employment" in section 5(a)(ii) and (iii) means "self employment." In amending section 5(b)(iii) in 1958, the legislature was careful to omit the three words 'trade', 'business', 'profession'. The reason for this is, not as Mr. Coore suggested, because they would have been unsuitable in provisions which dealt with "casual self-employment", (it is not difficult to imagine a casual trader, businessman, or professional) but because the legislature wished to leave the word "employment" unfettered of the limitation which would have been imposed if it had been preceded by these three words, as in section 5(a)(ii) and (iii).

The word vocation means a calling - a

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profession. A vocation, like a profession, may be followed by way of employment by another, or self employment. Preceded as it is, by the word 'employment', the word 'vocation' as it occurs in the context of section 5(b)(iii) should not be construed so as to control, but should itself take its colour from the meaning of the word 'employment' which, as demonstrated by the external evidence derived from previous legislation, comprehends the meaning "employment by another". But it is argued that particular internal evidence derived from the existing provisions of the Act itself provides an overwhelming indication to the contrary. This evidence consists of, -

(1) 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; and

(2) the fact that the P.A.Y.E. provisions of the law are confined to salaried income described in section 5(c).

With respect to (1). It is so that this transfer has had the result of releasing the word 'employment' from the significant incident which had determined with certainty its meaning in the 1954 law of "employment by another," but to treat the transfer as a conclusive indication that the word was now intended to mean "self employment" is a non-sequitur. The historical setting from which the word emerges, and the context - free of the preceding words 'trade, business, profession' - in which it continues to occur, clearly suggest that the word was intended to encompass "employment by another". Proof of this intention may not be as conclusive as it was in the 1954 Law, but still it is sufficient. And in truth, the transfer is explicable in simple terms which are entirely consistent with such an intention. In tax legislation, the process of development is gradual and likely to be endless. If the efforts of those persons who dishonestly seek to evade the law, and of those others who honestly attempt to avoid the law are to be kept in check; if the law is to keep pace with the advances of science and technology, and the dynamism of growth in the life of the country; and if the challenge of elegance in language and in structural form is to be met,

constant changes and amendments to the law are necessary. The striving towards an unattainable ideal of sophistication and precision; the quest for the absolute in efficiency, are categorically imperative so long as the present system which supports a free self-respecting community endures. Seen in the focus of this gradual and continuous development of the law, it is not difficult to understand that the definitive provisions were transferred to section 5(c) not for the reason suggested by Mr. Coore, but simply because they define identifiable perquisites of salaried employment, and when the amendments were made in 1958, it was perceived to be neater and more appropriate, to include them within provisions which deal specifically with that subject, rather than clumsily append them to "sweeping up" provisions as had been done in the 1954 legislation.

With respect to (2) the argument may be stated in the following terms -

(i) The only income which is conveniently susceptible to P.A.Y.E. deductions is salaried income.

(ii) The provisions which create the machinery for effecting P.A.Y.E. deductions apply only to salaried incomes described in section 5(c) -

(iii) A charge to tax on salaried income is imposed by the provisions of section 5(c).

Therefore

(iv) No other provisions of section 5 impose a tax on salaried income.

I apologise if this exposition of the dialectic is inadequate, but logic apart, the fundamental objection to the argument is that it ignores the distinction which has been affirmed between employment in the Island, and employment outside the Island and assumes that all salaried income was intended to be taxed as it was earned. For reasons which it considered sufficient, and as to which I am not required to speculate, but which come readily to mind nevertheless, the

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legislature decided in 1954 that the former employment should be subject to the P.A.Y.E. provisions of the law but not the latter. In construing the 1958 amendments this criterion for the application of the P.A.Y.E. provisions must not be overlooked. So that, although the appellant's salary was conveniently susceptible to P.A.Y.E. deductions, this is beside the point. Susceptibility to deductions is not the test for determining whether the deductions should be made, neither is it a guide for ascertaining whether tax has been imposed. Read as a whole with the other charging provisions, there are positive indications that the provisions of section 5(b)(iii) were intended to impose a tax on persons in the appellant's position, and the machinery provisions which establish P.A.Y.E. should not be allowed to defeat this intention. In my opinion, the phrase "any employment or vocation" means exactly what it says, with emphasis on the word "any". Unfettered by the words "trade, business, profession," and freed of the definitive provisions which were referable to salaried positions, the two words 'employment' and 'vocation' were deliberately placed in association with each other for the purpose of having a wide sweeping up effect, and to catch <u>any</u> employment or vocation, whether self directed, or directed by another which may have escaped the other relevant provisions in section 5.

Two matters remain -

a. The contention that the emoluments which the appellant received arose from an <u>office</u> of profit within the meaning of section 5(c) and not from an employment.

b. The claim that in any event the appeal should succeed because the P.A.Y.E. deductions which had been made from the appellant's salary were unauthorised.

<u>As to a</u>. It is true that in section 128(3) of the Constitution of Jamaica the post of Ambassador is described as an office, but from the written judgments which were delivered, it is clear that both the Income Tax Appeal Board and Parnell, J. concluded that the emoluments which the appellant received arose from the contract of employment

which is evidenced by the letter from the Governor-General, and that he was therefore in the employment of the Government of Jamaica. This conclusion is the reasonable inference to be drawn in the circumstances. The phrase "office or employment of profit" describes positions which may overlap. A person may occupy an office of profit exclusively. In such a case, his remuneration is by way of the fees and other premiums (exclusive of contractual rewards) which, as perquisites attached to the office itself, are receivable by whomsoever happens to occupy that office. On the other hand, 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 an employed person. His remuneration is not an incident of the office he occupies, but the consideration flowing from the contract of employment, and is properly described as a profit or gain accruing from employment. The appellant comes within this latter category. He escapes the provisions of section 5(c) because his employment was found not to have been "exercised or carried on in the Island", but he is caught by the wider all embracing provisions of section 5(b)(iii) which is free of any such limitation.

As to b. The central question in this appeal, and indeed the real question, is whether the appellant is liable for the payment of tax on the salary which he received during the year 1963 as the Ambassador for Jamaica in Washington. This question should be answered in the affirmative. Tax has been paid for that year by way of P.A.Y.E. deductions and is in excess of the amount which is properly payable. In the light of the conclusions which have been stated above, the matter now calls for adjustment at the administrative level and not for further judicial pronouncement. There is no merit in this claim.

I would dismiss this appeal with costs.

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Smith J.A.

SMITH J.A.

The appellant, Sir Neville Ashenheim, was appointed in August, 1962 as Jamaica's first Ambassador to Washington, U.S.A. The fact of his appointment, and the terms and conditions thereof, were set out in a letter dated 29th August, 1962 addressed to him by the Governor-General. His salary was stated to be at the rate of £3,500 a year and he was eligible for an overseas allowance of £7,000 a year, as well as other allowances. He served as ambassador from September 1962 until March 1967. The appellant is a Jamaican citizen and was found to have been domiciled in Jamaica at all material times.

The appellant was assessed to income tax for the year of assessment 1963 in respect of his full ambassadorial salary for the year 1963. He objected to this assessment and appealed to the Income Tax Appeal Board on the ground that he was not liable to pay tax on this salary. The Board allowed his appeal, holding that the appellant's ambassadorial salary was not taxable as paragraph (c) of section 5 of the Income Tax Law, 1954 was the only paragraph of that section that could apply to the salary of a person employed to another and that that paragraph did not apply to the appellant's salary as his employment was not exercised or carried on in Jamaica.

The respondent's appeal against the Board's decision was allowed by Parnell, J., who set aside the Board's order and restored the decision of the respondent on the assessment. Parnell, J. held that the appellant's salary was taxable under paragraph (b)(iii) of section 5 of the Income Tax Law, 1954. It is from this decision that this appeal is brought.

Section 5 is the charging section of the Law and its relevant provisions are as follows :

> "5 - Income tax shall.....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 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,....."

On behalf of the appellant it was submitted as follows :-

Firstly, that the salary paid to the appellant as ambassador is an emolument arising from an office of profit within the meaning of section 5(c);

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secondly, that, alternatively or co-extensively, the salary is an emolument arising from an employment of profit within the meaning of section 5(c);

thirdly, that such salary is not a profit or gain arising from any employment or vocation within the meaning of section 5(b)(iii);

fourthly, that there being no other portion of section 5 under which it is now contended that this salary falls, and it having been found and accepted that the appellant's duties as ambassador were not exercised or carried on in the Island, which is the condition precedent for the assessment of an emolument described in section 5(c), there is no basis on which the appellant's salary can be taxed.

There can be no doubt that as ambassador the appellant held an office. Section 128 of the Constitution, which authorised his appointment, so describes it. It comes within Rowlatt, J.'s definition of "office" in Great Western Railway Co. v. Bater (1920) 3 K.B. 266 at 274, which was adopted by Lord Atkinson in the same case /(1922) A.C. at p.157, and approved of by Lord Wright in McMillan v. Guest 24 T.C. 190 at 201. So the submission is right, in my view, that the salary paid to the appellant was an emolument arising from an office of profit within the meaning of section 5(c). Indeed, it is on this premise that the appellant's salary was assessed. It is conceded, however, that the salary is not taxable under section 5(c) as the appellant's office was not exercised or carried on in the Island. The question of substance which arises for decision therefore, is whether the appellant's salary is liable to be taxed under section 5(b)(iii). The respondent contends that it is, while the appellant says that it is not.

It was submitted on behalf of the appellant that if the appellant's salary is to be taxable at all it can only be taxable under section 5(c) because that is the only place in the charging section in which an office of profit

is mentioned. In deciding whether the emoluments arising from an office of profit are taxable or not one would, naturally, look first at section 5(c). Finding that it is not taxable there is it permissible to look elsewhere in the charging section? Learned counsel for the appellant submitted that it would be a very strange situation to find that the respondent could be given a discretion whether to charge a particular emolument either under section 5(c) or under section 5(a) or (b). Strange, it was said, in the sense that it would be contrary to the structure of the Income Tax Law, which has treated incomes that fall under section 5(c) in a different way from the way in which it treats incomes falling under section 5(a) and (b). This difference of treatment is in the way in which incomes are taxed. By virtue of section 6, incomes under section 5(c) are taxed on the basis of incomes for the year of assessment, while those under section 5(a) and (b) are taxed on the basis of incomes for the year immediately preceding the year of assessment.

Learned counsel for the respondent submitted that the various sub-paragraphs of section 5 are not mutually exclusive and that if a particular type of income falls into any particular category mentioned in any sub-paragraph then that income can be charged to tax in accordance with that sub-paragraph. This submission was based on Commissioner of Income Tax v. Hanover Agencies Ltd. (1967) 2 W.I.R. 565. In delivering the judgment of the Privy Council in that case, a Jamaican case, Lord Guest referred to an attempt by counsel for the appellant to draw an analogy from Fry v. Salisbury House Estate Ltd. /(1930) .A.C. 432/ in support of his argument and said, at pp. 568, 569:

> "There are expressions of opinion in some of the speeches that the company were not carrying on a trade, but these expressions must be taken in the context of the British Income Tax Law and particularly in the context of Schedule D. The real ratio decidendi is contained in the speech of Lord Atkin, when he says that annual income from the ownership of land can only be assessed under Schedule A and that the option of the

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Revenue to assess under whatever Schedule they prefer does not exist. The Schedules are mutually exclusive. In their Lordships' opinion the decision in the Salisbury House case has no bearing on the construction of the provisions of the Income Tax Law of Jamaica where there is no parallel to the division of the charges to income tax into various separate and distinct Schedules. Section 5 already referred to is an omnibus section which treats all profits and gains together whether arising from property or from a trade, business, employment or profession, or in respect of rent or emoluments, salaries or wages. These are all treated as profits or gains."

This passage clearly supports the submission that the several heads of charge under section 5 are not mutually exclusive. Learned counsel for the appellant conceded this but submitted that the Revenue is not free either in Jamaica or in England to elect whatever part of the charging section suits it best and in all cases to choose that part. He submitted that there are some situations in which a particular income must come under one particular portion of the charging section because to hold otherwise would be to defeat the clear intention of the law.

Since the heads of charge under section 5 are not mutually exclusive, it seems to follow that where a particular income falls under more than one head the Revenue has the option of deciding under what head to assess it. As I understand it, in practice it would make no difference in the majority of cases which head is chosen. If a case clearly falls under two heads and a taxpayer would be deprived of an allowance if taxed under one rather than the other, in justice the Revenue would be obliged to tax him so that he gets the allowance. In my opinion, the Hanover Agencies case (supra) does not support the submission that the Revenue is not free to elect as between parts of the charging section, as was contended. As I understand the decision in that case, on the facts found the profits of the company fell to be assessed under Section 5(a)(ii) only, not under both 5(a)(ii) and 5(b)(ii). Whatever may be said of a case where a particular income is taxable under more than one head, there can be no doubt,

in my opinion, that where a decision is being made whether income is liable to be taxed under one or other of two heads of section 5 under which, prima facie, it falls, the Revenue has a right to elect that head which makes the income liable to tax, where under the other it is not so liable. I hold, therefore, that the appellant's abmassadorial salary, not being liable to tax under section 5(c), may be taxed under section 5(b) if it is clear that it is a profit or gain within that provision.

On behalf of the respondent, it was submitted that the appellant's salary is a profit or gain arising from "employment" within the meaning of that word in section 5(b)(iii). The first question that arises on this submission is whether as an ambassador the appellant was an employed person. The appellant must not be taken by his second main submission to be admitting that he was an employed person. The submission was made on his behalf that it cannot be said that an ambassador is employed to anyone, and he is not self-employed; so, it was said, the only way in which one can describe an ambassador is to say that he is the holder of an office. The question whether the appellant held an office and was, therefore, not an employed person does not appear to have been raised before the Income Tax Appeal Board or Parnell, J. The Board held that the appellant's salary arose from an employment of profit within section 5(c). Parnell, J. impliedly held that the appellant was a person employed.

It is plain, in my view, that as Ambassador the appellant was employed to the Government of Jamaica. The appellant's letter of appointment has all the essentials of a contract of service. His salary and allowances, the duration of his appointment and his leave entitlement are all stated. His duties are not stated but it is well known that in the performance of his duties an ambassador is subject to the direction and control of his Government. It was said that section 128 of the Constitution describes the Ambassador as the holder of an office and that the fact that it was necessary to state this in the Constitution shows that an ambassador is not employed to anyone, otherwise it would be that person who would have power to appoint and dismiss. The power to appoint persons as ambassadors, and to remove from office persons

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so appointed, is by section 128 of the Constitution vested in the Governor-General, who also appoints, and removes from office, persons to public offices under section 125. Both section 125 and section 128 appear in Chapter IX of the Constitution, which bears the title "The Public Service," The Constitution, in section 1 defines "public office" as "any office of emolument in the public service," and "the public service" is defined as "the service of the Crown in a civil capacity in respect of the Government of Jamaica." An ambassador appointed under section 128 is the holder of a public office under the Constitution. His is not one of the offices excluded by section 1(6) from the definition of "the public service." So the fact that the Constitution describes the post as an office is no indication that a holder of that post is not a person employed, or the same could be said of the hundreds of persons known as public officers who are appointed to public offices under section 125. It cannot be doubted that these persons are all employees of Government. I hold that the fact that the appellant was the holder of an office is not inconsistent with his being also an employed person.

The other, and really difficult, question is whether the appellant's employment was "employment" within the meaning of that word in section 5(b)(iii). In what sense is "employment" used in that part of the section? The appellant contended that where the word "employment" appears in section 5(a) and (b) it is used in the sense of self-employment, as distinct from employment to another or salaried employment, which is the sense in which it is used in section 5(c). This contention was based on two main grounds, which overlap somewhat. Firstly, it was said that the word, as used in the context in which it appears in section 5(a) and (b), has been judicially construed to mean self-employment only; and that in accordance with well known principles of construction it must be assumed that the draftsman and the legislature who use in a statute words which have been judicially construed in enactments which are <u>in pari materia</u> are aware of that construction and intent to use the words in the meaning ascribed by that judicial construction. Secondly, that the history of, and the structural changes in, the Income Tax Law show quite clearly that the legislature intended

in 1958 to remove out of section 5(b) all employments in the sense of one man being employed to another and to put them in section 5(c). It was submitted that if it can be said that the appellant was employed to the Government the salary of that type of employment is chargeable only under section 5(c) and, therefore, is not chargeable under section 5(a) or (b).

It is conceded that "employment" in section 5(a), used in the context "trade, business, profession, employment or vocation," means self-employment. This is because the word has been judicially so interpreted when used in a similar context in United Kingdom income tax legislation. The word "employment" appeared in both Schedule D and Schedule E of the United Kingdom Income Tax Act, 1918. In Schedule D it was used in the context "trade, profession, employment or vocation." In Schedule E the context was "public office or employment of profit." In 1931, in Davies v. Braithwaite, (1931) 2 K.B. 628, (1931) All E.R. 792, 18 T.C. 198, Rowlatt, J. had to decide what the word meant in both schedules. He began his judgment by saying - at (1931) 2 K.B. 633:

> "The question of principle in this case is whether the respondent ought to be assessed under Schedule D of the Income Tax Act 1918, as following her profession of an actress, or whether she ought to be assessed under Schedule E as exercising certain employments under the particular engagements she makes. The question is a difficult one, mainly because of the want of precision in the meaning of the term "employment" as it comes into this controversy."

Then, at p. 634, he said:

> "When the word "employment" is used in connection with a profession or vocation in Schedule D it means the way in which a man employs himself. But "employment" in Schedule E means something different. In that Schedule it means something analogous to an office and which is conveniently amenable to the scheme of taxation which is applied to offices as opposed to the earnings of a man who follows a profession or vocation."

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The appellant contends that when "employment" is coupled with "vocation" in section 5(b)(iii) it should, for the same reason, have the meaning that it has in section 5(a) as "employment or vocation" is part of the context in section 5(a).

The rules which govern the construction of a taxing statute are not different from those which apply to statutes generally. In Attorney-General v. Carlton Bank, (1899) 2 Q.B. 158 at 164, Lord Russell of Killowen, C.J. said :

> "I see no reason why any special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely to give effect to the intention of the Legislature, as that intention is to be gathered from the language employed, having regard to the context in connection with which it is employed."

To the same effect are passages in Simon on Income Tax (1964-65) edition. V. 1 para. 83 - at p. 48:

> "It follows, therefore, that in construing a taxing Act the Court must have regard to the meaning of the words used and to the intention of the Legislature as shown by the statute or statutes."

and at p. 49:

> "The principle, therefore, does not entitle the Court either to disregard the plain meaning of words used in a taxing Act or to resolve ambiguities in favour of the taxpayer or the Revenue contrary to the plain intention of the Legislature as appearing from the statute."

The question to be answered is, therefore: what meaning did the legislature intend the word "employment" to have in section 5(b)(iii), having regard to its ordinary or primary meaning, the

context of the statute as a whole?

It was said that "employment" does not have a plain ordinary meaning. This may be true in the sense that it is a word of wide meaning and it may not be strictly accurate to describe its meaning as being plain. Vaisey, J. in Westall Richardson Ltd. v. Roulson, (1954) 2 All E.R. 448, 451, describes it as a word "of very wide significance." But it certainly has an ordinary meaning, which includes both self-employment and employment to another. Davies v. Braithwaite (supra) demonstrates this; though the context in which it appears may indicate that it is used in one sense and not the other, as that case also shows.

The history and structure of section 5, the charging section, of the Law of 1954 was examined and analysed before us by learned counsel for the appellant. As was pointed out, the first income tax law in Jamaica was passed in the year 1919. The charging section as then enacted remained unchanged through various amendments and re-enactments up to 1954, when the current law was passed. The charging section which section 5 of the Law of 1954 replaced was section 4 of the Income Tax Law, Cap. 156 (1953 Revised Edition of Laws of Jamaica). The relevant provisions of that section are as follows :

"4 - (1) Income tax shall be payable in respect of the following incomes:

(a) income arising or accruing to any person residing in this Island and derived from the annual profits or gains from any kind of property whatever wherever situate in this Island or elsewhere, or derived from the annual profits or gains from any profession, business, trade, adventure or concern in the nature of a trade, employment or vocation, whether the same shall be respectively carried on in this Island or elsewhere;

(b) income arising or accruing to any person not residing in this Island, whether a subject of Her Majesty or not, and derived from the annual profits or gains from any kind of property whatever in

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this Island or derived from the annual profits or gains from any profession, business, trade, adventure or concern in the nature of a trade, employment or vocation carried on within the Island.

Provided.....;

(c) income arising or accruing to any person, whether residing in this Island or not, and derived from any public office or employment of profit or from any pension payable out of the public revenue of this Island

Provided.....;

(d) income arising or accruing to any person residing in this Island and derived from any pension received from any source whatever in or out of this Island; and generally;

(e) income arising or accruing to any person residing in this Island and derived from any source whatever in or out of this Island, and income arising or accruing to any person not residing in this Island, whether a subject of Her Majesty or not, and derived from any source whatever in this Island."

It will be seen from an examination of the five paragraphs of the section that the clear intention was to tax two main categories of income, viz: (a) all income arising or accruing to residents of the Island, whatever its source, and (b) all income which has its source in the Island. For reasons already stated, "employment" in section 4(1)(a) and (b) meant self-employment while in section 4(1)(c) it meant employment to another. The salary of the appellant would, quite clearly, have been liable to tax under para. (c) if it were still in force.

The scheme of section 5 of the Law of 1954 is essentially the same as that of section 4 of the old law, which it replaced. The intention is to tax the same two main categories of income. The provisions in section 4(1)(a) now appear as section 5(a)(iii). Those in 4(1)(c) are now in 5(c) but

limited to office or employment exercised or carried on in the Island. Those in 4(1)(d) appear now in 5(b)(i). It was said on behalf of the appellant that there is no counterpart to section 4(1)(e) in the present law. It was described as an omnibus "clean up" provision which was intended to catch anything that may have been omitted from the words and categories defined in paras. (a), (b), (c) and (d) and which charged in terms the income of residents derived from any source whatever. Its omission from the present law, it was said, is a clear indication that the legislature was not intending in the present law necessarily to catch every emolument or earning of a Jamaican resident but was only intending to catch those specifically identified in the charging section. I agree that para. (e) of section 4(1) was a "clean up" or "sweeping up" provision. It followed exactly the pattern in paras. (a) and (b) in that it sought to sweep up income of residents from all sources and income of non-residents from all sources in the Island.

As originally enacted, section 5(b)(iii) was in these terms:

> "(iii) any employment, 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 but not including the payment for any passage from or to the Island for the purpose of leave granted in respect of the employment."

By section 2 of Law 42 of 1958, sub-paragraph (iii) was deleted and the present provision - "any employment or vocation" - substituted. The words appearing after the word "employment" in the sub-paragraph as originally enacted were, by the same Law of 1958, added to section 5(c). It is plain, in my view, that section 5(b) was intended to be, and is, the sweep up provision of section 5, intended to catch any income not caught within paras. (a) and (c). Though it is not in identical terms, it serves the same purpose in section 5 as did section 4(1)(e) in section 4 of the old law. It appears in one respect to be wider in scope than was section 4(1)(e). In respect of the specific matters set out, it purports to tax a non-resident on income derived from sources out of the Island, once the

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non-resident is domiciled here (see section 15). If the appellant's contention as to the meaning of "employment" in section 5(b)(iii) is held to be wrong, the result may be that this provision makes section 5 wider in scope than section 4(1)(e) made section 4 of the old law.

Craies on Statute Law (6th edn.) deals with the judicial interpretation of words in a prior statute in the following passage, at pp. 171, 172:

> "It is a general rule of construction..... that the use in a statute of a term which has received a judicial construction leads to the presumption that the term is used in that sense. Accordingly notwithstanding the fact that..... the meaning of ordinary words will vary according to the subject or occasion on which they are used, if, as Lord Coleridge said in Barlow v. Teal, 'Acts of Parliament use form of words which have received judicial construction, in the absence of anything in the Acts showing that the legislature did not mean to use the words in the sense attributed to them by the courts, the presumption is that Parliament did so use them.'"

Dealing with the same topic, in Simon on Income Tax (op cit); V.1. p.49 para. 84, it is stated as follows :

> "In construing the present Act, that Act and subsequent Finance Acts will all be taken in pari materia, so that the meaning and intention of a provision will be ascertained from the words used in the light of the statutes as a whole. In cases of doubt or ambiguity recourse may be had to the former statutes ..... and where words are used in the same context as in previous statutes, and those words have received judicial interpretation, it will be assumed that the words are used in the same sense."

In answer to the contention that this rule of construction applies so as to give the meaning of self-employment to "employment" in section 5(b)(iii) it was submitted that the rule does not apply because: (i) para. (b)(iii) in its present form is not a re-enactment of any provision found in the

previous legislation and has no counterpart in the United Kingdom Income Tax Act, 1952, the Act on which the Law of 1954 was based; (ii) the context of para. (b)(iii) is not the same as in the previous, or United Kingdom, legislation, and (iii) there is indication in the Law that the legislature did not intend to confine the meaning of "employment" in the paragraph to self-employment. These submissions are based on, and are supported by, the passages just cited.

As will be seen above, with the exception of the word "business," the context in which "employment" is used in section 5(a) is identical to the context in the corresponding United Kingdom legislation. ("Business" appears in section 5 but not in the U.K. Acts.). So it is easy to see why the concession had to be made as to the meaning of the word in that context. It is true that the words "employment or vocation" appearing in para. (b)(iii) do not appear in isolation in the United Kingdom legislation. Those words, so used, have not, so far as is known, been the subject of prior judicial interpretation. The rule of construction being discussed would not, therefore, apply. It was said, however, that both words are part of the wider context of words in section 5(a) and "employment" should, therefore, have the same meaning as it, admittedly, has in the wider context. In Davies v. Braithwaite (supra) Rowlatt, J. (at p.634) said that "when the word 'employment' is used in connection with a profession or vocation in Schedule D it means the way in which a man employs himself." I do not think it can be said that the learned judge meant that when the word is used with "vocation" separately from "profession" it has the meaning stated. It was not suggested that the passage can be interpreted in this way. I think that the word "profession" is the governing word in the context "profession, employment or vocation" and that it is this word rather than "vocation" which has impressed the meaning of self-employment upon "employment." I say this because, like "employment", "vocation" is a word of general and very wide meaning. It is described in Halsbury's Laws of England (3rd edn.) V.20 p.244 para.446, as "a word of very wide meaning, and is analogous to a calling, and means the way in which a person passes his life." This statement is taken from Partridge v. Mallandaine, (1886) 18 Q.B.D. 276,

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in which Denman, J. said, at p.278: "But the word 'vocation' is analogous to 'calling', a word of wide signification, meaning the way in which a man passes his life." The Oxford English Dictionary defines the word as meaning: "one's ordinary occupation, business or profession." And Webster's International Dictionary (New edn.) defines it as: "destined or appropriate employment; calling; occupation; trade; business; profession." Its meaning is, therefore, wide enough to include self-employment and employment by another. "Profession," on the other hand, in its common acceptation, is a word of more precise, or less general, meaning. A profession is a vocation but a vocation is not necessarily a profession. In my opinion, the fact that the words "employment or vocation" are part of the group of words in para. (a) of section 5 is not sufficient to give "employment" in para. (b)(iii) the same meaning as it has been held to bear in para. (a).

The meaning of "employment" was arrived at in Davies v. Braithwaite (supra) as a result of the application of the rule of construction noscitur a sociis. This rule, or principle, was also relied on by the appellant. It was submitted that the juxtaposition of "employment" and "vocation" has the effect of restricting the meaning of "employment" to self-employment. The rule is stated thus in Maxwell on Interpretation of Statutes (12th edn.) at p.289.

> "Where two or more words which are susceptible of analogous meaning are coupled together, noscuntur a sociis. They are understood to be used in their cognate sense. They take as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general."

For the reasons I endeavoured to give above in discussing the meanings of both words, I am of the view that this rule cannot assist the appellant's contention. Both being general words of wide significance one is incapable of restricting the meaning of the other. Indeed, as seen above, each may mean both self-employment and employment by another.

In support of the respondent's contention that there is indication in the Law that the legislature did not intend to confine the meaning of "employment" in para. (b)(iii) to self-employment, reliance was placed on an amendment of the Law of 1954 by Act 9 of 1963. This amendment exempted from taxation any allowance paid 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. (see para. (s) of section 7 added by Act 9 of 1963). It was argued that this amendment would have been unnecessary if allowances paid to persons serving abroad were not taxable, prior to the passing of the act of 1963, as profits or gains from employment; that they could only have been taxable unswe awxrion 5(b)(iii); that if the allowances paid to them were taxable so were their salaries; that since the salaries paid to such persons were not likewise exempted by the Act of 1963 they remain taxable under section 5(b)(iii); that, therefore, this indicates that the legislature intended "employment" in the section to include employment to another or salaried employment. In my view, this is not a convincing argument. The short answer to it seems to be that the legislature may have mistakenly assumed in 1963 that the allowances were taxable. In Simon on Income Tax (op cit), V.1 p.48 para. 83, it is said that "the mere fact that the statute appears to assume that the existing law lays down a particular rule does not in itself make the rule to be law when the assumption is erroneous." This passage is supported by extracts from the judgments of Lord Radcliffe and Lord Reid in I.R. Commissioners v. Dowdell O'Mahoney & Co. Ltd. (1952) A.C. 401. In one of these extracts Lord Radcliffe said (at p.426) that "the beliefs or assumptions of those who frame Acts of Parliament cannot make the law."

I deal now with the arguments of the appellant based on the amendments made to paras. (b) and (c) of section 5 by the Law of 1958. It was admitted that before the amendment, when "employment" stood alone, para. (b)(iii) applied to persons in the employment of another. It was argued, firstly, that the removal from para.

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(b)(iii) of all reference to annual value of quarters, leave passage etc., which, it was said, seem to be germane to salaried employment, and putting them in para. (c) was designed to make it clear beyond doubt that the employments being dealt with under para. (c) were of an entirely different kind and specie from anything that could properly be considered to fall under para. (b)(iii) in its new form; that the legislature intended to remove out of section 5(b) all employments in the sense of one man being employed to another and put them in section 5(c). I do not think it reasonable to say that the removal of the provisions from para. (b)(iii) to para. (c) was for the purpose suggested. It seems to me to have been a tidying up exercise and nothing more. Section 5(c), as enacted originally, dealt expressly with salaried employment, to which quarters, leave passages etc. are relevant. Section 5(b), on the other hand, is, as I have suggested, a general sweeping up provision. Only the odd case would be affected by the presence of the provisions in question in this part of section 5. The proper place for them to be is in section 5(c) and they should have been put there from the start. The amendment was, in my view, only correcting the error.

Next, it was argued that the legislature, knowing the interpretation of "employment" when put with "vocation", changed para. (b)(iii) and put in "employment or vocation" to make it abundantly clear that in that paragraph the word "employment" was to mean "the way in which a man busies himself." This argument has already been dealt with.

Finally, it was said that section 6 of the Law of 1954 assists the contention of the appellant. The first proviso to sub-section (1) of section 6 provides that "in respect of income arising from emoluments (as specified in para. (c) of section 5 of this Law) the statutory income shall be the income of that person for the year of assessment." This provision is the basis of what is known as the "pay-as-you-earn" system. Other income, as already stated, is taxed on the basis of income for the year immediately preceding the year of assessment. The p.a.y.e. system is, as stated, limited to income from emoluments i.e. to incomes of persons in employer/employee relationship.

It was argued that in view of the p.a.y.e. provisions in section 6 it could not have been the intention of the legislature, when in 1958 it enacted para. (b)(iii) of section 5 in its present form, to include in it any income of a type covered by section 5(c). It was submitted that it became apparent by 1958 that the law as it stood did not make it clear that persons who were in some employer/employee relationship could only fall under section 5(c). It was not made clear, it was said, because section 5(b)(iii) used the word "employment" only and would seem at that time to comprehend salaried employment. The legislature, so the argument ran, realising the inconvenience of that situation (presumably so far as it affected the operation of the p.a.y.e. system) amended para. (b)(iii) to make it clear that that paragraph no longer applied to salaried employment.

Section 6 is a machinery, not a charging, section. The p.a.y.e. provisions contained in it merely provide for a surer and more convenient method of tax collection. "A machinery section will not be so construed as to defeat a charge which is clearly imposed." (vide Simon on Income Tax (op cit) V.1 p.56 para.90). The fact that the p.a.y.e. provisions would not apply to a case of salaried employment falling within para. (b)(iii) is not a valid reason, in my view, for saying that, therefore, salaried employment cannot fall within that paragraph. Tax in that case would simply be assessed on the previous year basis. Indeed, that is the case with certain emoluments which, as a result of provisions in para. (ii) of the proviso to section 5(c), are expressly excluded from the p.a.y.e. system. It must also be remembered that the p.a.y.e. provision in section 6 was part of the Law of 1954 since its enactment and during the time, up to 1958, when there was no doubt that para. (b)(iii) applied to salaried employment.

In spite of the compelling and, as always, able argument of learned counsel for the appellant, no valid reason has, in my opinion, been advanced for restricting the meaning of "employment" in section 5(b)(iii). As I have indicated, I do not agree that the coupling of "vocation" with "employment" has the effect of limiting the meaning

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(continued)

of "employment" to self-employment. It is difficult to believe that a draftsman would select this roundabout and imprecise method to change the meaning of "employment" when it could be done by simple and direct language. It is also extremely unlikely, in my view, that the legislature would deliberately limit the scope of tax legislation in this way without very compelling reason. On the contrary, it is my opinion that the purpose in adding "vocation" was to widen the scope of the sweep up provisions in section 5(b) to embrace any activity not caught by section 5(a) or (c) which, though not an employment, may be a vocation. I think this view is more consistent with reason.

In my judgment, "employment" in section 5(b)(iii) is used in its unrestricted sense and includes salaried employment. The ambassadorial salary of the appellant was, therefore, liable to be taxed under this provision.

If I am right that the appellant's salary is liable to be taxed under section 5(b)(iii) the assessment made by the respondent was wrong. For year of assessment 1963, it is the salary received in 1962 that should have been assessed, i.e. approximately four months' salary. Instead the whole of the salary for 1963 was included in the assessment. Learned counsel for the appellant submitted that on the respondent's own case the assessment must, at the very lowest, be varied by deleting the amount of salary over and above the amount earned during the four months in 1962.

The contention of the appellant before the Board was that his salary for 1963 was not liable to tax at all. It does not appear that it was sought to reduce or vary the assessment on any other ground. Before Parnell, J. the same position obtained. Before us the question of the excessive assessment, if the appellant's salary was taxable under section 5(b)(iii), was raised during the argument but variation or reduction of the assessment on this ground is not asked for in the notice of appeal. In the notice of appeal the contention is maintained that the salary for 1963 does not fall for assessment in 1963 or at all. I agree that the excessive assessment, which will result if my view prevails, is a matter for

administrative adjustment. I would, accordingly, dismiss the appeal.

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(continued)

ECCLESTON, J.A.

Eccleston J.A.

I have read the judgments prepared by my brethren. I agree with their conclusions. The appeal is, therefore, dismissed with costs.

No. 9

FORMAL ORDER OF THE COURT OF APPEAL DATED 29th December 1970.

No. 9

Formal Order of the Court of Appeal

29th December 1970

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 35 of 1968.

BETWEEN SIR NEVILLE ASHENHEIM Appellant

AND THE COMMISSIONER OF INCOME TAX Respondent

THIS APPEAL coming on for hearing on the 17th, 18th, 19th and 22nd June, 1970, before the Honourable Mr. Justice Eccleston, President, the Honourable Mr. Justice Fox and the Honourable Mr. Justice Smith and after hearing Mr. David Coore of Queen's Counsel and with him Mr. Winston Waters-McCalla of Counsel for the Appellant and Mrs. Angela Hudson-Phillips for the Respondent and the Court having taken time to consider, the Court on the 9th day of October, 1970 ORDERED that the appeal be dismissed with costs.

In the Court of Appeal Jamaica

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Formal Order of the Court of Appeal

29th December 1970

(continued)

Given under my hand and the Seal of the Court this 29th day of December 1970.

(Sgd.) L.I. DIGGS WHITE

Deputy Registrar

FILED by the Crown Solicitor, Crown Solicitor's Office, 134-140 Tower Street, Kingston, Solicitor for and on behalf of the abovenamed Respondent.

No. 10

Order granting final leave to Appeal to Her Majesty in Council

5th March 1971

No. 10

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL DATED 5th March, 1971.

SUPREME COURT CIVIL APPEAL No. 35 of 1968

BETWEEN Sir Neville Ashenheim — Appellant

AND The Commissioner of Income Tax — Respondent

BEFORE THE HONOURABLE SIR CYRIL HENRIQUES, President, THE HONOURABLE MR. JUSTICE EDUN AND THE HONOURABLE MR. JUSTICE GRAHAM-PERKINS, Judges of Appeal.

The 5th day of March 1971.

UPON the Notice of Motion on an Application for Final Leave to Appeal to Her Majesty in Council from the Judgment of the Court of Appeal dated the 9th day of October 1970, and after hearing Mr. David Coore of Her Majesty's Counsel on behalf of the Appellant and Mrs. A.C.Hudson-Phillips of Counsel on behalf of the Respondent and upon referring to the Affidavit of Richard Gordon Ashenheim filed herein and the exhibits to the said Affidavit IT IS HEREBY ORDERED as follows:-

1. Final Leave granted to Appeal to Her Majesty in Council.

2. That the costs of this Order and of the Application herein be costs in the cause.

BY THE COURT

(Sgd.) Deputy Registrar

FILED by MILHOLLAND, ASHENHEIM & STONE of No.11 Duke Street, Kingston, Solicitors on behalf of the abovenamed Appellant.

IN THE PRIVY COUNCIL No. 13 of 1971

ON APPEAL
FROM THE COURT OF APPEAL JAMAICA

B E T W E E N :

SIR NEVILLE ASHENHEIM Appellant

- and -

THE COMMISSIONER OF INCOME TAX Respondent

RECORD OF PROCEEDINGS

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