[2017] JMSC Civ 160

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 03071

BETWEEN	**HASON HOSANG**	**1ST APPLICANT**
AND	**CHRISTOPHER ROBERTS**	**2ND APPLICANT**
	CHRISTOPHER BARNES	**3RD APPLICANT**
	RUDOLPH SPEID	**4TH APPLICANT**
	OLIVER CLARKE	**5TH APPLICANT**
AND	**THE COMMISSIONER OF TAXPAYER AUDIT AND ASSESSMENT**	**1ST RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND RESPONDENT**

IN CHAMBERS

Michael Hylton Q.C. and Kevin Powell instructed by Michael Hylton and Associates for the Applicant.

Miss Althea Jarrett instructed by the Director of State Proceedings for the Respondents.

Heard: July 26 and 27, 2012 and November 3, 2017

DAYE, J.

Refund of Voluntary Contributions to employee – Pension Scheme – Whether liable to income tax 1955, Sections 2, 5, 13 and 44 Income Tax Act – 31 and 32 – Pensions (Superannuation Funds and Retirement Schemes) Act 2004 – Interpretation of Revenue Statute.

Introduction

[1] The Gleaner Company Limited operated a pension fund scheme for its employees in the form of an approved superannuation fund under the Pensions (Superannuation Funds and Retirement Schemes) Act. This pension fund scheme was called the Contributory Pension Fund for Employees of the Gleaner Company Limited ("the Fund") and came into effect on 30th October 2008.

[2] The Consolidated Trust Deed and Rules for The Contributory Pension Fund for the Employees of the Gleaner Company Limited dated the 30th day October 2008 contained the following commencement provisions:

> "WHEREAS:
>
> 1. The Trust Deed and Rules made on the 18th September 1961 (hereinafter called the "Original Deed and Rules") established with effect from the 2nd May 1957 a superannuation fund approved under Section 25 of the Income Ta law for providing retirement pensions and other benefits for present and future employees of the Gleaner Company and any company controlled by, affiliated or subsidiary to it (hereinafter together referred to as "the Company") in accordance with the provisions of the Original Deed and Rules as amended from time to time.
>
> 2. The Original Rules and the amendments made thereafter were consolidated with effect from May 1, 1997 in the Consolidated Rules of the Contributory Pension Scheme for Employees of the Gleaner Company and Any Future Subsidiaries or Associated Companies (hereinafter called the "1997 Consolidated Rules").
>
> 3. This Trust Deed and Rules is supplemental to the Original Deed and the 1997 Consolidated Rules as amended from time to time.
>
> 4. The Trustees are the current trustees of the Scheme.
>
> 5. Pursuant to Clause 11 of the Original Deed, the Company may alter, modify or add to any of the provisions of the said Deed or its Rules, by resolution of its Board of Directors provided that no such amendment or alteration shall substantially prejudice the existing rights of any member at the time of such amendment.
>
> 6. The Company has resolved to amend the Original Deed and the 1997 Consolidated Rules to comply with the provisions of the Pensions (Superannuation Funds and Retirement Schemes) Act, 2004 and its

attendant Regulations ("the Pensions Act"), to effect recommended changes and to consolidate the amendments with the provisions of the Original Deed and the 1997 Consolidated Rules as amended from time to time with effect from the 2nd day of May 2008 ("the Consolidation Date").

7. …"

[3] The Applicants in this claim are the named Trustees ("the Trustees") for the Fund. The Fund was discontinued and in the process of being wound up. There was a surplus on the Fund and it was decided that the voluntary contributions of the members would be refunded to them upon request. Based upon the advice of KPMG, the Fund's accountants, it was expected that the refunds were to be exempt from income tax deductions as the Fund was an approved pension fund. On the contrary, the position of the Commissioner of Taxpayer Audit and Assessment ("the Commissioner"), the First Respondent, was that the voluntary contribution refunds of the Fund would be subject to income tax.

[4] The diametrically opposing views of KPMG and the Commissioner on the treatment of income tax on the refunds of the voluntary contributions from the Fund left the Trustees in a state of uncertainty as to how to proceed.

[5] This uncertainty led the Trustees to ask the Court after consideration of the issues, to grant the following Declarations:

i. A Declaration that on a proper construction of the Income Tax Act and the Rules and Regulations made thereunder and the Pensions (Superannuation Funds and Retirement Schemes) Act, voluntary contributions repaid on the winding up of an approved superannuation fund are not subject to income tax.

ii. Consequentially, a Declaration that the repayment of voluntary pension contributions to members of the Contributory Pension Fund for the Employees of The Gleaner Company Limited (:the Fund) is not subject to income tax and those members, the trustees and the administrator of the Fund are not liable to account for income tax for such repayments.

iii. Such further or other relief as the Honourable Court deems necessary to give effect to the declarations sought.

iv. Costs

The background to the Commissioner's decision

[6] KPMG, in their capacity as the Fund's accountant, sought clarification from the Commissioner on the treatment of the refund of the voluntary contributions and surplus arising from the discontinuation and subsequent winding up of the Fund. It was the position of KPMG that the Income Tax Act was silent on the treatment of refunds of voluntary contributions and that the said contributions may be refunded without the imposition of income tax and that the surplus was subject to income tax in accordance with section 44(3) of the Income Tax Act.

[7] On 12 August 2010, KPMG wrote the Commissioner seeking to confirm their understanding of the tax implications on the refund of the voluntary contributions and surplus arising from the discontinuation of the Fund. The letter stated inter alia:

> The Commissioner of Taxpayer Audit and Assessment
>
> Taxpayer Audit and Assessment Department
>
> 9th Floor Mutual Life Building
>
> 2 Oxford Road
>
> Kingston 5
>
> **Attention: Mr. Bevon Sinclair**
>
> Dear Sir,
>
> **Treatment of the refund of voluntary contributions on the winding up of an approved pension fund**

Further to our recent discussions (Jolly-Stone/Rainford/Sinclair/Newman), we write to confirm our understanding of the Revenue's position on the manner in which voluntary contributions which are refunded to contributors from a Jamaican approved pension fund should be treated for the purpose of Income Tax.

Section 31 of the Pensions (Superannuation Funds and Retirement Schemes) Act stipulates that on the winding up of an approved pension fund, voluntary contributions are liabilities that should be paid out of the fund prior to arriving at the surplus. This surplus is subject to income tax under section 44(3) of the Income Tax Act (Act). However, the Act does not state that the refunds of the voluntary contributions are subject to tax, as neither section 5 ("the charging section") nor section 44(3) make any reference to the refund of the voluntary contributions.

It is our understanding that the position of the Revenue Department is that the voluntary contributions may be refunded to contributors without the imposition of income tax.

It is our understanding that the position of the Revenue Department is that the voluntary contributions may be refunded to contributors without the imposition of income tax.

If our understanding, as outlined above, represents the Revenue's position, please sign the confirmation statement on the attached copy of this letter and return it to us.

Yours faithfully,

EAJ:yj-s:no

[8] Some 5 months later, the Commissioner responded by way of letter dated 16 December 2010 as follows:

December 16, 2010

KPMG

Chartered Accountants

The Victoria Mutual Building

6 Duke Street

Kingston

Attention: Mrs Yanique Jolly-Stone

Dear Mrs Jolly-Stone

Re: Treatment of the refund of voluntary contributions on the winding up of an approved pension fund

Reference is made to your correspondence dated August 12, 2010 in respect of the above captioned issue. We wish to advise that the refund of pension contributions to employees are taxable income which falls within the definition of emoluments described in Section 2 of the Income Tax Act which speaks to among other things "any payment of money made, or other valuable consideration given, to any person being the holder or past holder of any office or employment of profit in consideration for, or otherwise in connection with, the termination of the holding of that office or employment (otherwise than by death) or **any change in its nature or terms,"**

It is clearly stated in **The Income Tax (Superannuation Funds) Rules, 1955** that contributions to the fund by the employer and the employee shall be mutually recognized by both of them as a condition of the employment, and therefore any refund of such contribution constitutes a change in the terms of such employment. In other words, the refund of contributions to an employee, constitute a payment of money to that person being the holder of an office or employment of profit in consideration for, or otherwise in connection with any change in its nature or terms of that employment.

The fact that the refund of employees contributions constitutes emoluments as outlined above, and chargeable to tax under section 5 (1)(c), brings the payment within the scope of The Income Tax (Employments) Regulations which defines an employer as "as any person paying emoluments, whether on his own account or on behalf of another person paying emoluments, whether on his own account or on behalf of another person." This means that the trustee or administrator who makes this payment to the employee would be deemed to be the employer for the purposes of this section and therefore mandated to account for the tax.

Issue

[9] Whether the voluntary contributions are "emoluments" and therefore subject to income tax as a result of the winding up of the Fund?

[10] The answer to this question lies in the interpretation of the applicable legislation that dictates the income tax treatment of voluntary contributions to an approved superannuation fund and the implications on a winding up of an approved superannuation fund.

<u>The Statutory treatment of Voluntary Contributions</u>

The Income Tax Act

[11] Section 5 of the Income Tax Act contains the provisions that allow for the taxation of income subject to various exceptions:

> 5.--(1) Income tax shall, subject to the provisions of this Act, 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-
>
> …
>
> (c) all emoluments arising or accruing to any person (or any member of his family or household) by reason of his office or employment of profit
>
> …

[12] The operation of this section is subject to section 13 of the said Act which addresses the allowable deductions.

> Ascertainment of chargeable home
>
> 13 (1) For the purpose of ascertaining the chargeable income or statutory income, as the case may require, 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 subsection (1) of section 5 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,
>
> and such disbursements and expenses may include-

…

(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 and has not been approved under this Act, 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 first March 2005-

(A) an employee's contribution in any year of assessment shall not exceed 10% of his annual remuneration; and

(B) an employer's contribution in any year of assessment as respects an employee shall not exceed 10% of that employee's annual remuneration,

so, however, that where the employer contributes less than 10% of an employee's annual remuneration, the employee may contribute the difference between the employer's actual contribution and the maximum contribution payable by the employer;

[13] Section 2 defines:

“emoluments” includes, in relation to any office or ....”

(a) all salaries, fees, wages, all provision or payment, as the case may be, …; and

(b) without prejudice to the provisions of section 13, all sums paid to any person by an employer in respect of expenses whether reimbursable or not;

(c) all annuities, pensions, superannuation or other allowances payable in respect of past services in any office or employment of profit, whether legally due or voluntary, and including lump sums paid in commutation or in lieu of a pension or other periodical superannuation payment, and any payment of money made, or other valuable consideration given, to any person being the holder or past holder of any office or employment of profit in consideration for, or otherwise in connection with, the termination of the holding of that office or employment (otherwise than by death) or any change in its nature or terms, or any undertaking given by that person as to his future conduct, whether the payment is made to that person or to his relative or dependant (in which case it shall be treated as made to that person, unless he is dead, when it shall be treated as made to the recipient thereof);

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

[14] Contributions to a superannuation fund by employer and employee are addressed in section 44 of the Income Tax Act. The relevant sections state:

Superannuation Funds

44.-(1) Subject to the provisions of this Act and to any regulations and rules made thereunder, any sum paid by an employer or employed person by way of contribution towards an approved superannuation fund shall, in computing profits or gains for the purpose of an assessment to income tax, be allowed to be deducted as an expense incurred in the year in which the sum is paid:

…

(3) Income tax shall be chargeable in respect of any sum-

(a) paid or repaid out of an approved superannuation fund to an employer who is a contributor to such fund; or

(b) paid by way of annuity out of an approved superannuation fund to an employed person or his dependents; or

(c) paid by way of distribution of any surplus arising on a winding-up of an approved superannuation fund as if such sum were income of the year in which it was so paid or repaid.

SUBMISSIONS

[15] I will consider first the submissions in law of Counsel Miss Althea Jarrett for the respondents. Though this is not the order or sequence in which the submissions were make. I will then consider the applicant's submission, that is, the Trustees of the Fund.

[16] Miss Jarrett submitted that refund of voluntary contributions of the employees of the company on the winding up the fund are chargeable to income tax. She argued that under section 5 (1) (c)of the Income Tax Act, Income Tax is payable because voluntary contributions are emoluments and qualifies as an income payment (See sec 5 (1) (c)and Sec 2 of Income Tax Act at (Para 11 and 13).

[17] Mr. Michael Hylton Q.C. submission in response is that section 5 ITA and particularly the voluntary contribution in issue are payments relating to a change of the nature or terms of an employer's office, is that, section 5 of the ITA states that it is "subject to the provisions" of the Act. Therefore section 5 must be read in light of and subject to the other relevant provisions. He referred to section 44 which deals specifically with approved superannuation fund. He contended further that Section 44 (3) identifies the specific circumstances in which tax is chargeable in respect of approved superannuation fund. He argues that those circumstances do not include voluntary contributions. In summary he submitted that Sections 2 and 5 of the ITA deals with payments of income tax generally while Section 44 (3) deals specifically with payments out of approved superannuation fund (See paragraph 14).

[18] Counsel relied on the general principle of statutory interpretation (as well as contractual interpretation) that the specific takes precedents over the general. He cited the decision of the Court of Appeal of **Jamaica Stock Exchange v Fair Trade Commission** (S.C.C.A 92/97, del January 29, 2011) there the issue was whether the Fair Competition Act applied to the operations of the Jamaica Stock Exchange. The court held that Securities Act contained specific provisions regulating the stock exchange and that was the relevant statute.

[19] Counsel further submitted that the interpretation of the commissioner of tax based on Section 2 and 5 would render the provisions of section 44 (3) meaningless.

[20] Counsel previously argued that the portion of the definition of emoluments that relates to the change of the nature or terms of employment had nothing to do with voluntary contribution. It related to payment such as early retirement and resignation that could be described as 'golden hand shake'.

[21] Fundamental to all these submissions is the legal position that the modern interpretation of revenue statutes is that the provisions of the statute should be given a purposive interpretation and the words of the statute should not be given a literal interpretation. The Commissioner of Tax contended that their interpretation and reliance on section 2 and 5 of the ITA is not literal but purposive. Counsel Mr. Hylton Q.C. contended that if the interpretation of the provisions does not take into account section 44 of the ITA as also the Pensions Act and the rules and regulation under these Acts then any such interpretation is not purposive.

[22] Miss Althea Jarrett for the Respondent submitted in relation to section 44 of the ITA, that section 44 (1) treats all contribution to a superannuation fund paid by both employer and the employed person as deductible for the purpose of arriving at chargeable income. Further she stated that under section 13 (1) (i) “ordinary annual contributions” to an approved superannuation fund are included in disbursement and expenses and are deductible in the year of assessment for which they are made.

[23] Para 23 of her written submissions explains her reasoning on section 44 of the ITA.

"23 while voluntary contributions paid into the fund are not liable to income tax by virtue of section 13 (I) of the Income Tax Act it is submitted that on a true construction of the income tax act voluntary contribution paid out of the fund to members on the winding up of the fund are subject to income tax".

[24] Miss Jarrett's reason is that it could not have been the intention of Parliament that no income tax is charged when the voluntary contributions is paid into the fund and no income tax is charged when the voluntary contribution is paid out of the fund. The employee she said, would get a “wind fall”.

[25] But Counsel Mr. Michael Hylton Q.C. responded that it could never be the intention of parliament that the employee should be liable to double taxation. This is how he treat it with section 44 (1). He said it is subject to rules and regulation made under the ITA. Under rule 2 of the Income Tax Act (Superannuation Fund Rules) "ordinary annual contribution" this expression means an annual contribution to a superannuation fund fixed in amount or computed by reference to the earnings, the contribution or the number of members of the fund. "Basic Contribution under the fund are computed by reference to [a member's earnings] Counsel submitted, since they are fixed to 5% of Pensionable Salary, voluntary contribution on the other hand are neither fixed in amount nor 'computed by reference to the earnings the contributions or the number of members of the fund'. The basic contribution would be exempted by tax pursuant to section 44 (1) and 13 (1) (ii) of the Income Tax Act but the same is not applicable to additional voluntary contributions.

[26] In my view the submissions of Michael Hylton Q.C. for the trustees are more consistent with a purposeful interpretation of section 44 (1) and (3) of the income tax act than the submissions of Counsel Miss Jarrett for the TAAD.

The specific provisions of the income tax act that deals with liability for income tax for payment out of a superannuated fund, said Mr. Hylton Q.C. is section 44 (3) there are 3 circumstances listed (a)-(c).

[27] Counsel submits this section does not apply also to be voluntary contribution. He submitted that one has to consider the relevant provisions in the pension (Superannuation Fund and Retirement Scheme) Act.

[28] Section 2 of the act defines 'surplus' as the "excess of the value of the assets of a pension fund over the value of the of the assets of a pension fund over value of its liabilities as determined by an Actuary..."

[29] Section 31 of the PSFRSA provides: "upon the winding up of founds or scheme shall be delivered to the trustee or provisions trustee where shall pay all debts in the following order of priority:

(a) express the fund or scheme;

(b) voluntary contribution and transfer values;

(c) permission owing to pensioners or their beneficiaries;

(d) pension for members eligible for each retirement and their beneficiaries;

(e) pension owing to defendant pensioners and their beneficiaries;

(f) perspective pensions for the remaining active members and their beneficiaries;

(g) any other liabilities relating to approved superannuation fund or approved retirement scheme".

[30] The section 32 (1) of the PSIRSA provides:

> *"If after discharging the liabilities specified in section 34 (a) to (f) and surplus exist, the trustee or the provisional trustee shall employ an Actuary approved by the commission to the amount of the surplus ".*

[31] Counsel submit based on these section the repayment of the voluntary contributions would not be a distribution of the surplus. Voluntary contribution is a liability of the fund.

[32] Miss Jarrett for the Respondent does not rebut these submissions. She contend simply that a literal interpretation should not be placed on section 44 (3) become voluntary contribution is part of the salary of the employee that is the source of the transaction. The source of the contribution is income and therefore chargeable to income tax. Their submission in my view does not take into account the fiscal regime of the income tax act as a whole. This is what is required for a purposeful interpretation of section 44 (3).

The Interpretation of Revenue statutes

[33] Both the applicant and respondent submitted several authorities on the interpretation of revenue statutes in support of their position. The unanimous decision of the Court of Appeal in **Commissioner of Taxpayer Audit and Assessment v CIBC Trust and Merchant Bank Jamaica Limited et al** (SCCA 3/04, judgment delivered 8th November 2006) where it was held that the surplus of the pension fund was subject to income tax, endorsed the purposive approach to the interpretation and application of revenue statutes.

This was an appeal against the decision of Anderson J on 17th December 2003 in which the learned trial judge found that the surplus arising from a resulting trust that was created by the discontinuance of the Air Jamaica Pension Fund was not income chargeable to tax under either section 5 or 44(3)(c).The appellant claimed that income tax was payable.

The Air Jamaica pension scheme required contribution from employees by way of payroll deduction from his compensation where compensation is defined as regular salary or wages. The company was required to pay into the Fund amounts equal to that paid by members. Based on section 5 (1) and (3) and section (44)(1) of the Income Tax Act, such contributions are not subject to the payment of income tax and are excluded from the computation of emoluments which are subject to such tax. However, section 44(3) of the Income Tax Act provides that Income tax is payable subsequently.

44 (3) Income tax shall be chargeable in respect of any sum-

(a) paid or repaid out of an approved superannuation fund to an employer who was a contributor to such fund; or

(b) paid by way of annuity out of an approved superannuation fund to an employed person or his dependents; or

> (c) paid by way of distribution of any surplus arising on a winding-up of an approved superannuation as if such sum were income of the year in which it was so paid or repaid.

This provision is an indication that the Act anticipates that income tax is payable on the distribution of a surplus which may arise on the winding up of an approved Pension Plan.

Section 13 of the Air Jamaica Pension Plan purportedly dealt with a surplus arising. However, the clause in section 13.3 (ii) was void for perpetuity and a resulting trust as to the surplus arose.

Interpretation of the Revenue Statute

[34] In his judgment, Harrison P held the view that the statute must be read as a whole and the intention of the legislature must be ascertained from the statute, regardless of the nature of the statute. He cited that the author of the **Construction of Statutes** by E.A. Driedger (1974) commenting on the approach to the interpretation of revenue statutes concluded at page 153 that:

> *"…there are no special rules or canons of construction for tax exemptions, and whether a subject is taxable or exempt depends in all cases on the intention of the legislature to be ascertained in the normal way."*

His Lordship bolstered his position with the 1899 case of **Attorney General v Carlton Bank** (1899) 2 Q.B. 158 where Lord Russell maintained that a taxing statute should be read in the light of its true object:

> *"I see no reason why any special canons of construction in respect of 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 that has been employed having regard to the context in connection with which it is employed."*

[35] Also relied on was , **Inland Revenue Commissioners v McGuckain** [1997] 3 All ER 817 where their Lordships in the House of Lords asserted that in construing tax legislation, the statutory provisions were to be applied to the substance of the transaction. Lord Steyn at page 824 said:

> *"Towards the end of the last century Pollock characterized the approach of judges to statutory construction as follows—'… Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds' (see Pollock Essays in Jurisprudence and Ethics (1882) p 85). Whatever the merits of this observation may have been when it was made, or even earlier in this century, it is demonstrably no longer true. During the last 30 years there has been a shift away from literalist to purposive methods of construction. Where there is no obvious meaning of a statutory provision the modern emphasis is on a contextual approach designed to identify the purpose of a statute and to give effect to it. But under the influence of the narrow Duke of Westminster doctrine, tax law remained remarkably resistant to the new non-formalist methods of interpretation. It was said that the taxpayer was entitled to stand on a literal construction of the words used regardless of the purpose of the statute (see **Pryce v Monmouthshire Canal and Railway Cos** (1879) 4 App Cas 197 at 202–203; Cape Brandy Syndicate v IRC [1921] 2 KB 64 at 71; **IRC v Plummer** [1980] AC 896). Tax law was by and large left behind as some island of literal interpretation.*
>
> *…the intellectual breakthrough came in 1981 in the Ramsay case, and notably in Lord Wilberforce's seminal speech which carried the agreement of Lord Russell of Killowen, Lord Roskill and Lord Bridge of Harwich. Lord Wilberforce restated the principle of statutory construction that a subject is only to be taxed upon clear words ([1982] AC 300 at 323). To the question 'What are "clear words"?' he gave the answer that the court is not confined to a literal interpretation. He added 'There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded'. This sentence was critical. It marked the rejection by the House of pure literalism in the interpretation of tax statutes."*

[36] In concluding, Harrison P held that the sum of money in the hands of the trustees, being the employees' share of the surplus in the Air Jamaica Pension Fund at its discontinuance in 1994, was liable to income tax and that the trustees should deduct such tax before distribution of the surplus to the members of the fund.

[37] Cooke, JA also made a significant finding in relation to the character of the surplus. He cited their Lordships comment in the Privy Council decision in **Air Jamaica Limited& Ors. V Charlton** (1999) 54 W.I.R. 359 where they stated that the resulting trust which concerned the surplus "arises by operation of the general law, ... the pension scheme and the scope of the relevant tax legislation." Accordingly, he found that the failure of the trust created the surplus and therefore the surplus was not as a result of the winding up of the Pension Plan and the payment of the surplus was not connected to their employment. Consequently, with no causal relationship between the winding up of the Pension Plan and the resulting trust, the disbursement of the surplus did not fall within section 44(3) of the Income Tax Act but rather section 5(1)(c).

[38] His Lordship quoted paragraphs 28 to 32 from **Barclays Mercantile Business Finance Limited v Mawson (Inspector of Taxes)** [2004] UHL 51:

"28. As Lord Steyn explained in ***IRC v McGuckian*** [1997] 3 All ER 817, [1997] 1 WLR 991, 999, the modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. Until the *Ramsay* case, however, revenue statutes were "remarkably resistant to the new non-formalist methods of interpretation". The particular vice of formalism in this area of the law was the insistence of the courts on treating every transaction which had an individual legal identity (such as a payment of money, transfer of property, creation of a debt, etc) as having its own separate tax consequences, whatever might be the terms of the statute. As Lord Steyn said, it was:

> *". . . those two features – literal interpretation of tax statutes and the formalistic insistence on examining steps in a composite scheme separately – [which] allowed tax avoidance schemes to flourish."*

29. The *Ramsay* case [1982] AC 300] liberated the construction of revenue statutes from being both literal and blinkered. It is worth quoting two passages

from the influential speech of Lord Wilberforce. First, (at p 323) on the general approach to construction:

> *"What are 'clear words' is to be ascertained upon normal principles: these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded."*

30. Secondly (at pp 323–324), on the application of a statutory provision so construed to a composite transaction:

> *"It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded."*

31. The application of these two principles led to the conclusion, as a matter of construction, that the statutory provision with which the court was concerned, namely that imposing capital gains tax on chargeable gains less allowable losses was referring to gains and losses having a commercial reality ("The capital gains tax was created to operate in the real world, not that of make-belief") and that therefore (p 326):

> *"To say that a loss (or gain) which appears to arise at one stage in an indivisible process, and which is intended to be and is cancelled out by a later stage, so that at the end of what was bought as, and planned as, a single continuous operation, there is not such a loss (or gain) as the legislation is dealing with, is in my opinion well and indeed essentially within the judicial function."*

32. The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyses the facts and then ask whether they satisfy the

requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found. As Lord Nicholls of Birkenhead said in ***MacNiven v Westmoreland Investments Ltd*** [2001] UKHL 6, [2003] 1 AC 311, 320, para 8:

> *"The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case."*

[39] The decision of the Court of Appeal reflected the approach of examining the nature of the surplus and how it arose in making a final determination on its status to be chargeable for tax. A significant factor in arriving at this determination was first ascertaining how the surplus arose before ascertaining if it fell within the provisions of the chargeable section of the Income Tax Act.

Analysis

[40] The applicant and respondent seem to be of one accord as it relates to the treatment of income tax on the surplus of the Fund. As such no more needs to be said on this. In order to become a member of the Fund, one had to be an employee of the Gleaner Company. Clause 1.23 defines **Member** as:

> 1.23 **Member** means any Employee who in accordance with these Rules shall for the time being participate in the Fund. A person upon ceasing to be employed by the Employer shall cease to be a member of the Fund.

[41] Members are required to make voluntary contributions to the Fund by way of payroll deductions as stipulated in section 6 of the Trust Deed and Consolidated Rules of the Fund. Section 6 states that:

SECTION 6 – CONTRIBUTIONS

6.01 Member's Contribution

> A Member is required to contribute to the Fund, by way of payroll deductions, 5% of Pensionable Salary. These contributions shall be referred to as "basic contributions". No Member shall be required to make any contributions to the Fund beyond his Normal Retirement Date.
>
> In addition to the above a Member may make additional voluntary contributions, by way of payroll deductions. Such contributions, together with the basic contributions in the paragraph above, will not exceed 10% of Pensionable Salary in any Fund Year or such other amount as may be legally permissible. These contributions shall be referred to as "voluntary contributions".
>
> 6.03 Contributions made by the Company to provide benefits to the Members shall not exceed 10% of the Members' annual Pensionable Salaries save where the Company is required to make special contributions in accordance with the recommendation of the Actuary to ensure solvency of the Fund is not impaired. …

[42] These voluntary contributions, being an allowable disbursement from emoluments under section 13(1) (i), would not be subject to income tax. On this basis, it could be concluded that once these amounts were deducted from the members' salary and paid over to the Fund, they ceased to be emoluments and were now voluntary contributions.

[43] In paragraph 2 of the Commissioner's letter dated 16 December 2010, the Commissioner posited that the refund of the voluntary contributions arising from the discontinuation of the Fund constituted a change in the terms of the employment and *"…constitute a payment of money to that person being the holder of an office or employment of profit in consideration for, or otherwise in connection with any change in its nature or terms of that employment."* In other words, the refund of voluntary contributions from an approved pension fund would be classified as emoluments.

[44] An examination of section 13(1)(c) of the Income Tax Act gives an indication that the purpose of this section is to provide a tax incentive to the employee and employer for the contribution to an approved superannuation fund (application of **Commissioner of TAAD v CIBC et al**). In the instant case, the applicant's superannuation fund is an approved superannuation fund that also operated with a three year exemption from income tax. This income tax exemption was effective for the period 1 December 2008 to 31 December 2011 and was approved by the Commissioner. The said certificate provided for the Fund to be exempt under section 12(j) of the Income Tax Act and for interest, dividends or any other income accruing to the Fund to be paid gross without deduction of Withholding Tax. Further, there are no provisions in the relevant sections that give rise to the taxation of voluntary contributions.

[45] The applicants who are also the Trustees have presented the sequence of their actions in paragraph 4 of the Particulars of Claim as follows:

> *"The Fund has been discontinued and is in the process of being wound up. The Fund has a surplus and it has been decided that the voluntary contributions of the members of the Fund will be refunded to them, upon request. …"*

Further in paragraph 7 of the Particulars of Claim:

> *"There are 58 beneficiaries of the Fund who are present or former employees of the company, who have opted to receive their voluntary contributions."*

[46] The House of Lords approach in the **Barclays** case is to give the statutory provision a "…a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide the actual transaction…"An application of this construction would find that the Trustees' approach to the winding up of the Fund falls in the provision of section 31 of the Pensions (Superannuation Funds and Retirement Schemes) Act. Section 31 stipulates the order in which liabilities of the Fund are to be settled when a pension fund is being wound up as follows:

Notwithstanding anything to the contrary in this Act, upon the winding-up of an approved superannuation fund or approved retirement scheme, all assets for the time being of that fund or scheme shall be delivered to the trustee or provisional trustee who shall pay all debts in the following order of priority-

(a) expenses of the fund or scheme;

(b) voluntary contributions and transfer values;

(c) pensions owing to pensioners or their beneficiaries;

(d) pensions for members eligible for early retirement and their beneficiaries;

(e) pensions owing to deferred pensioners and their beneficiaries;

(f) prospective pensions for the remaining active members and their beneficiaries;

(g) any other liabilities relating to the approved superannuation fund or approved retirement scheme.

[47] Therefore, on a proper construction of the statute, the refund of voluntary contributions ranks second on the list of distributions before arriving at the final position, that of the surplus which is taxable. Further, section 44(3)(c) of the Income Tax Act makes it very clear as to the amounts on which income tax is payable on a superannuation fund. The refund of voluntary contributions is not included in any of the provisions. The section is stated below for emphasis.

44 (3) Income tax shall be chargeable in respect of any sum-

(a) paid or repaid out of an approved superannuation fund to an employer who was a contributor to such fund; or

(b) paid by way of annuity out of an approved superannuation fund to an employed person or his dependents; or

(c) paid by way of distribution of any surplus arising on a winding-up of an approved superannuation;

as if such sum were income of the year in which it was so paid or repaid

Conclusion

[48] I hold the Commissioner's position in that voluntary contributions are emoluments when being refunded and therefore chargeable to tax under section 5(1)(c) is not guided by the modern approach to the interpretation of the statutory provisions relating to a superannuation fund under the Income Tax Act.

[49] This principle of interpreting Revenue statute were enunciated in the Court of Appeal decision in **Commissioner of Taxpayer Audit and Assessment v Cigarette Company of Jamaica Ltd. (In Voluntary Liquidation)** [2012] UKPC 9, a case in which the respondent ("the Commissioner") by virtue of section 72 of the Income Tax Act ("the Act"), notified CCJ of a tax assessment of $5.7 billion ($2.17 billion tax and $3.54 billion in penalties pursuant to section 41(2)(b) of the Act) for the years of assessment 1997 to 2002 in respect of transfers of funds made to the appellant by its holding company in each of those years. This assessment arose as a result of the Commissioner's view that the transfers, though reflected in the audited financial statements of both companies as loans were not genuine loans, but rather distributions and as such were liable to income tax deducted at source.

[50] Some of the principles Morrison , JA suggested in considering the issues of the case included:

i) In interpreting the provisions of a revenue statute, such as the Act, the paramount question for the court is the construction of the particular provision and its application to the facts of the particular case. This question is in fact no different from the correct approach to the interpretation of statutes generally.

ii) It is not necessarily or inevitably the case that transactions or elements of transactions that have no discernible commercial purpose are to be disregarded. What is important in every case is for the court to determine firstly exactly what transaction it was the intention of the statute to capture and then to see whether the transaction in question falls into the statutory net.

[51] In addressing the question of whether the transactions were properly characterized by the Commissioner as distributions, it was held that even though the Commissioner is entitled to disregard a transaction, it was still necessary for the taxpayers liability to be grounded elsewhere in the Act and that further, the Commissioner has no power under the Income Tax Act (section 16 in this instance) to "recharacterise" a transaction as something which it is not.

[52] The appeal against the assessments was allowed and the judgment of the court below in respect of the assessments set aside and judgment entered for the appellants. The Privy Council in its judgment delivered on March 13, 2012 also agreed with the decision of the Court of Appeal and dismissed the appeal on the single ground that section 16 of the Income Tax Act had no application at all.

In concluding, it is suggested that:

i) the Trustees should be allowed to proceed to refund the voluntary contributions without the imposition of income tax; and

ii) Any remaining surplus after the dispositions according to section 44 and the Trust Deed should be distributed subject to the deduction of the applicable taxes.

[53] The court therefore make the following Declarations:

i) That on a proper construction of the Income Tax Act and the Rules of Regulations made thereunder and the Pensions (Superannuation Funds and Retirement Schemes) Act, voluntary contributions repaid on the winding-up of an approved superannuation fund are not subject to income tax.

ii) That the repayment of voluntary pension contributions to members of the Contributory Pension Fund for the employees of the Gleaner Company Ltd. ("the Fund") is not subject to income tax and those members, the trustees and the administrator of the Fund are not liable to account for income tax on such repayments.