Privy Council Appeal No. 31 of 1965

The Commissioner of Income Tax – – – – – *Appellant*

v.

Hanover Agencies Limited – – – – – *Respondents*

FROM

THE COURT OF APPEAL, JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. DELIVERED THE 14TH DECEMBER, 1966

Present at the hearing:
LORD GUEST
LORD UPJOHN
LORD PEARSON
[*Delivered by* LORD GUEST]

This is an appeal from a judgment of the Court of Appeal of Jamaica allowing an appeal by the respondents from an order made by Shelley, J. by which order the respondents' appeal against a decision of the Income Tax Appeal Board of Jamaica was dismissed. By this decision the Income Tax Appeal Board upheld an assessment to income tax, dated the 5th January 1962 made on the respondents for the year of assessment 1960.

The respondents unsuccessfully appealed to the Income Tax Appeal Board against the determination of the appellant as to the assessment on the company for the year of assessment of 1960 claiming to be entitled under section 8 (*o*) of the Income Tax Law of Jamaica to an allowance for wear and tear in respect of a building known as the " Bank Building ".

Section 8 (*o*) of the Income Tax Law so far as relevant is in the following terms:—

> " 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
>
> . . .
>
> and such disbursements and expenses may include
>
> . . .
>
> (*o*) a reasonable amount for exhaustion, wear and tear of any building or structure used by the owner thereof for the purpose of acquiring the income from a trade, business, profession or vocation carried on by him;
>
> . . . "

The facts may be summarised as follows. The respondent company was incorporated as a limited liability company in 1947 for the purpose of taking over a business carried on under the name or style of Kirkconnell Brothers Successors; it had as one of its objects the acquiring of freehold property and the leasing of all or part of the company's property. That business which, up to 1944 was carried on and known as Kirkconnell Brothers was purchased in 1944 by the principal shareholders of the respondent Company. The business of Kirkconnell Brothers included that of merchants dealing in hardware and lumber, that of operating a wharf and of letting premises to tenants. Their

successors added to the range of businesses that of dry goods merchants, picture house proprietors, building blocks, manufacturers, wholesale provision merchants and insurance sub-agency. In 1945 Kirkconnell Brothers Successors purchased three buildings, one of them was subsequently pulled down and rebuilt in accordance with designs and plans submitted by Barclays Bank D.C.O. to whom the building was leased and who still occupy the " Bank Building " as tenants of the respondents.

After the acquisition of the business of Kirkconnell Brothers Successors, the respondents continued to rent the premises acquired from Kirkconnell Brothers Successors and acquired six additional premises which they also rented out.

The question whether they were carrying on business is primarily a question of fact. There are concurrent findings of fact in the Courts below to this effect and there was in their Lordships' opinion ample evidence upon which such a conclusion could be reached.

As the respondents' claim depends on their satisfying the requirements of section 8 (*o*), it may be convenient to consider this section first. In order to qualify for the deduction the building must be used for the purpose of acquiring income from a trade or business carried on by the respondents. The word " business " is of wide import and must be given its ordinary meaning unless the context otherwise requires. The respondents' objects include *inter alia* acquiring of freehold property and the leasing of all or any of the company's property. If a company's objects are business objects and are in fact carried out, it carries on business (*Westleigh Estate Co. v. Commissioners of Inland Revenue* 12 T.C. 657 Pollock M.R. at 686). The respondents are engaged in negotiating leases and collecting rents from their properties. This would *prima facie* indicate that they were carrying on business so as to bring them within the terms of section 8 (*o*).

The appellant, however, submitted that in order to ascertain whether the respondents were carrying on business the terms of section 5 of the Income Tax Law must be looked at in order to see whether they were carrying on a business on the profits of which they were taxed. This, it was said, was the proper question which arose. The scheme of the Income Tax Law as a whole must be looked at. Section 5 defines chargeable incomes. The classes of income profits or gains are respectively described as income profits or gains arising or accruing (*a*) (i) from any kind of property, (ii) from any trade, business, profession, employment or vocation and (*b*) (ii) rents, royalties, premiums and any other profits arising from property. It was submitted that the charge to income tax on the respondents was in respect of the rent arising from the " Bank Building ". Thus, it was argued, they were not carrying on business on the profits of which they were taxed, but the profits on which they were taxed arose from the rent. Counsel attempted to draw an analogy from the case of *Fry v. Salisbury House Estate Limited* [1930] A.C. 432. This company, formed to acquire and manage a block of buildings, let out the rooms as unfurnished offices to tenants. The company also provided services at an additional charge. They were assessed under Schedule A to income tax on the gross annual value of the building. The Revenue claimed, in making an assessment under Schedule A, to include the rents of the offices as part of the receipts of the trade, making allowance for tax assessed under Schedule A. This claim failed, the House of Lords holding that the assessment under Schedule A was exhaustive. 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 ([1930] A.C. at page 454), 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 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 charge 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. There is no heading corresponding to Schedule A and there is no provision for income tax in respect of the ownership of lands and hereditaments, it is only the rent of leased property which is charged. There is in fact in Jamaica a separate property tax on the capital value of all property shown in the Valuation Roll and imposed on the person in possession of the property (Property Tax Law Cap. 212). The question, therefore, reverts to whether the respondents were carrying on a business. It was not seriously disputed by the appellant that they were. If so, then it appears to their Lordships indisputable that the profits on which they were assessed under section 5 (*a*) (ii) were the profits arising from that business. If, of course, there was a case of an individual or a company which did not carry on a business of letting property, then they would be assessed in respect of the rent of the property under section 5 (*b*) (ii), but this provision cannot preclude the assessment of a company engaged in the business of letting property upon the rents obtained as the profits of that business. Their Lordships agree with the opinion formed by the Court of Appeal upon this branch of the case.

The second requirement under section 8 (*o*) is that the building must be used by the respondents for the purpose of acquiring the income from the business carried on. Discussion took place on the meaning to be attributed to the word " used ". Here again the word must be given its ordinary meaning in the absence of any indication to the contrary. In the ordinarily accepted meaning of the word a building is " used " for the purpose of acquiring income if rents are derived from it. The appellant argued that if this meaning were given to the word " used ", then there might in view of the definition of " owner " in paragraph 7 (*a*) of the Second Schedule be two claims for wear and tear, one from the lessor and one from the lessee. However this may be, it cannot control the meaning to be attributed to the word " used " if it is capable of being applied both to the lessor and the lessee. The appellant's contention really amounted to saying that " used " must mean " occupied ", but this is not what the section says, although it would have been simple for the legislation so to provide. Their Lordships adopt with approval the view of Waddington J. to this effect:—

> " It is my view that an owner of premises who leases them is making use of these premises by employing or applying them for the purpose of letting, and it follows therefore, that if he carries on a business of letting premises then he is using the premises for the purpose of acquiring any income which he may derive therefrom. It is with regret therefore that I find myself in respectful disagreement with the decision, on this aspect of the case, of the learned judges in the *Hendriks* case, and I would accordingly answer the second question posed above in the affirmative."

Support for this view is to be obtained from sub-sections (*c*) and (*g*) of section 8. Section 8 (*c*) provides for the purpose of ascertaining a chargeable income for a deduction in respect of sums expended for repair of buildings employed in acquiring the income and section 8 (*g*) provides for deduction of fire insurance premiums on property used in acquiring the income upon which the tax is payable. The legislation accordingly treats the owner of property as employing or using the property in acquiring the income whether he does it as part of a business or not. These deductions, their Lordships were informed, are in practice given to property owners irrespective of whether they carry on a business of letting the property or not.

The Income Tax Appeal Board while reaching the conclusion that the respondents were carrying on the business of letting premises felt

themselves bound by the decision in the case of *Hendriks v. (Income Tax) Assessment Committee* (1941) 4 J.L.R. 60 and dismissed the appeal. That case concerned the same provision of the Income Tax Law as this case. The Court of Appeal in that case held that on the facts of that case the individual taxpayer who rented service properties was not carrying on a business within the meaning of section 8 (*o*). They did, however, reserve the case of a company formed and organised expressly for the purpose of acquiring and letting property. Furness C. J. who gave the opinion of the Court proceeded to deal, upon the assumption that the appellant was carrying on a business, with the question whether it could be said that the premises were being used for the purpose of acquiring the income in this way: —

> " That business would be carried on—not on the premises in question but elsewhere—at the appellant's office or home. It would be the appellant's office or home that would be used for the purpose of acquiring the income from the business—not the premises themselves. The premises were used by the various tenants. The appellant, having parted with possession of them, could no longer be said to be using them within the meaning of s. 5 (*c*) though it is true, as Mr. Manley urged, that they in fact produced the income."

There is some question whether these observations were *obiter,* but whether they were or not, their Lordships have reached the conclusion that they are not well founded.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

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In the Privy Council

THE COMMISSIONER OF INCOME TAX

v.

HANOVER AGENCIES LIMITED

DELIVERED BY
LORD GUEST

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