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IN THE PRIVY COUNCIL

No. 31 of 1965

ON APPEAL

FROM THE COURT OF APPEAL JAMAICA

B E T W E E N :

THE COMMISSIONER OF INCOME TAX Appellant

- and -

HANOVER AGENCIES LIMITED Respondent

Record

CASE FOR THE RESPONDENT

10 1. This is an appeal brought by leave from the p.49
Judgment and Order of the Court of Appeal Jamaica
dated 18th December 1964 allowing the Respondent's p.47
appeal against the Formal Judgment of the High p.16
Court of Justice Jamaica dated 18th October 1963
dismissing the Respondent's appeal against a
Decision of the Income Tax Appeal Board dated 1st p.3
May 1963 confirming a Decision made by the Appellant p.1
in respect of an Assessment on the Respondent for
the Year of Assessment 1960.

20 2. The substantial questions arising on this
appeal are whether the Respondent was carrying on
a business of letting premises within the meaning
of the Income Tax Law and if it was whether certain
premises were being used by the Respondent for the
purpose of acquiring income from such business

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within the meaning of Section 8(o) of the Income Tax Law 1954, Law 59 of 1954 (hereinafter referred to as "Law 59")

3. The provisions of Section 8(o) Law 59 are as follows:-

"8 For the purpose of ascertaining the chargeable income of any person there shall be deducted all disbursements and expenses wholly and exclusively incurred by such person in acquiring the income 10

and such disbursements and expenses may include

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"(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:

Provided that if at any time the building or structure is sold, or the building or structure is demolished or destroyed, or without being demolished or destroyed, ceases to be used, an allowance or charge shall be made to the owner, and the provisions contained in paragraph 3 of Part I of the Second Schedule to this Law shall mutatis mutandis apply: 20

Provided that if any allowance is made to an owner under this paragraph, no allowance under any other part of this Law in respect of exhaustion, wear and tear, shall be available to him;" 30

4. Other relevant statutory provisions are as follows:-

"2(1).....

'trade' includes every trade, manufacture, adventure or concern in the nature of trade;

'chargeable income' means the aggregate amount of income of any person from all sources remaining after allowing the appropriate deductions and exemptions under this law; 40

"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

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

10 (ii) rents, royalties, premiums and any other profits arising from property;"

Extract of Section 8 of Law 59 of 1954

ASCERTAINMENT OF CHARGEABLE INCOME

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

20 (i) where the income arises from emoluments specified in paragraph (c) of section 5 of this Law, during the year of assessment; and

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

and such disbursements and expenses may include -

30 (a) any sum paid by such person by way of interest upon any money borrowed by him, where the Commissioner is satisfied that the interest was paid on capital employed in acquiring the income:

Provided that -

(1) the interest is paid to a person resident in this Island; or

(2) the interest is paid to a person resident elsewhere than in this Island and that either - (Sec. 4 of 33 of 1964)

40 (i) no tax is required to be deducted from the interest or such tax as is required by this Law to be deducted; has been deducted from

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the interest and has been accounted for to the Commissioner; or (ii) there is in the Island some person who can be assessed in respect of the interest, or who is liable to pay the tax chargeable upon the interest;

(applied also to Jamaica Government $6\frac{3}{4}\%$ Stock 1974/76 issued in UK in 1964 where owned by a person other than a person residing or ordinarily resident in Jamaica (G.S. 29.7.64) and also to Govt. 7% Stock 1976/78 issued in UK in 1965 (G.S. 12.8.65)).

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(applied also to Jamaica Government $6\frac{1}{4}\%$ stock 1978/80 which is payable to a person other than a person residing or ordinarily resident in the Island. (G.S. 18.8.60) - and similarly applied to Jamaica Government $6\frac{3}{4}\%$ Stock issued in the UK in 1963 pursuant to the Loan Law 1959 - (G.S. 2.5.63)).

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(b) rent paid by any tenant of land or buildings occupied by him for the purpose of acquiring the income;

(c) any sum expended for repair of buildings, plant and machinery employed in acquiring the income, or for renewal, or repair of any implement, utensil or article so employed;

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(d) bad debts incurred in any trade, profession or business, proved to the satisfaction of the Commissioner to have become bad during the year immediately preceding the year of assessment, and doubtful debts to the extent that they are respectively estimated to the satisfaction of the Commissioner to have become bad during the said year notwithstanding that such bad or doubtful debts were due and payable prior to the commencement of the said year: Provided that all sums recovered during the said year on account of amounts previously written off or allowed in respect of bad or doubtful debts shall for the purposes of this Law be treated as receipts of the trade, profession or business for that year;

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(e) any allowances made in accordance with the provisions of the Second Schedule to this Law;

(f) any rates and taxes paid on real estate (but not including income tax) from which the income is derived;

(g) premiums paid on any insurance policy on property used in acquiring the income upon which the tax is payable;

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(h) the amount of any loss sustained in a trade, profession or business carried on in the Island or in the ownership or occupation of any land situate in the Island -

(i) which, if it had been profit, would have been assessable under this Law;

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(ii) during the six years preceding the year of assessment:

Provided that the total amount of such loss which was admitted for those years shall be reduced by any amount which has been claimed under the immediately preceding subparagraph or allowed against the income of any previous year or in the year of assessment;

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(i) ordinary annual contributions to an approved superannuation fund: Provided that not more than 15% or, where the fund was approved under the Income Tax Law (now repealed) and has not been approved under this Law, not more than 5% of the employee's remuneration shall be allowed to a contributor (whether employer or employee) as a deduction: Provided further that from and after the 29th day of May 1958, the foregoing proviso shall be construed as if the figures and symbol "10%" were substituted for the figures and symbol "15%", but nothing in this proviso shall operate either to invalidate the approval of a fund approved prior to the date aforesaid or to prevent the approval of a fund where application for approval was made to the Commissioner prior to the date aforesaid and was pending at that date.

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(j) any sums paid to an approved fund by an approved association or by any member of an approved association;

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(k) Any sums deducted or paid from the stipends of ministers of religious denominations in respect of contributions to the Widows' and Orphans' Funds of such denomination, in cases where no benefits from such funds enure until the death of the contributors.

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(l) any sums deducted or paid in respect of contributions under Pensions Laws, the Civil Service Widows' and Orphans' Pension Law or the Provident Fund Law;

(m) any sums deducted from the pay of any member of the Jamaica Constabulary Force pursuant to the provisions of any Law for the time being in force requiring deductions to be made from such pay by way of contribution to any pension fund or scheme;

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(n) allowances due under sections 12 and 13 of this Law;

* * * * *

(p) annuities or other annual payments secured by deed of covenant for a period of at least five consecutive years in favour of the University of the West Indies or of the College of Arts Science and Technology;

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(q) the amount of any donations made on or after the 1st day of January, 1963 and before the 1st day of January 1966 to any fund established for the benefit of sufferers from poliomyelitis or from cancer and approved by the Minister by order.

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(r) the amount of any contribution paid pursuant to the National Insurance Act, 1965:

Provided that -

(i) nothing in this paragraph shall be construed as allowing any amount to be deducted from the income of any person in respect of any contribution paid by him on behalf of any other person or paid by him in respect of a domestic worker as defined in that Act;

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(ii) nothing in this paragraph shall apply to any employer's contribution which, apart from this paragraph, would be allowable as a deduction in computing the amount of any profit or gains;

10 (iii) a person who by virtue of any provision of the National Insurance Act, 1965, suffers a deduction from his emoluments in respect of any contribution payable under that Act shall be deemed for the purposes of this paragraph to have paid a contribution equal to the amount of the deduction.

Section 103 of the Jamaica Order in Council 1962

COURT OF APPEAL

20 103. (1) There shall be a Court of Appeal for Jamaica which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law.

(2) The Judges of the Court of Appeal shall be -

(a) a President:

30 (b) the Chief Justice by virtue of his office as head of the Judiciary but who, however, shall not sit in the Court of Appeal unless there are at least four other Judges sitting and unless he has been invited so to sit by the President of the Court;

(c) three other Judges; and

(d) such number, if any, of other Judges as may be prescribed by Parliament.

(3) The President of the Court of Appeal shall be responsible for the arrangement of the work of the Court and shall preside whenever he is sitting in that Court.

40 (4) No office of Judge of the Court of Appeal shall be abolished while there is a substantive holder thereof.

(5) The Court of Appeal shall be a superior court of record and save as otherwise provided by Parliament, shall have all the powers of such a Court.

p.13 5. The facts of the case appear in the Statement
p.18 of Facts and Determination of the Income Tax Appeal
Board (hereinafter referred to as "the Board") and
in the Judgments in the Court of Appeal Jamaica
and so far as material may be summarised as
follows:-

(i) The Respondent was incorporated in 1947
to take over and carry on a business which
was then carried on and known as Kirkconnell
Brothers Successors. 10

(ii) One of the objects in the Memorandum
of Association of the Respondent is to lease
all or part of its property.

(iii) The business of Kirkconnell Brothers
Successors included that of merchants dealing
in hardware and lumber, operating a wharf,
letting premises to tenants, picture house
proprietors, manufacturers, wholesale
provision merchants and insurance sub-agency.

(iv) In 1945 Kirkconnell Brothers Successors 20
purchased three buildings: the first was
taken down and a picture theatre built in its
place; the second was tenanted to Barclays
Bank D.C.O. (this building is hereinafter
referred to as "the Bank Building") and the
third was tenanted to a number of tenants.

(v) Since 1947 the Respondent purchased and
tenanted the following premises in the town
of Lucea:-

- (a) 1947 Producers Building
- (b) 1947 22 Main Street
- (c) 1947 29 Main Street
- (d) 1954 30A Main Street
- (e) 1956 31 Main Street
- (f) 1957 28 Main Street

6. The Respondent claimed that for the purpose of ascertaining its chargeable income for the year of assessment 1960 there should be deducted a
10 reasonable amount for exhaustion, wear and tear in respect of the Bank Building in accordance with the provisions in Section 8(o) of Law 59. The Appellant rejected the Respondent's claim.

7. On an appeal to the Board, the Board on the 18th June 1963 held as a question of fact that the Respondent was carrying on a business of letting premises but following the decision of the former Court of Appeal in Hendriks v. (Income Tax) Assessment Committee (1941) 4 J.L.R. 60 the Board
20 held that the premises were not "used" for the purposes of acquiring the income within the meaning of Section 8(o) of Law 59.

8. The Respondent appealed to a Judge in Chambers p. 6
from the decision of the Board and by agreement between the parties the appeal was dismissed on p.16
the 18th October 1963 without a hearing on the merits with a view to the matter being argued at length before the Court of Appeal.

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p.18 9. The appeal came on for hearing in the Court of Appeal on the 10th, 11th, 12th, 15th, 19th, 22nd and 23rd June 1964 before The President, Mr. Justice Henriques and Mr. Justice Waddington, and on the 18th December 1964 the Court delivered Judgment unanimously allowing the appeal.

p.48 10. On the 23rd July 1965 the Court of Appeal granted the Appellant Final Leave to appeal to Her Majesty in Council.

p.19 11. Delivering the leading judgment in the Court of Appeal Mr. Justice Waddington said that two questions fell for consideration in the case: 10

p.21 (1) was the Board wrong in Law in finding, on the facts before it, that the Respondent was carrying on a business of letting premises; (2) If the answer to question (1) was in the negative, was the Bank Building used by the Respondent for the purpose of acquiring the income from the business carried on by it.

The Appellant's contention was that the negotiations of leases and the collection of rents did not constitute the carrying on of a trade or business and the Appellant relied on Hendriks v. (Income Tax) Assessment Committee (1941) 4 J.R.L. 60 and Fry v. Salisbury House Estate Ltd. (1930) A.C. 432 to support the contention. Mr. Justice Waddington did not think that the Hendriks case decided that in no circumstances could the letting 20

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of premises ever constitute the carrying on of a business. In that case there was a passage on page 64 of the judgment of Chief Justice Furness recognising that a company genuinely formed for the express purpose of acquiring and letting premises could be said to be carrying on a business. In the present case one of the objects of the Memorandum of Association of the Respondent was the renting of premises and, on the evidence before them, the Board unanimously came to the conclusion that the Respondent was engaged in carrying on a business of letting premises.

Mr. Justice Waddington thought that what the learned Judges in the House of Lords in Fry v. Salisbury House Estate Ltd. were saying was that, having regard to the provisions in Schedule "A", a pure receipt of rent by the company simpliciter could not thereby take the case out of Schedule "A" which undoubtedly applied, and bring it within Schedule "D", as the mere receipt of rent could not in the circumstances constitute the carrying on of a trade within the meaning of Schedule "D". Different considerations, however, were applicable where the question was merely whether a person who habitually acquired and let property could be said to be carrying on a trade or business of letting property.

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In the judgment of Mr. Justice Waddington the first of the two questions which he posed had to be

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p.26 answered in the negative. On the second of the questions, he thought that the word "used" in the relevant context had been restricted in its ordinary meaning in the Hendriks case by the learned Chief Justice in equating the meaning of the word with a physical user or occupancy of the premises by the owner. Mr. Justice Waddington cited passages

p.26 from the judgment of Lord Justice Upjohn in Stephens v. Cuckfield Rural District Council (1960) 2 All E.R. 716 that ordinary words in common and general use should be given their ordinary meaning unless the context required some special or particular meaning should be placed on them. The ordinary dictionary meaning of "used" was "the employment or application of something to a purpose".

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p.27 Mr. Justice Waddington took the view that an owner of premises who leases them is making use of the premises by employing them for the purpose of letting. Accordingly, if he was carrying on the business of letting premises, then he was using the premises for the purpose of acquiring any income which he might derive therefrom. The second question posed was therefore answered

p.28 in the affirmative. Mr. Justice Waddington was satisfied that the Court was not bound by the decisions of the former Court of Appeal.

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p.29 The two questions which the learned President

said arose for consideration were substantially the same as those asked by Mr. Justice Waddington. On the first question the learned President took the view that the decision of the Board that the Respondent was carrying on a business in respect of the negotiation of leases and the collection of rents from the tenants of its various holdings was correct. It was his view that the words "trade" and "business" in Section 8(o) of the Act were not synonomous and that the word "business" had a wider connotation. He found support for this view in the judgment of Lord Wright M.R. in In re a Debtor (1936) 1 Ch 237.

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On the second question the learned President took the view that the owner of buildings who lets them for a rent is using them for the purpose of acquiring the income to be derived therefrom and that it would be wrong to limit the natural and ordinary interpretation of the words "used for the purpose of" to the actual physical occupation and user by the owner himself. In forming this view the learned President was influenced by an examination of the provisions in Section 8 of Law 59 as a whole, by a consideration of earlier legislation and by the decision of the Privy Council in Newcastle City Council v. Royal Newcastle Hospital (1959) 1 All E.R.734. The Newcastle City Council case illustrated that use of land by its owner

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p.44 depended on the purpose for which he owned it and did not necessarily entail actual physical use thereof. It was not possible to reconcile the Hendriks decision with the decision of the Privy Council in Newcastle City Council case. The learned President was satisfied that the Hendriks decision was wrong.

p.43 The learned President said that the present Court of Appeal was a completely new Court of Appeal for independent Jamaica established by The Constitution of Jamaica made by Her Majesty the Queen on the 23rd July, 1962. In these circumstances the present Court of Appeal was not bound by a decision of earlier Courts of Appeal and in particular was not bound by the decision in the Hendriks case. 10

p.44 Mr. Justice Henriques thought the Board were correct in their conclusion that the Respondent
p.46 was carrying on a business of letting premises. He took the view that an owner who leases is in fact making use of his premises by employing them for the purpose of letting and if he engages as a consequence in the business of letting the premises then he may be said to be using the premises for the purpose of
p.46 acquiring any income which he may derive therefrom. He did not think that the present Court of Appeal was bound by any decision of any former Court of Appeal. 20

12. The Respondent respectfully submits that the Board were correct in finding that the Respondent carried on the business of letting premises. The word "business" is not defined in the relevant legislation. In *Rolls v. Miller* (1884) 27 Ch. Div. 71 at page 88 Lord Justice Lindley said that the word meant almost anything which is an occupation as distinguished from a pleasure. It is submitted that the leasing of the Bank Building by the Respondent was an occupation in this sense. Further, it was an occupation which was carried on for the purpose of producing profits. And it was the intention or purpose of the Respondent to carry on such a gainful occupation.

It is respectfully submitted that the restriction of the word "use" in Section 8(o) of Law 59 to physical use or occupancy by the owner is not justified. In the context the ordinary meaning of the word should be adopted. The ordinary meaning of the word is "the employment or application of something to a purpose". In this sense the Respondent used the premises in question by letting them. And the Respondent let them for the purpose of acquiring income from the business carried on by it.

13. The Respondent humbly submits that the decision of the Court of Appeal is right and should be affirmed and that this Appeal should be

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dismissed with costs both here and below for
the following amongst other

R E A S O N S

1. BECAUSE the word "business" in
Section 8(o) of Law 59 should
be given its ordinary meaning
2. BECAUSE there was evidence
before the Board on which they
could reasonably reach the
conclusion that the Respondent 10
was carrying on the business
of letting premises
3. BECAUSE the word "used" in
Section 8(o) of Law 59 should
be given its ordinary meaning
4. BECAUSE the Bank Building was
used by the Respondent for the
purpose of acquiring income
5. BECAUSE on the facts of the case
the test contained in Section 20
8(o) of Law 59 is satisfied
6. BECAUSE the Judgments in the
Court of Appeal were correct
and ought to be confirmed.

STEWART BATES

IN THE PRIVY COUNCIL No.31 of 1965
ON APPEAL FROM THE COURT OF APPEAL
JAMAICA

THE COMMISSIONER OF
INCOME TAX Appellant

- and -

HANOVER AGENCIES
LIMITED Respondent

CASE FOR THE RESPONDENT

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