JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 18 OF 2006.

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

BETWEEN THE COMMISSIONER OF TAXPAYER APPEALS APPELLANT

AND SWEPT AWAY RESORTS LIMITED RESPONDENT

Patrick Foster Q.C. and Jerome Spencer instructed by the Director of State Proceedings for the Appellant.

Allan Wood instructed by Livingston, Alexander and Levy for the Respondent.

June 16, 17, 2008 and May 8, 2009

PANTON, P.:

I have read the judgment of Harrison, J.A. I agree with his reasons and conclusions. There is nothing further that I wish to add.

HARRISON, J.A.

1. This is an appeal from the judgment of Anderson J, presiding in the Revenue Court. On the 30th January, 2006 he allowed a tax appeal filed by Swept Away Resorts Limited ("the Respondent") against the decision of The Commissioner of Taxpayer Appeals ("the Appellant").

2. The facts indicate that the respondent operated a hotel at Long Bay, Negril in the Parish of Westmoreland which was declared an "approved hotel enterprise" under The Approved Hotel Enterprise (Swept Away Hotel Resort Enterprise) Order dated August 16, 1991. As such, it was entitled to relief from income tax for a period of ten years. The term "hotel enterprise" is defined in section 3 of The Hotels (Incentives) Act (the Act) to mean: "the business concerned with the establishment or operation of a hotel".

3. Between the years 1995-1999, it was the practice of the management of the respondent to place surplus cash which was not immediately required to meet day-to-day operating requirements, in interest-bearing accounts in a commercial bank. The respondent generated significant interest income as a result of this practice.

4. Initially, the respondent had treated the interest income as subject to tax and had paid tax on the interest earned after it submitted its income tax returns for the relevant years of assessment. However, amended returns were filed by KPMG Peat Marwick (the respondent's accountants and tax advisors) on April 27, 2001 and May 8, 2001 respectively. The amended returns purported to treat the interest income as not being subject to tax by virtue of section 9 of the Act.

5. On October 15, 2003 KPMG Peat Marwick, wrote to the Acting Commissioner of Taxpayer Appeals (the Commissioner) on behalf of the respondent and claimed a refund of the income tax previously assessed. The letter stated inter alia:

> "Our above named client, an approved hotel under the Hotel (Incentives) Act, had, in our belief erroneously filed their tax returns for the period 1995-1999 on the basis that their

interest income was subject to tax, and had made tax payments on this premise.

On April 27, 2001 and May 8, 2001 amended returns were filed on the client's behalf for the years 1995 to 1998 and 1999 respectively, based on our understanding that under the Hotels (Incentives) Act, the interest which they received is relieved from taxation. The amended returns claimed refunds totalling $7,478,370.70, which represents Estimated Tax paid of $7,271,856.30 and Tax at source on Interest of $206,514.40.

Subsequent to the filing of the amended returns, discussions were held and correspondence was sent to the Taxpayer Audit and Assessment Department (hereafter referred to as TAAD) in relation to the refunds claimed. The TAAD has however, advised in their letter dated September 17, 2003 that our client's interest income is taxable under Section 5 of the Income Tax Act, as the interest 'was not earned or arose/accrued from the business concerned with the establishment or operation of the Hotel' (see paragraph 3 of the letter).

In accordance with section 75(6A) of the Income Tax Act and the Revenue Administration (Appeals and Dispute Settlement) Regulations, we hereby submit on our client's behalf a Notice of Appeal of the decision of the Commissioner. Our client's appeal is based on the belief that the interest income is entitled to relief from income tax under section 9 of the Hotels (Incentives) Act which states.....

We believe that the relief mentioned in Section 9 is not confined to profits or gains arising or accruing directly from the establishment or operation of the hotel. It covers also the profits or gains arising or accruing from the business concerned with those activities, thus we are of the view that the opening of an interest bearing bank account and the deposit therein of room receipts and other such funds arising from the operation of the hotel, would be included in the business concerned with the operation of a hotel and the interest on such an account would not be subject to income tax....."

6. On September 17, 2003 the Taxpayer Audit & Assessment Department advised the respondent in writing that the interest earned on the deposits was subject to the payment of income tax under section 5 of the Income Tax Act. This letter stated inter alia:

> "The interest accrued is immediately derived from the deposit of money with the Bank on the terms that the Bank would pay interest for the use of the money. It was not earned or arose/accrued from the business concerned with the establishment or operation of the Hotel.
>
> In view of the foregoing the interest is taxable in accordance with Section 5 of the Income Tax Act..."

7. The respondent was dissatisfied with the decision of the Commissioner and filed a Notice of Appeal dated October 15, 2003 in accordance with section 75(6A) of the Income Tax Act and the Revenue Administration (Appeals and Dispute Settlement) Regulations. The Commissioner heard that appeal and held that interest earned for the years of assessment was not exempt from tax under section 9 of the Act.

8. A further Notice of Appeal was filed by the respondent in the Revenue Court on the 23rd September 2004 and Anderson J., allowed its appeal on January 30, 2006. The learned judge held that interest earned on the deposits for the years of assessment was exempt from income tax pursuant to the provisions of the Hotels (Incentives) Act and the Approved Hotels Enterprise (Swept Away Resort Hotel Enterprise) Order 1991. He further held that such interest was properly to be treated as part of the profit arising or accruing from the operation of an approved hotel enterprise. Costs were ordered against the Commissioner.

9. The appellant appealed the judgment of Anderson J and Notice and Grounds of appeal were filed in the Registry of the Court of Appeal on March 13, 2006. Two major issues arise for determination in this appeal. Firstly, is interest earned from a bank account to be regarded as profits or gains arising or accruing from an Approved Hotel Enterprise and therefore exempt from income tax by reason of section 9 of the Act or is it income which becomes chargeable and subject to the payment of income tax pursuant to section 5 of the Income Tax Act?

10. Mr. Patrick Foster Q.C. for the appellant argued the following grounds of appeal:

> a) The Learned Judge erred in finding that the interest earned on the deposit account, in any commercial sense, was derived from the "approved hotel enterprise" in the sense that that was the only business carried on by the enterprise.
>
> b) The Learned Judge erred in ruling that the source of the income of the hotel enterprise does not matter as long as it falls within the provisions of section 5 of the Income Tax Act, since income tax is charged on the aggregate income of the taxpayer from all sources remaining after allowing the appropriate deductions and allowances;
>
> c) The Learned Judge erred in ruling that the wording of section 9 of the Hotels (Incentives) Act speaking as it does to relief from tax on profits or gains, is intended to encompass the wider concept of the aggregate income in section 5 of the Income Tax Act, that is, income from all sources mentioned in section 5 of the Income Tax Act and;
>
> d) The Learned Judge erred in ruling that the interest income earned on the deposit account is from the source mandated by the Hotels (Incentives) Act".

11. The facts are not in dispute in this appeal so I turn now to section 9 of the Act which states as follows:

> "Any company to which section 8 applies shall be entitled to relief from income tax in respect of profits or gains arising or accruing during the relevant concession period, from the approved hotel enterprise, of an approved extension of any hotel, of which it is the owner, tenant or operator."

And section 8 states:

> "8. The benefits of sections 9 and 11 shall be enjoyed by -
> (a) any company which is for the time being the owner or tenant of the premises comprising any hotel in relation to which an order under section 3 or under section 4 has been made, whether or not such company is the operator or is entitled to receive any profits arising from the operation of such hotel; and
>
> (b) any company which, not being the owner of such hotel, operates it in accordance with an agreement made between itself and the owner or tenant and certified by the Minister to be acceptable for the purposes of this Act:
>
> Provided that a company which is approved, recognized or declared for the purpose of any of the enactments specified in the First Schedule shall not be entitled to such benefits".

12. It is clear from the above provisions that Parliament intended to provide certain tax incentives to various players in the hotel industry. The critical issue therefore turns on the interpretation to be given to section 9 of the Act. In **Inland Revenue Commission v McGuckian** [1997] 1 WLR 991 Lord Steyn stated inter alia at page 999 of the judgment:

> "...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..."

13. In **Barclays Mercantile Business Finance Ltd. V Mawson (Inspector of Taxes)** [2005] 1 AC 684 it was decided that the Court should give a purposive

construction to the statutory provision in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction answered to the statutory description. The basic task of the court therefore is really to ascertain and give effect to the true meaning of what Parliament intended. In **Cory (William) and Son Limited v Harrison** (1906) AC 274 Lord Halsbury, L.C said:

> "... You must look at the facts of the particular case and look at the business meaning of the words."

14. The major reasoning behind the decision of Anderson J. appears at pages 28 – 29 of his judgment. He stated inter alia:

> "In the case of the Appellant company, the Memorandum and Articles of Association which formed part of the documentation submitted with the application for the incentives clearly provides that it was one of the objects of the company "to lend money and to make advances to customers and others with or without security and upon such terms as the company may approve" and also *to invest in and deal with the moneys of the company whether or not immediately required for the purpose of its business in or upon such investments or securities or in such manner from time to time may be determined* ...It seems to me that, if it were the intention to prevent the Appellant company from benefitting from the relief in relation to such interest income, it would have been easy to provide in the relevant order for such exclusion. No such exclusion is apparent. I therefore form the view that the ordinary meaning of the expression "concerned with" does include the interest income in question.
>
> But there are also some other reasons why I believe this appeal must succeed. I accept the view that the legislation is intended to encourage and facilitate investment in the Tourist Industry. It is safe to assume that efficient investment and operation would be preferred to inefficient investment and operation. Given the limitations upon

> distribution of profits,....it seems that any interest accruing as in this case would necessarily go towards reducing either the debt or the equity requirement (more likely the former) of the investment (sic) it would seem that any reduction in the debt burden of the investment without a corresponding increase in the equity requirement must contribute toward the efficiency of the investment. Is the inference to be drawn from the Revenue's treatment that an approved hotel enterprise which has surplus cash flow and keeps it in a non-interest bearing current account and so earns no interest with which it could reduce its reliance on debt, is to realize a preferred tax position to a company like the Appellant which uses its resources more efficiently?"

15. Mr. Foster Q.C. for the appellant, submitted that although there was only one business carried on by the respondent during the tax years 1995 -1999, the learned judge had erred when he concluded that the interest which the respondent earned from the bank account arose or accrued from the business concerned with the operation of the hotel. He submitted that the earned income was clearly derived from investments made by the approved hotel enterprise as a result of the banker/creditor relationship between the Respondent and its bankers. Mr. Foster referred to **London Joint Stock Bank v. Macmillan** [1918] AC 777 where Lord Findlay L.C said inter alia at 789:

> "The relation between banker and customer is that of debtor and creditor..."

16. Learned Queen's Counsel argued that the learned judge was therefore in error when he held that the source of the income of the hotel enterprise did not matter as long as it fell within the provisions of section 5 of the Income Tax Act. He submitted that the learned judge had ignored the clear wording of section 9 of the Act, which indicated that the source of income amenable to relief must be profits or gains accruing from the approved hotel enterprise. He submitted that by inserting the words "...from

the approved hotel enterprise" the draftsman had qualified the source of profits and gains which were relieved from the payment of income tax.

17. Learned Queen's Counsel said that the expression "business concerned with the operation of a hotel" in the context of the Act, denotes a business whose inherent character and activity is the provision of services such as accommodation, meals and entertainment for reward. He said that section 9 of the Act does not seek to relieve from income tax the profits and gains **of** a business concerned with the operation or establishment of a hotel but, it seeks to grant relief to profits or gains arising or accruing **from** such a business. He argued that the relief is made contingent on the nature of the business activities carried out by the taxpayer and that the effect of the inclusion of the word "from" in section 9 of the Act, is to make it clear that (i) the source of the profit and gains to be relieved must be the business concerned with operating the hotel; and (ii) that the intention of Parliament is not to relieve all the profits and gains of the business from income tax. He therefore submitted that the words "profits or gains arising or accruing from the business concerned with the operating of a hotel", mean the surplus by which the receipts derived from the provision of the Hotel Services exceeded the expenditure earned from the provision of Hotel Services. In concluding, he said that it was not correct to say that section 9 of the Act offered relief to the aggregate income or income from whatever source earned by the respondent.

18. Mr. Wood for the respondent submitted on the other hand, that the business of a hotel enterprise as defined by the Act would encompass any normal business activity which could reasonably be expected to be undertaken in connection with the operation of the hotel. He argued that the maintenance of bank accounts and deposits in which excess cash receipts were deposited and which resulted in the earning of interest from such deposits, came within the normal business activity which one would reasonably expect to be carried on by a hotel. He submitted that the learned judge below was therefore correct to have concluded that an efficiently operated business which kept surplus funds in interest bearing bank accounts and which were available for further utilization by the business, would and ought to fall within the term "the business concerned with the operation of the hotel".

19. I fully agree with both Mr. Foster and Mr. Wood that a purposive construction has to be applied in construing section 9 of the Act. Lord Nicholls of Birkenhead said in **MacNiven (HM Inspector of Taxes) v Westmoreland Investments Ltd** [2003] 1 AC 311, 320, at paragraph 8:

> "The need to consider a document or transaction in its proper context, and the need to adopt a purposive approach when construing taxation legislation, are principles of general application..."

20. One must view the whole situation realistically and consider the nature of the transaction which produced the interest income to the taxpayer. The words: "profit or gains arising or accruing during the relevant concession period, from the approved hotel enterprise" must therefore be given a purposive construction.

21. Some assistance can be derived from **Hochtrasser (Inspector of Taxes) v Mayes** [1959] 3 All ER 817. Of course, I bear in mind the what their Lordships' Board said in **Carreras Group Limited v The Stamp Commissioner** (2004) 64 WIR 228. That case held inter alia, that a local court should be careful of transposing the legislation of one country to that of another particularly when the local legislation has no equivalent provision to the U.K legislation.

22. In the **Hochtrasser** case, a taxpayer was employed by Imperial Chemical Industries from 1941 under contracts which obliged him to move to such of their factories or offices as his employers should from time to time direct. In 1950 under that obligation he was transferred from Hertfordshire to Lancashire. He then first heard of the employers' housing scheme for the assistance of employees in the purchase of a house in the form of an interest-free loan secured by mortgage of the house, and not to be called in for fifteen years except on certain eventualities such as transfer elsewhere. Under the scheme the employers undertook (among other obligations) in the event of the taxpayer's transfer elsewhere to pay for any loss on sale of the house, reserving to themselves an option to purchase it. In 1951 the taxpayer entered into an agreement with the employers under the scheme and bought a house for £1,850 on which he received a tax-free loan of £300. In 1954 on his transfer to Wilton in Yorkshire he sold the house for £1,500 with the consent of the employers. They made good to him the £350 representing the loss incurred. He was assessed to income tax under Schedule E in respect of the £350. At first instance Upjohn J held that the £350 was not a profit

arising from the taxpayer's employment, but was something collateral, and therefore was not taxable under Schedule E (s 156 of the Income Tax Act, 1952) that stated inter alia that tax "shall also be charged in respect of any office, employment or pension the profits or gains arising or accruing from which would be chargeable to tax under Sch. D but for the proviso to para. 1 of that Schedule."

23. The issue which the House of Lords had to determine in the **Hochtrasser** case was whether the sum paid by the respondent's employer was a profit or gain accruing from his office or employment. The House of Lords, concurring with the decision of the Court of Appeal, and upholding the judgment of Upjohn J., held that the payment by the respondent's employee was not a profit or gain accruing from his employment in that it was not in reference to any service rendered by the Respondent whether past, present or future.

24. In the instant case, Anderson J. held that "the interest in any commercial sense was derived from the "approved hotel enterprise" in the sense that that was the only business carried on by the enterprise". I do agree with the learned judge that it would have been most imprudent for the respondent to have kept the surplus profit in its vault at the hotel. But, the question is simply this: Was the interest received by the respondent, a "profit", arising or accruing from the approved hotel enterprise?" I think not, for the simple reason that it was something which was wholly collateral to the "hotel enterprise" and was earned solely by virtue of a banker and customer relationship which the respondent had with its bank. I do agree with Mr. Foster Q.C.

that the word "from" which is used by the draftsman in section 9 of the Act, makes it clear (1) that the source of the profit and gains to be relieved must be the business concerned with operating the hotel; and (2) that the intention of Parliament was not to relieve all the profits and gains of the business from income tax. Mr. Wood's arguments were thoughtful and well presented but I am unable to accept them. In my judgment, the submissions of Mr. Foster Q.C. are unanswerable.

25. Accordingly, I hold: (i) that the interest earned on the investment income was subject to the payment of income tax under section 5 of the Income Tax Act; and (ii) that Anderson J was in error when he held otherwise.

26. I would therefore allow the appeal by the Commissioner of Taxpayer Appeals, and affirm the assessments made by the Taxpayer Audit & Assessment Department. The respondent should pay the costs in the court below and in this Court.

DUKHARAN, J.A.:

I agree.

PANTON, P.:

ORDER:

The appeal is allowed and the assessments made by the Taxpayer Audit and Assessment Department are affirmed.

Costs are awarded to the appellant, both in this court and the court below, to be taxed if not agreed.