[2020] JMCA Civ 53

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 163/2012

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA

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

Miss Althea Jarrett, Director of State Proceedings, for the appellants

Michael Hylton QC and Kevin Powell instructed by Hylton Powell for the respondents

9 October 2019 and 30 October 2020

MORRISON P

Introduction

[1] The 1st appellant is the Commissioner of Taxpayer Audit and Assessment ('the CTAA'), while the 2nd appellant is the Attorney-General of Jamaica. The 2nd appellant is a party to the proceedings by virtue of the Crown Proceedings Act.

[2] The respondents ('the trustees') are the trustees of the Contributory Pension Fund for the Employees of the Gleaner Company Limited ('the Fund').

[3] This appeal is concerned with the proper interpretation of certain provisions of the Income Tax Act ('the ITA'), the Income Tax (Superannuation Funds) Rules, 1955 ('the 1955 rules'), and the Pensions (Superannuation Funds and Retirement Schemes) Act ('the PSFRSA').

[4] Although obviously not having legislative effect, it is also relevant to consider the provisions of the Consolidated Rules of the Contributory Pension Fund for the Employees of the Gleaner Company Limited, dated 30 October 2008 ('the Fund rules').

[5] The issue in the appeal is whether, on a proper construction of the relevant provisions of the statutes and the 1955 rules, the refund to employees of their voluntary contributions to an approved superannuation fund, upon a winding-up of the fund, is subject to income tax.

[6] While the phrase 'voluntary contributions' is not defined in the ITA, it is common ground that such contributions are, as section 2 of the PSFRSA provides, "contributions which an active member elects to make in order to supplement the benefits payable under an approved superannuation fund or approved retirement scheme". They are, therefore, optional contributions which a member chooses to make in addition to the

compulsory contributions which the member is obliged to make "as a requirement for participation by that member in an approved superannuation fund …"[1]

[7] In a judgment given on 3 November 2012, and subsequently reduced to writing and issued on 3 November 2017[2], Daye J ('the judge') granted a declaration that repayment of voluntary contributions upon a winding-up of an approved superannuation fund is not subject to income tax.

[8] As a consequence of this declaration, the judge granted a further declaration that the proposed repayment of voluntary pension contributions to members of the Fund by the trustees in this case is not subject to income tax under the ITA.

[9] The CTAA contends that the judge erred and misdirected himself in law in granting these declarations. The trustees, on the other hand, maintain that the judge came to the correct conclusion on the facts of this case, albeit not entirely for the reasons which he gave.

[10] I will consider the issues raised in this appeal under the following heads and in the following order:

1. The background to the dispute (paragraphs [11]-[18])

2. The relevant provisions of the ITA, the 1955 rules, the PSFRSA and the Fund rules (paragraphs [19]-[29])

[1] PSFRSA, section 2, definition of 'compulsory contributions'
[2] [2017] JMSC Civ 160

3. What the judge found (paragraphs [30]-[31])

4. The grounds of appeal (paragraph [32])

5. Counsel's submissions (paragraphs [33]-[35])

6. The approach to the interpretation of revenue legislation (paragraphs [36]-[38])

7. Discussion and analysis (paragraphs [39]-[70])

8. Conclusions (paragraph [71])

9. Disposal of the appeal (paragraph [72])

The background to the dispute

[11] As there is no controversy about the underlying facts of this matter, the relevant background can be shortly stated[3].

[12] The Fund was an approved superannuation fund under both the PSFRSA and the ITA. The evidence was that the Fund had been discontinued and was in the process of being wound up. As part of that process, the trustees determined that the voluntary contributions of the members of the Fund should be refunded to them upon request. A total of 58 beneficiaries of the Fund opted to receive refunds of their voluntary contributions.

[3] The account which follows is based on the affidavit of Rudolph Speid in support of fixed date claim form, sworn to on 28 April 2011 and filed on 4 May 2011.

[13] The trustees were advised by KPMG, the Fund's accountants, that repayment of the voluntary contributions was not subject to income tax. KPMG then sought to confirm this position with the CTAA[4]. But the CTAA strongly disagreed and, by letter dated 16 December 2010, advised that the refund of voluntary contributions to employees constituted taxable income and was therefore subject to income tax.

[14] The CTAA gave the following reasons for this conclusion:

> " … We wish to advise that the refund of pension contributions to employees are [sic] taxable income which falls within the definition of emoluments described in Section 2 of [the ITA] 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 [1955 Rules] 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 [sic] 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. …" (Emphases as in the original)

[15] On this basis, the CTAA advised that the trustees were "therefore mandated to account for the tax".

[4] Letter dated 12 August 2010, KPMG to CTAA

[16] Arising from the conflict between the advice given by KPMG and the position taken by the CTAA regarding the liability for income tax on the repayment of voluntary contributions, the trustees decided to turn to the court for guidance. Accordingly, by fixed date claim form filed 4 May 2011, in which the CTAA and the Attorney General were named as defendants, the trustees moved the court for the following declarations:

> "1. A Declaration that on a proper construction of the [ITA] and the Rules and Regulations made thereunder and the [PSFRSA], voluntary contributions repaid on the winding up of an approved superannuation fund are not subject to income tax.
>
> 2. Consequentially, a Declaration that the repayment of voluntary pension contributions to members of [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."

[17] The claim was opposed by the CTAA. In an affidavit in response filed on the department's behalf by Mrs Cecile Walker-Clarke[5], she confirmed that the Fund was an approved superannuation fund[6] and restated the CTAA's position that, upon a refund to the members, the voluntary contributions "were exigible to tax"[7].

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[5] Affidavit of Cecile Walker-Clarke sworn to 17 January 2012 and filed on 18 January 2012. Mrs Walker-Clarke was then a manager in the Superannuation, ESOP, Exemption Organization Unit of Tax Administration Jamaica.

[6] The Certificate of Income Tax Exemption issued by the Taxpayer Audit & Assessment Department under section 44 of the ITA is dated 19 November 2008.

[7] Para. 9

[18] In due course, after a hearing based entirely on the affidavit evidence and legal submissions on both sides, the judge granted the declarations sought by the trustees on 5 November 2012[8].

The relevant provisions of the ITA, the 1955 rules, the PSFRSA and the Fund rules

The ITA

[19] I will first mention section 2, which contains some relevant definitions (the emphases are mine):

> "'**approved superannuation fund**' means a superannuation fund registered under the [PSFRSA] and approved by the Commissioner under this Act."
>
> "'**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."
>
> "'**emoluments**' includes, in relation to any office or employment of profit –
>
> (a) all salaries, fees, wages, all provision or payment, as the case may be, in respect of living or other accommodation, entertainment, utilities, domestic or other services and other benefits, perquisites and facilities whatsoever (whether or not similar to any of the foregoing and whether in money or otherwise); 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,

[8] Judgment on fixed date claim form filed 5 November 2012

> 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);"

[20] Next, there is section 5, which is generally described as the charging section of the ITA. With specific reference to this case, section 5(1)(c) provides that:

> "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-
>
> (a) …
>
> (b) …
>
> (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."

[21] Then, there is section 13, which addresses allowable deductions for the purpose of ascertaining chargeable income. Section 13(1)(i) provides:

> "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; …"

[22] Section 13(1) goes on to provide that "such disbursements and expenses may include … (i) ordinary annual contributions to an approved superannuation fund". But the section is subject to a proviso, which provides that, from and after 1 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."

[23] And, finally as regards the ITA, I must mention section 44, which deals specifically with approved superannuation funds and featured prominently in the arguments on this appeal. The following are of particular relevance:

> "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:
>
> Provided that no allowance shall be made under the preceding provision in respect of any contribution by an employed person which is not an ordinary annual contribution, and where a contribution by an employer is not an ordinary annual contribution, it shall, for the purpose of the preceding provision, be treated, as the Commissioner may direct, either as an expense incurred in the year in which the sum is paid,

> or as an expense to be spread over a period not exceeding ten years.
>
> (2) - …
>
> (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 fund,
>
> as if such sum were income of the year in which it was so paid or repaid."

The 1955 rules

[24] Rule 2 of the 1955 rules defines "ordinary annual contribution" as "an annual contribution to a superannuation fund, fixed in amount, or computed by reference to the earnings, the contributions or the number of the members of the fund".

[25] The conditions of approval of a superannuation fund under the ITA are set out in the Schedule to the 1955 rules. Section 6 of the Schedule provides that:

> "The contribution made to the fund respectively by the employer and the employee shall be an ordinary annual contribution and shall not exceed in either case ten per cent of the employee's current remuneration."

The PSFRSA

[26] Section 2 is also the definition section of the PSFRSA. I will mention four of the definitions contained in the section:

> "'approved superannuation fund' means a fund, not being a specified pension fund –
>
> (a) whereby contributions toward pensions are made by employers on behalf of employees; and
>
> (b) which is approved and registered by the [Financial Services] Commission;"
>
> "'compulsory contributions' means contributions which are made by or on behalf of an active member as a requirement for participation by that member in an approved superannuation fund or approved retirement scheme;"
>
> "'sponsor' means –
>
> (a) in relation to a superannuation fund, an employer who –
>
> (i) establishes the superannuation fund or causes it to be established;
>
> (ii) participates in the superannuation fund; or
>
> (iii) accepts the obligations of the former sponsor of the superannuation fund …"
>
> "'voluntary contributions' means contributions which an active member elects to make in order to supplement the benefits payable under an approved superannuation fund or approved retirement scheme."

[27] Section 13(2) sets out the conditions for approval of a superannuation scheme by the Financial Services Commission. The only ones that are of relevance in the current context are conditions (e) and (g):

> "(e) the ordinary annual contribution made by a sponsor in respect of a member shall not exceed such amount as may be prescribed by the [ITA], so, however, that where the contribution of a sponsor does not meet the minimum funding and solvency requirements, the sponsor may make special contributions in order to meet those requirements;
>
> …
>
> (g) yearly contributions to the fund by an active member shall not exceed such amount as may be prescribed by the [ITA];"

[28] And finally, sections 31 and 32(1) of the PSFRSA, respectively address the application of the assets of a fund upon a winding up and treatment of any surplus:

> "31. 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.
>
> 32.- (1) If after discharging the liabilities specified in section 31 (a) to (f) any surplus exists, the trustees or provisional

trustees shall employ an actuary approved by the Commission to verify the amount of the surplus.

(2) …

(3) …

(4) …

(5) …"

The Fund rules

[29] Under the rubric 'Contributions', section 6 of the Fund rules provides that:

"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' ...

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'.

6.02 Company's Contributions

The Company shall also remit periodically to the Trustees but not less frequently than annually such payments as are recommended by the Actuary to be sufficient, in addition to the total members' contributions, to provide the benefits set out in these Rules and to ensure the solvency of the Fund and to provide for all administrative expenses of the Fund, provided always that the Company must be an ordinary annual contributor to the Fund.

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 that the solvency of the Fund is not impaired. These special contributions shall be remitted not less frequently than quarterly.
>
> 6.04 …"

What the judge found

[30] The judge identified the issue as being "[w]hether the voluntary contributions are 'emoluments' and therefore subject to income tax as a result of the winding up of the Fund?"[9]

[31] In considering this issue, the judge examined the provisions of the ITA, the 1955 rules and the PSFRSA. He also considered a number of authorities on the proper approach to the interpretation of revenue statutes. Having considered the circumstances of this case in the light of the various provisions and the relevant authorities, the judge came to the following conclusions:

> (i) "The House of Lords approach in the **Barclays** case is 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 the actual transaction …'"[10] (Emphasis as in the original)
>
> (ii) "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

[9] Judgment, para. 9

[10] Judgment, para. 46. The reference to "the Barclays case" is to the decision of the House of Lords in **Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)** [2004] UKHL 51, [2005] 1 All ER 97

members' salary and paid over to the Fund, they ceased to be emoluments and were now voluntary contributions."[11]

(iii) "… there are no provisions in the relevant sections that give rise to the taxation of voluntary contributions".[12]

(iv) "… on a proper construction [of section 31] of the [ITA], 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 [ITA] 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 ..."[13]

(v) "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 [ITA]."[14]

The grounds of appeal

[32] The appellants rely on the following grounds of appeal:

"a) The Learned Judge erred and misdirected himself in law in finding that on a proper construction of the [ITA] and the Rules and Regulations made thereunder and the [PSFRSA], voluntary contributions repaid on a winding up of an approved superannuation fund are not subject to income tax.

b) The Learned Judge failed to have any or any sufficient regard to the decision of the **Court of Appeal in Commissioner of Taxpayers Audit and Assessment v CIBC Trust and Merchant Bank Jamaica Limited, unreported Supreme Court Civil No3/04** in which it was held that in determining whether the surplus in the Air

[11] Judgment, para. 42
[12] Judgment, para. 44
[13] Judgment, para. 47
[14] Judgment, para. 48

Jamaica Pension Plan was chargeable to tax, what was important was the 'character' of the funds.

c) The Learned Judge failed to have any or any sufficient regard to the fact that the character or true nature of the voluntary contributions to the Contributory Pension Fund for the Employees of The Gleaner Company Limited was income and therefore chargeable to tax.

d) The Learned Judge fell into error and misdirected himself in law in applying a strictly literal interpretation to section 44(3) of the [ITA] and so determine that because voluntary contributions are not included in section 44(3), those contributions are not liable to income tax on being repaid to the Members of the Contributory Pension Fund for the Employees of The Gleaner Company Limited on the winding up of the Fund.

e) The Learned Judge fell into error in failing to have any or any sufficient regard to the decisions in **Barclays Mercantile Business Finance Ltd v HM Inspector of Taxes [2005] 1 All E.R 97**, in which the House of Lords reiterated that the modern approach to the constructions of statutes [sic], including taxing statutes is to have regard to the purpose of the particular provision and to give effect to it.

f) The Learned Judge fell into error when he failed to properly interpret sections 5(1), 13(1) and 44(1) of the [ITA] in light of the House of Lord's [sic] decision in **Barclays Mercantile Business Finance Ltd v HM Inspector of Taxes [2005] 1 All E.R 97**, and the Jamaican Court of Appeal decision in **Commissioner of Taxpayers Audit and Assessment v CIBC Trust and Merchant Bank Jamaica Limited, unreported Supreme Court Civil No3/04**.

g) The Learned Judge failed to recognise that to allow voluntary contributions to be repaid out of the Contributory Pension Fund for Employees of The Gleaner Company Limited without being liable to income tax, would amount to the members of that Plan being blessed with a windfall which the fiscal regime of the [ITA] could not have contemplated.

h) The Learned Judge erred and misdirected himself in law in finding that a repayment of voluntary contributions to members of [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." (Emphases as in the original)

Counsel's submissions

[33] Miss Althea Jarrett, the Director of State Proceedings, who also appeared for the CTAA in the court below, argued all eight grounds together. I trust that I do no disservice to her detailed submissions by summarising them as follows.

[34] Miss Jarrett submitted that voluntary contributions are ordinary annual contributions within the meaning of the ITA and the 1955 rules. When paid into a superannuation fund, ordinary annual contributions are deductible for the purpose of calculating chargeable income. No income tax is therefore paid on them, although they are income in the sense of being part of the employee's total earnings (as to which, see **Parry v Cleaver**[15]). Accordingly, when being paid out on the winding up of the Fund, they fall to be treated as taxable income within the meaning of section 5(1)(c) of the ITA, otherwise the employee would reap a windfall, contrary to the provisions and the intendment of the statute. This interpretation is consistent with the provisions of the 1955 rules, the PSFRSA and the Fund rules, and remained unaffected by section 44 of the ITA. In this regard, as Harrison P explained in **Commissioner of Taxpayer Audit and Assessment v CIBC Trust and Merchant Bank Jamaica Limited et al**[16] ('**CTAA v CIBC**'), "the statute must be read as a whole and the intention of the legislature must

[15] [1969] 1 All ER 555

[16] (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 3/2004, Judgment delivered 8 November 2006, at page 10

be ascertained therefrom regardless of the nature of the statute". Accordingly, had the judge applied a purposive interpretation to the statutory provisions, as he was required in law to do, he would inevitably have concluded that voluntary contributions paid out of the Fund to members on a winding-up are subject to income tax.

[35] Mr Michael Hylton QC, who also appeared for the trustees in the court below, pointed out at the outset of his submissions that there was no evidence regarding whether the affected employees' voluntary contributions in the case were paid out of untaxed income. This was never an issue in this case and was therefore irrelevant to the determination of the appeal. He submitted that, on a proper interpretation of the relevant legislative provisions, voluntary contributions are not taxable when repaid on the winding-up of an approved superannuation fund. Voluntary contributions are not "ordinary annual contributions", which are deductible for the purposes of ascertaining chargeable income. They are therefore subject to income tax when paid into a superannuation fund and should not be so subject when repaid. To do otherwise would result in double taxation. In any event, section 5 of the ITA is expressly subject to the provisions of the statute. The CTAA's position had the effect of making section 44(3) of the ITA otiose, given that, while the section specifically identifies the payments from an approved superannuation fund which are taxable, it makes no mention of a refund of voluntary contributions being taxable. In these circumstances, the principle of statutory interpretation that the specific will take precedence over the general applies. When sections 2 and 32(1) of the PSFRSA are read together, it is clear that voluntary contributions are a liability of an approved superannuation fund and therefore do not form part of the surplus. Accordingly, they are

not caught under section 44(3)(c). In the result, the judge's decision was therefore correct and should not be disturbed.

The approach to the interpretation of revenue legislation

[36] Happily, there is no dispute between the parties as to the correct approach to the interpretation of revenue legislation. It is in fact no different to the approach to the construction of statutes generally. In this regard, it is now accepted that, "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"[17]. Accordingly, as Lord Nicholls of Birkenhead explained in **MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd**[18], "[t]he paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case".

[37] These principles were accepted and applied by this court in **CTAA v CIBC**. The issue for determination in that case was whether the employees' share of the surplus existing in the Air Jamaica Ltd Pension Fund upon its discontinuance was liable to income tax (the court's answer was that it was). After referring to the impact of some of the leading modern authorities, Harrison P observed[19] that "[t]he literal construction of

[17] **Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)** [2004] UKHL 51, [2005] 1 All ER 97, para. [28]

[18] [2001] UKHL 6 at [8], [2001] 1 All ER 865 at [8]; see also **Cigarette Company of Jamaica Ltd (In Voluntary Liquidation) v Commissioner of Taxpayer Audit and Assessment** [2010] JMCA Civ 3, para. [75](i).

[19] At page 12

revenue statutes was to give way to a more purposive approach"[20]. I will return to this case in due course.

[38] There is no question that the judge accepted that the modern authorities mandated a purposive approach to the interpretation of the statutory provisions in this case[21]. The real tension between the parties, therefore, is as to the judge's application of this approach to the law and facts of this case.

Discussion and analysis

[39] The three issues which arise for consideration are (i) whether the phrase "ordinary annual contributions" in section 13(1)(*l*) of the ITA includes voluntary contributions; (ii) what is the meaning and scope of section 44 of the ITA, in particular, section 44(3); and (iii) whether, even if the refund of the employees' voluntary contributions in this case is not subject to income tax under section 44(3), it is nevertheless taxable under section 5(1)(c) of the ITA.

(i) Do ordinary annual contributions include voluntary contributions?

[40] It is generally accepted that section 5(1)(c) of the ITA establishes the basis of the charge to income tax. Under the section, as has been seen, income tax is payable by every person for each year of assessment in respect of all income, profits or gains. This includes all emoluments arising or accruing to any person by reason of his office or

[20] To similar effect, see the judgments of Cooke JA, at pages 26-28, and McCalla JA, at page 34
[21] See the passage from his judgment quoted at para. [31] (i) above.

employment of profit, save in respect of such sums as are specifically excepted under the provisions of section 5(1)(c).

[41] Section 2 of the ITA defines emoluments to include all salaries, fees, wages and the like, as well as all annuities, pensions, superannuation or other allowances payable in respect of past services.

[42] Section 13(1) sets out the allowable deductions for the purpose of calculating one's chargeable income. Among them are ordinary annual contributions to an approved superannuation fund. However, in the case of an employee, the contribution in any year of assessment shall not exceed 10% of his annual remuneration; and, in the case of an employer, the contribution in any year of assessment in respect of an employee shall not exceed 10% of the employee's annual remuneration. (These provisions are subject to an exception, which does not apply in this case, which allows an employee, in a case in which the employer contributes less than 10% of the employee's annual remuneration, to contribute the difference between the employer's actual contribution and the 10%.)

[43] The total of an employee's ordinary annual contributions is therefore capped at 10%. But the question of what comprises the employee's ordinary annual contribution is contentious, given Mr Hylton's submission that it does not include voluntary contributions. It is therefore necessary as a first step to determine that question.

[44] Rather inconveniently for present purposes, there is no definition of ordinary annual contributions in the ITA. Only marginally more helpful, rule 2 of the 1955 rules defines ordinary annual contributions as "an annual contribution to a superannuation

fund, fixed in amount, or computed by reference to the earnings, the contributions or the number of the members of the fund".

[45] However, perhaps more to the point, section 6 of the Schedule to the 1955 rules states, as a condition of approval of a superannuation fund under the ITA, that "**[t]he contribution** made to the fund respectively by the employer and the employee **shall be an ordinary annual contribution** and shall not exceed in either case ten per cent of the employee's current remuneration" (emphases mine). In my view, this is certainly some indication that, from the standpoint of the 1955 rules at any rate, the total of an employee's contribution to the fund in each year, irrespective of how it is made up, is what is described as his ordinary annual contribution to an approved superannuation fund.

[46] As has been seen, there is no definition or even mention of voluntary contributions in either the ITA or the 1955 rules. In fact, the phrase makes its first appearance in the PSFRSA, a statute enacted 50 years after the ITA. There is therefore no indication – whether explicit or implicit - in the ITA itself that ordinary annual contributions are to be given the restricted meaning contended for by Mr Hylton. In these circumstances, in the absence of clear limiting words in the ITA to this effect, and in the light of the generality of the phrase, I have found it impossible to accept the submission that the legislature must have intended to exclude voluntary contributions from the scope of ordinary annual contributions.

[47] Section 13(2)(e) and (g) of PSFRSA indicates that (i) the ordinary annual contribution made by a sponsor and (ii) the yearly contributions to the fund by an active member, "shall not exceed such amount as may be prescribed by the [ITA]". From the standpoint of the PSFRSA, therefore, it is also clear that, however described, the contribution made by an employee to an approved superannuation fund, cannot exceed the 10% cap stated in section 13(1) of the ITA.

[48] And this, as it seems to me, is entirely consonant with section 13(1) of the ITA, despite the fact that it does not mention voluntary contributions. I therefore think that the phrase ordinary annual contributions is, as the 1955 rules suggest and the PSFRSA makes clear, to be interpreted to encompass, subject to the 10% cap in section 13(1) of the ITA, all contributions which an employee makes to an approved superannuation fund in any particular year of assessment. It follows from this that, in my view, the employees' ordinary annual contributions in this case, included voluntary contributions, provided that they did not exceed 10% of their pensionable salary in aggregate, qualified as deductions from their chargeable incomes for the purposes of calculating their income tax liability. If that is so, then the spectre of double-taxation which Mr Hylton raises, that is, that since the employees' voluntary contributions would have already been subject to tax when paid in to the Fund, they should not be so subject when paid out on a winding-up, must fall away completely.

[49] I would only add this for completeness. The correct interpretation of section 13(1) of the ITA is, of course, a question of law for the court, irrespective of whatever other

interpretation others may have given it from time to time. But I cannot help observing, purely for what it is worth, that the view I have taken of the matter reflects the way in which the framers of the Fund rules, as approved by the respective regulators under both the ITA and the PSFRSA, obviously understood the position. For those rules, as has been seen, sub-divide an employee's contributions into basic and voluntary contributions, though the aggregate of both sets of contributions cannot exceed 10% (or such other amount as may be legally permissible) of the employee's pensionable salary in any fund year.[22]

(ii) What is the meaning and scope of section 44 of the ITA, in particular section 44(3)?

[50] Under the rubric 'Superannuation Funds', section 44(1) of the ITA provides that, subject to the Act and to any rules or regulations made under it, any sum paid by an employer or employee as a contribution to an approved superannuation fund will be an allowable deduction for the purpose of assessing the amount of income tax payable by that person. In other words, no income tax is payable in respect of such a contribution. However, as the proviso to section 44(1) indicates, such a contribution will not avail an employee unless it is an ordinary annual contribution. In this regard, section 44(1) is therefore entirely consistent with section 13(1).

[51] But Mr Hylton placed particular reliance on section 44(3), which specifically provides that income tax is payable in respect of any sum which is (a) paid or repaid out of an approved superannuation fund to an employer who was a contributor to the fund;

[22] See para. 29 above

(b) paid by way of annuity to an employee or dependent; or (c) paid by way of distribution of any surplus arising on a winding-up of the fund.

[52] Thus, so the argument runs, to the extent that repayment of voluntary contributions is not expressly captured in section 44(3), which sets out various taxable amounts paid out of an approved superannuation fund, the judge was right to conclude that the repayment of such contributions in this case did not attract income tax.

[53] It is clear that neither section 44(3)(a) nor 44(3)(b) applies in this case. And, to the extent that what is in issue is the repayment of voluntary contributions, and not a distribution of the surplus, I am inclined to agree with Mr Hylton that section 44(3)(c) is equally inapplicable.

[54] I say this because, as Mr Hylton pointed out, section 31(b) of the PSFRSA provides for repayment to employees of voluntary contributions out of a fund which is in the process of being wound up, as a debt due from the fund, before the question of a surplus can arise. Accordingly, despite the rather loose – or perhaps I should say informal - use of the word by the trustees in this case[23], the question of whether or not there is a surplus and, if so, what is the extent of it, will not in point of fact be determined until the debts of the Fund, including voluntary contributions, have been paid pursuant to section 31(a)-(f) and the surplus verified by the actuary under section 32(1). In other words, repayment

[23] See, for instance, the affidavit of Rudolph Speid, sworn to on 28 April 2011, at para. 5

of voluntary contributions in this case does not equate to a payment by way of distribution of the surplus, which is what section 44(3)(c) expressly contemplates.

(iii) Is the repayment of the employees' voluntary contributions taxable under section 5(1)(c) of the ITA?

[55] So the question is whether, even if repayment of the voluntary contributions is not caught by section 44(3)(c), it can nevertheless be regarded as taxable income pursuant to section 5.

[56] A similar question arose for consideration in **CTAA v CIBC**, albeit in the context of a proposed payment by way of distribution of a pension fund surplus. In that case, the CTAA contended that the sums which it was proposed to pay to former members of the Air Jamaica pension fund out of the actuarially determined surplus in the fund was taxable under either section 5(1)(c) or section 44(3)(c), or both. It may be helpful to consider the decision in a little more detail.

[57] The background to the case is well known. In **Air Jamaica Ltd and Others v Joy Charlton and Others**[24], the Privy Council held that the Air Jamaica pension fund had been discontinued and that the trusts of the fund were void for perpetuity. Accordingly, the surplus of some $400,000,000.00 devolved to the company and the individual members in proportion to their respective contributions to the fund.

[58] The respondent in **CTAA v CIBC** was the court-appointed trustee of the surplus. It was therefore charged with the responsibility of repaying to the members their share

[24] (1999) 54 WIR 359

of the surplus. R Anderson J held that these amounts were not taxable under section 44(3)(c) of the ITA, because there was no evidence that a winding-up of the fund had either occurred or was in progress; nor were they taxable under section 5, as they did not fall under any of the heads of income set out in the section.

[59] By the unanimous decision of the court[25], the CTAA's appeal succeeded and it was held that the proposed payments were in fact subject to tax. Both Harrison P and McCalla JA (as she then was) accepted the CTAA's argument that (i) contrary to Anderson J's finding, there was evidence that a winding-up was in progress and that the amounts were therefore taxable under section 44(3)(c); and (ii) the amounts standing to the credit of each member of the pension fund, as the product of their respective contributions plus interest, "remained income, subject to the payment of income tax"[26]. This is what McCalla JA said about the second point[27]:

> "The distribution of the surplus in the Fund is income which is chargeable to income tax under section 5(1)(c) of the [ITA]. There being no provision in the [ITA] exempting such payments from income tax, the funds are taxable as falling within the ambit of that section as taxable emoluments."

[60] Cooke JA disagreed on the first point. In his view, it was the failure of the trust which created the surplus and it could not therefore be said "that the surplus arose on

[25] Harrison P, Cooke and McCalla JJA
[26] Per Harrison P at page 17
[27] At page 36

the winding up of the Pension Plan … [t]here was no causal relationship between the winding-up of the [plan] and the resulting trust"[28].

[61] However, on the second point, he was fully in agreement with Harrison P and McCalla JA. After referring to the basis on which R Anderson J had rejected the argument that income tax was also payable by virtue of section 5(1)(c) of the ITA, Cooke JA said this[29]:

> "The first question to be asked in resolving this issue is what qualified anyone to be a recipient of a portion of the surplus fund? The answer is that the qualification was to have been a member of the pension scheme created [by the company]. The next question is what was the essential criterion to be satisfied before becoming a member? The answer is by being an employee of the company. Then there is the question: How was the surplus fund to be distributed? It was to be divided on a pro rata basis according to the contribution made by each such member. The proffered answer to the questions posed does indicate that the payment of money from the surplus fund was made to members in connection with their employment. To describe the payment as a 'capital' one does not make such payment any less one which while it is an emolument within that definition of the Act [sic]. Those members did not pay any income tax on their contributions which was part of the surplus fund. See sections 44(1) and 13(1) of the Act. The fiscal regime cannot have contemplated that each such recipient member would be blessed with a wind fall. In my view a proper construction of section 5(1)(c) of the Act results in the payment of income tax by each recipient member (or estate)."

[28] Per Cooke JA, at page 23
[29] At page 25

[62] As has been seen, section 5(1) imposes income tax, subject to the provisions of the ITA, on every person in respect of all income, profits or gains respectively described in the section. Under section 5(1)(c), income tax is payable on "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". In addition to all salaries, fees, wages and the like, the definition of emoluments in section 2 includes, "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 …". The proviso to section 5(1)(c) sets out a number of exclusions from the scope of emoluments, none of which is applicable in this case.

[63] It has not seriously been argued that the voluntary contributions which the trustees propose to repay in this case will not qualify as income falling within the broad purview of section 5(1)(c). In my view, the voluntary contributions clearly derive directly from the employees' earned income. Had they not been contributed to the Fund, they would have attracted income tax under section 5(1)(c) at the applicable rate. It therefore seems to me that, by analogy to **CTAA v CIBC**, the voluntary contributions are plainly subject to income tax upon repayment to the employees.

[64] In this analysis, I have not lost sight of Mr Hylton's submission that, as section 5 of the ITA is expressed to be subject to the provisions of the statute, it must give way in this case to section 44, which deals specifically with taxation of payments being made out of an approved superannuation fund. In this regard, Mr Hylton referred us in his written submissions to the maxim *lex specialis derogat lex generali,* or, as it is expressed

in the English equivalent in Jowitt's Dictionary of English Law[30], "a special statute overrules a general one".

[65] In relation to internal conflicts within a single statute, the maxim *generalibus specialia derogant* expresses the same idea, which is, as Bennion explains[31]:

> "Where the literal meaning of a general enactment covers a situation for which specific provision is made by some other enactment within the Act or instrument, it is presumed that the situation was intended to be dealt with by the specific provision."

[66] However, while this is a well-recognised general canon of construction of statutes, it has also been held that "the maxim does not apply where, instead of a specific provision and a more general provision, there are 'simply different provisions concerned with overlapping aims and with overlapping applications'"[32].

[67] It is therefore necessary in every case, as it seems to me, taking a purposive approach to the construction of the statute in question as a whole, to consider the relevant provisions with a view to discerning the intention of the legislature.

[68] I think it is hardly surprising that the imposition of income tax by section 5 of the ITA should have been made subject to the provisions of the statute, since other sections of the Act provide for, for example, exemptions from income tax (section 12) and

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[30] 2nd edn, Volume 2, page 1090

[31] Oliver Jones, Bennion on Statutory Interpretation, 6th edn, page 1038

[32] Op cit, citing the decision of the United Kingdom Supreme Court in **Cusack v Harrow London Borough Council** [2013] UKSC 40, per Lord Neuberger at para. [61]

allowable deductions in calculating chargeable income (sections 13, 14, 14A, 14B and 44(1)). But, as Miss Jarrett pointed out[33], in my view correctly, there is nothing in the ITA that states that, to be liable to income tax, repayment of voluntary contributions must be included in section 44(3).

[69] In these circumstances, all that section 44(3) does, in my view, is to supplement the general liability to tax in section 5. It makes it clear, perhaps for the avoidance of doubt, that payments out of an approved superannuation fund in the three specified situations (that is, (i) to an employer who was a contributor to the fund, (ii) by way of annuity to an employed person or his dependents, and (iii) by way of distribution of any surplus arising on a winding-up) are subject to income tax. Other kinds of payments out of an approved superannuation fund, such as for instance, pensions, superannuation or other allowances payable in respect of past services in any office or employment of profit, lump sums paid in commutation or in lieu of a pension or other periodical superannuation payment, and the like, are specifically covered in the definition of emoluments and are therefore included in the general liability to income tax in section 5(1)(c). As it appears to me, therefore, sections 5 and 44(3) are in fact intended to be complementary rather than mutually exclusive.

[70] Accordingly, in the absence of clear language to the effect that income from an approved superannuation fund does not incur liability to income tax otherwise than by virtue of section 44(3), I would hold that it is entirely open to the CTAA to maintain the

[33] Appellant's Written Submissions dated 30 July 2019, paragraph 35

position that, even if the proposed repayments of the voluntary contributions are not taxable under section 44(3)(c), they nevertheless remain taxable under section 5(1)(c). This was precisely the position taken by the CTAA in **CTAA v CIBC** and there is nothing in any of the judgments to suggest that the CTAA could not pursue taxation of the surplus under either section 44(3)(c), or, in the alternative, section 5(1)(c). Indeed, as has been noted, Harrison P and McCalla JA held that the CTAA was entitled to succeed under both sections, while Cooke JA found the members liable to tax under the latter section, but not under the former.

Conclusion

[71] I have therefore come to the conclusion that the CTAA's appeal succeeds. The voluntary contributions were part of the employees' ordinary annual contributions. Subject to the 10% cap prescribed by section 13(1) of the ITA, ordinary annual contributions are allowable deductions for the purposes of calculating chargeable income. They are therefore not subject to income tax. The proposed repayments of the voluntary contributions do not constitute a distribution of the surplus under section 44(3)(c), and are therefore not taxable under that section. However, repayments of the voluntary contributions will constitute income in the hands of the employees and are therefore liable to income tax under section 5(1)(c) of the ITA. This conclusion is entirely in keeping with what I take to be the intention of the framers of the ITA, which is that, subject to the specified statutory exemptions and allowable deductions, income tax is payable on all income coming within the meaning of section 5(1)(c).

Disposal of the appeal

[72] I would therefore make the following orders:

1. The appeal is allowed and the orders made by Daye J are set aside and the following orders substituted:

   (i) 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 subject to income tax, and;

   (ii) subject to proof that no income tax was in fact paid on the voluntary contributions in this case, the repayment of voluntary pension contributions to members of the Contributory Pension Fund for the employees of the Gleaner Company Ltd ("the Fund") is subject to income tax and those members, the trustees and the administrator of the Fund are liable to account for income tax on such repayments.

2. Costs of the hearing in the court below and of the appeal to the appellants, such costs to be agreed or taxed.

F WILLIAMS JA

[73] I have read in draft the judgment of the learned President and agree with his reasoning and conclusion. I have nothing further to add.

EDWARDS JA

[74] I too have read the draft judgment of the learned President. I agree with his reasoning and conclusion and have nothing to add.

MORRISON P

ORDER

1. The appeal is allowed and the orders made by Daye J are set aside and the following orders substituted:

    (i) 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 subject to income tax, and;

    (ii) subject to proof that no income tax was in fact paid on the voluntary contributions in this case, the repayment of voluntary pension contributions to members of the

Contributory Pension Fund for the employees of the Gleaner Company Ltd ("the Fund") is subject to income tax and those members, the trustees and the administrator of the Fund are liable to account for income tax on such repayments.

2. Costs of the hearing in the court below and of the appeal to the appellants, such costs to be agreed or taxed.