

IN THE PRIVY COUNCIL

No. 31 of 1970

ON APPEAL
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

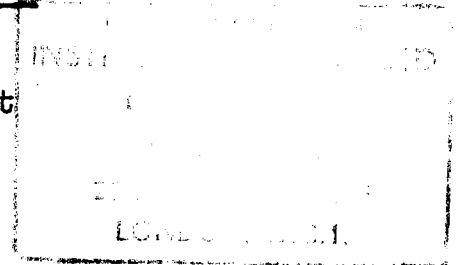
WALTER FLETCHER
on his own behalf and on the
behalf of TRUSTEES AND
COMMITTEE OF DOCTOR'S CAVE
BATHING CLUB

Appellant

and

THE COMMISSIONER OF INCOME
TAX

Respondent



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CASE FOR THE RESPONDENT

1. This is an Appeal from a Judgment and Order of the Court of Appeal of Jamaica (Moody, Shelley and Luckhoo JJ.A) dated the 28th March, 1969, following an Appeal by the Respondent from a Judgment and Order of Edun J. dated the 19th December, 1969, in favour of the Appellant.

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2. There are two questions in issue in this Appeal:-

- (i) The first, which relates to a preliminary point to be taken by the Respondent before your Lordships' Board, is whether the Appellant is entitled to appeal to Her Majesty in Council as of right by virtue of Section 110(1)(a) of the Constitution of Jamaica (S.1.1962-550) on the footing that the matter in dispute "is of the value of five hundred pounds or upwards" or that the Appeal "involves directly or indirectly a claim to or question respecting

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Record
p.49 1.20 -
p.58 1.41
p.19 1.10 -
p.47 1.30

Record

property or a right of the value of five hundred pounds or upwards".

- (ii) The second question, which relates to the substantive issue under Appeal, raises two points of law; the first is whether the chargeable income of Doctor's Cave Bathing Club (hereinafter referred to as the "Club") for the purposes of Section 5 of the Income Tax Law, 1954, should, as the Respondent claims, properly include a sum representing payments received by the Club from hotel members (computed on the basis of the audited house count (explained below) for the period from 14th October 1963 to 31st December 1963, or whether, as the Appellant contends, such sum is not to be brought into account in computing the Club's chargeable income by virtue of the "mutuality principle"; the second point of law is whether Section 10(1) of the Income Tax Law 59 of 1954 entitles the Respondent to disregard the transaction consisting (as the Respondent claims) of the change of the Rules of the Club in October 1963, which transaction (the Respondent claims) purported to reduce the amount of tax payable by the Club, on the footing that such transaction was artificial or fictitious and to assess the Club to tax accordingly by bringing such sum into account in computing the Club's chargeable income.

3. (i) The statutory provision relevant to the preliminary point is Section 110 of the Constitution of Jamaica (S.1 1962/1550):

"110. (1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases -

"(a) Where the matter in dispute on the appeal to Her Majesty in Council is of the value of five hundred

"pounds or upwards or where the
 "appeal involves directly or in-
 "directly a claim to or question
 "respecting property or a right of
 "the value of five hundred pounds
 "or upwards, final decisions in any
 "civil proceedings;

10 (ii) The statutory provisions relevant to
 the substantive points at issue are the Income
 Tax Law, 1954, Section 5 (imposing income tax
 on trading profits); that section is as
 follows:

"5-Income tax shall, subject to the
 provisions of this Law, be payable by
 every person at the rate or rates
 specified hereafter for each year of
 assessment in respect of all income,
 profits or gains respectively
 described hereunder -

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(a) the annual profits or gains
 arising or accruing -

(i) to any person residing in the
 Island from any kind or
 property whatever, whether
 situate in the Island or
 elsewhere; and

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(ii) to any person residing in the
 Island from any trade,
 business, profession,
 employment or vocation
 whether carried on in the
 Island or elsewhere; and

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(iii) to any person whether a
 British subject or not;
 although not resident in the
 Island, from any property
 whatever in the Island, or
 from any trade, business,
 profession, employment or
 vocation exercised within
 the Island;

Record

- (b) profits or gains accruing in or derived from the Island or elsewhere, and whether received in the Island or not in respect of -
- (i) dividends, discounts, interests, annuities, pensions or other annual sums;
- (ii) rents, royalties, premiums and any other profits arising from property ..."

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and Income Tax Law 59 of 1954, Section 10(1) which, so far as is material to the present Appeal, is as follows:

"10(1) Where the Commissioner is of opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious or that the full effect has not in fact been given to any disposition, the Commissioner may disregard any such transaction or disposition and the person concerned shall be assessable accordingly.

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(2)-(6)

(7) For the purposes of this Section the expression "disposition" includes any settlement, trust, covenant, agreement, arrangement or transfer of assets...."

p.19 l.10 -
p.47 l.30

4. The facts to which this Appeal relates are, in the main, set out in the Judgment of Edun J. and are summarized as follows:

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(i) The Appellant is a Members' Club consisting of ordinary honorary, hotel and temporary members; the annual subscription fees for ordinary members are £1. 10/- for each single person, and £3 for ordinary family membership; and an entrance fee of £3. 3/- is payable by every person on his election as an ordinary member and in the case of family membership

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£3. 3/- by the applicant plus £1. 1/- for each additional member of the family registered as a user of the Club.

Prior to 14th October, 1963 -

10 By Rule 8c, hotel members were defined as hotels in Montego Bay which paid to the Club subscriptions based on the audited house count of its guests or such other subscriptions as might from time to time be agreed by the Committee of the Club, and their resident guests should be entitled to the use and amenities of the Club.

By Rule 10a, ordinary and hotel members should have proprietary rights in the Club.

By Rule 10b, temporary and honorary members should not have any proprietary rights in the Club, and

20 By Rule 10c, only ordinary members should have voting rights.

By Rule 16, visitors to the Club could only be introduced by an ordinary member who had paid his subscription for the current year.

30 By Rule 20, visitors to the Parish of St. James who are not members (with the exception of guests residing at hotels which are hotel members) might be admitted to the Club by daily tickets or by such method as the Committee might from time to time decide.

40 (ii) On 12th June, 1963, the Income Tax Appeal Board heard an appeal by the Club against the Commissioner assessing the revenue or income from the hotel members based on the "audited house count" for tax purposes. The Board deciding that the payments received from hotel members were not excluded from charge to tax by reason of the mutuality principle, dismissed the Club's appeal.

p.1 l.1 -
p.2 l.20

Record
p.17
ls. 9 & 10

(iii) Thereafter, the Club at a Special General Meeting on 14th October, 1963 amended its Rules, some of which are as follows:-

(a) Rule 7 now reads "Membership shall consist of ordinary honorary and temporary members and election to membership shall be in the hands of the Committee, save ~~that~~ a hotel member shall be deemed to be elected a member of the Club when it is agreed that the amount of the audited house count will be paid in respect of the hotel owned or operated by him or his corporation". 10

(b) By substituting for Rule 8(c), the following:-

"8(c) Hotel members shall be the owners or operators of hotels in Montego Bay which pay to the Club in addition to an annual subscription of £1. 10/- (as in the case of an ordinary member) an aggregate amount based on the audited house count of its guests or such other amount as may from time to time be agreed by the Committee of the Club and the resident guests of such hotels shall be entitled to the use and amenities of the Club. 20

If such owner or operator is a Corporation it may authorise such persons as it thinks fit to act as its representatives at any meeting of the Club and the person so authorised shall be entitled to exercise the same powers on behalf of the Corporation which he represents as that corporation could exercise if it were an individual member of the Club". 30

(c) "8(d) A Hotel member shall not be required to pay an entrance fee"

(d) "10(c) Only ordinary and hotel members shall have voting rights. Each hotel member shall be entitled to one vote only". 40

At the hearing before the Income Tax Appeal Board in March 1966 Mr. Nation, Solicitor, who appeared for the Club stated this:

10 "If there are some hotels which are not on the audited house count and those hotels have books of tickets which they sell, they buy the tickets, a book of 20 tickets for £3 and they buy the tickets from the Doctor's Cave (the Club), they sell to their guests and of course they pocket the money because the Doctor's Cave is only concerned with that hotel, but that hotel is not a hotel member, because it's not using the audited house count, and we pay Income Tax on that".

The following additional facts are relevant to the matter under appeal:

20 Rule 16 of the Rules of the Club provides as follows:

"16. An Ordinary Member may introduce as visitors to the Club bona fide, non-paying house guests for not more than 42 days during any one year of membership. (For the purpose of this Rule Family Members shall be classed as one member only)"

30 Rule 17 of the Rules of the Club provides as follows:

"17. Visitors, who may be introduced under Rule 16 by an Ordinary Member shall not be residents of the Parishes of St. James, Hanover, Trelawny or Westmoreland, nor be staying at any hotel, guest or boarding-house, or as a paying guest with a family or individual".

40 From the Judgment of Luckhoo J.A. in the Court of Appeal the following evidence of Mr. J.W.N. Downer, a Chartered Accountant, given

Record

at the hearing before the Income Tax Appeal Board in March 1966.

- p.52 1.15
p.52 1s.9
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- (i) Two companies, the Beach View Company Limited (which operated one hotel) and the Hotel Casa Blanca Limited (which owned and operated two hotels) were the hotel members of the Club in respect of whose subscriptions for the year 1963 (Year of Assessment 1964) the question of exigibility of the Club to tax is concerned in the Appeal. 10
- p.52
1s.17-20
- (ii) No part of the profits made by the Club was distributed to its members, all income derived being utilised for improvement of facilities of the Club.
- p.52
1s.21-25
- (iii) As far as Mr. Downer knew, no specific charge was made against any of the resident guests of the three hotels concerned in respect of their enjoyment of the bathing and other associated facilities provided by the Club. 20
- p.52
1s.26-36
- (iv) That part of the subscriptions paid by the hotel members which was based on the audited house counts of their hotels would form part of the inclusive charge the hotels would make against their resident guests which would cover all of the amenities (including the use of the amenities provided by the Club) provided by the hotels but (as far as Mr. Downer knew) would not be separately charged against resident guests for the bathing and associated amenities provided at the Club. 30
5. (i) The Appellant appealed to the Income Tax Appeal Board against the decision of the Respondent dated the 21st July 1965 fixing the Appellant's chargeable income at £5,042 for 40

the Year of Assessment 1964. In a decision given on the 14th March 1966, the Board held unanimously that there was mutuality of interest between ordinary members and hotel members and that there was no trading by the Club in receiving subscriptions based on the audited house count; that, therefore, the said sum of £5,042 was not chargeable income of the Appellant.

Record
p.12
ls.6-18

10 (ii) The Respondent appealed to the Judge in Chambers (Edun J.) against the decision of the Income Tax Appeal Board. On the 19th December 1966 Edun J. gave judgment dismissing the Respondent's Appeal.

p.19 l.10
p.47 l.30

20 (iii) Before the learned Judge three separate contentions were raised by the Respondent. The first such contention, which related to the system of accounting adopted by the Appellant and to the onus of proof on the Appellant to show that the assessment was excessive or based on a wrong principle, is not raised by the Respondent in the Appeal before your Lordships' Board. The second contention of the Respondent was that the mutuality principle did not apply to the facts of the appeal; that there was no complete identity of the contributors with the participators of the surplus or assets of the Club; and that the subscriptions of the hotel members based on the audited house count were business transactions or trading receipts of the Club and as such were chargeable to income tax.

p.23
ls.38-42

p.23 l.43
p.24
ls.1-11

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ls.21-30

40 The learned Judge reviewed the decision of Hamilton J. in Carlisle and Silloth Golf Club v. Smith, 6 Tax Cas. 48. He observed that on the true construction of Rules 7 and 8(c) of the Club in the present case hotel members would not enjoy the amenities of the Club as of right; that the rights of these guests were not only dependent upon the payment of an annual subscription of £1. 10/- by the hotel member, but also upon the payment or agreement for the payment of an additional, an aggregate, amount based on the audited house count of these guests; that unless the contrary

p.32
ls.31-37
and
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ls.1-25

Record

was proved, the facts showed that the contributions or additional payments based upon the audited house count were borne exclusively by the hotel members and that in a winding up the hotel members were entitled to share equally with other members in the surplus assets of the Club. The facts that (a) a hotel member had one vote, although there were many guest-users of the Club or (b) in the case of a winding up a hotel member was entitled only to one share in the surplus, although the business introduced was enormous, made the present case no different in principle from the situation where popular members made more use of a club by introducing more guests than other members and were called on to pay higher subscriptions; thus the learned Judge took the view that, unless there was something more to be considered, the present case was one where members clubbed together to reduce the expenditure on the common objects of providing physical enjoyment of the bathing by subscriptions or contributions which the Club fixed roughly with reference to the cost.

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ls.41-46
and
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The case of Municipal Mutual Insurance Limited v. Hills, 16 Tax Cas. 430 was, in the view of the learned Judge, distinguishable because in that case the facts were that non-members transacted other insurance business by paying, among other things, premiums to the company in which the fire policy holders were members. Whereas here, the guests of hotel members did not contribute anything to the hotel members or to the Club.

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ls.10-42

In New York Life Insurance Company v. Styles, (1889) 14 A.C. 381, 27 Tax Cas. 460 the company in question was assessed to tax in respect of profits made on annuities granted and on premiums paid under non-participating policies. In that case premiums paid by annuitants and the receipt of annuities did not make the annuitants members. In the present case, however (i) the guests of hotel members did not contribute anything, and the facts further showed (ii) that the additional sums of money paid by a hotel member based on the audited

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house count constituted the hotel member a member of the Club.

In the case of National Association of Local Government Officers v. Watkins, 18 Tax Cas, 499, where non-members were paying for the enjoyment and facilities of a holiday camp, it was held that the liability to income tax was confined to profits from non-members. Given that the issue of assessability to income tax in the present case depended upon whether or not a hotel member paid for a guest, then two questions had to be answered. Firstly were the subscribers and the participants the same? That question did not, in the learned Judge's view, arise, because the guests of the hotel members did not subscribe anything. Secondly did the payments by the hotel members constitute membership or not? Rules 7 and 8(c) of the Club provided, in his view, the best answer. The payment by the hotel of an additional amount based on the audited house count, in his view of Rules 7 and 8(c) of the Club, constituted the hotel member a member of the Club, entitled its guests to the use and amenities of the Club, with the result that the rights of those guests were dependent upon the membership of the hotel members. Thus the additional payments were membership subscriptions and as such the Club could not be said to be trading with non-members. He stated that his conclusions were fortified and confirmed by the reasons for judgment of Kennedy L.J. in Carlisle and Silloth Golf Club v. Smith, 6 Tax Cas. at pages 200-201.

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The learned Judge further took the view that as, in his view, the hotel members were bona fide members and accepted and regarded as such by the Commissioner, the right to vote conferred on the hotel members by Rule 10(c) was immaterial.

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The third contention raised by the Respondent at the hearing before the learned Judge in Chambers was that the amendment of the Rules of the Club constituted a transaction which reduced, or would reduce, the amount of

Record

tax payable by the Club and that it was artificial or fictitious: that, therefore, the Respondent, acting pursuant to Section 10(1) of the Income Tax Law 1954, was entitled to disregard the form and to tax the Club accordingly. Dealing with the question whether the amendments to the Rules constituted a "transaction" for the purposes of Section 10(1) the learned Judge reviewed the decision of the Court of Appeal and the House of Lords in Littman v. Barron (1951) Ch. 993 and (1953) A.C. 96 respectively. He was of the view that, having regard to the provisions of Section 10 as a whole and to the statutory definition of "disposition" in sub-section (7), the word "transaction" should be given a meaning in line with the statutory definition of "disposition". The meaning of the word "transaction" included in his view, "any dealing with property or arrangement or transfer of assets which reduced or would reduce the amount of tax payable by any person". He was unable to see what facts constituted a "transaction" within the meaning of Section 10(1).

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Taking into consideration the decision in Johnson v. Jewitt, 40 Tax Cas. 231, Griffiths v. Harrison (J.P.) (Watford) Ltd. (1963) A.C.1, and Latilla v. Commissioners of Inland Revenue (1943) A.C. 337, and the decision of Your Lordships' Board in Desmond Lees Peat v. Commissioners of Taxation of the Commonwealth of Australia, (1967) 1 A.C. 308 on the application of Section 260 of the Income Tax and Social Services Contribution Assessment Act 1936-60, the learned Judge took the view that Section 10(1) was too vague to increase the incidence of taxation in any respects other than a transaction or dealing with property or an arrangement on transfer of assets which reduced or would reduce the amount of tax payable by any person and where the Commissioner was of opinion that such transaction or dealing with property or such arrangement or transfer of assets was sham, unreal, illegal or fraudulent. The Respondent had not, in his view, shown that the Rules or the amendment to the Rules were a sham, unreal

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or fictitious. He considered that the Respondent failed on this ground of appeal.

The learned Judge, therefore, decided that the Respondent's Appeal failed on all three grounds and accordingly dismissed the Appeal.

6. (i) The Respondent appealed against the judgment of Edun J. to the Court of Appeal of Jamaica (Moody, Shelley and Luckhoo J.J.A.). The judgment was given on the 28th March, 1969, by a majority (Moody J.A. dissenting).

p.49 1.19
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and
p.50 1.1
p.58
ls.1-41

(ii) Luckhoo J.A. for allowing the appeal, took the view that the substance of the matter was that, instead of each hotel resident guest paying the sum of three shillings for each occasion on which he enjoyed the Club's amenities, the hotel now paid at the rate of two shillings per resident guest based on an audited house count over a given period. The arrangement amounted, in his opinion, to a trading transaction. The expenditure made by the hotels to secure the use of the amenities offered by the Club for their own guests was made with a view to enhancing their own trade. Obviously a corporation as such could not, and was not intended to, enjoy the bathing and other amenities offered by the Club. The membership of such a corporation was clearly intended to facilitate the use of the Club by hotel guests and the "subscription" paid in regard of such membership was no more and no less part of the trading receipts of the hotel - the same having been derived from the custom of its guests, albeit not by way of a specific charge made for the enjoyment of the Club's amenities but by way of an inclusive charge. The hotel paid it to the Club in the name of the hotel owner or operator who might or might not have been a different corporation. It was the hotel and not the hotel owner or operator who by the Club's rules was required to pay the subscription of the hotel owner or operator. In the learned Judge's view the principle of mutuality as enunciated in New York Life Insurance Company v. Styles, (1889) 2 Tax Cas. 460, and the other authorities cited in that respect had no application to the facts of the

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Record

case. The contributors were in fact the hotel's resident clientele even though no specific charge was made in respect of the use of the Club's amenities by them and the participators were the hotel owners or operators. He would, therefore, allow the appeal.

p.54 1.29
p.54 1.30

(iii) Shelley J.A. concurred with the judgment of Luckhoo J.A.

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ls.32-48

(iv) Moody J.A. for dismissing the appeal, 10 declared that the decided cases made a distinction between revenue which the Club or association earned from trading with non-members or persons who were non-members. It was not how much each member paid but whether the revenue was paid by virtue of membership and whether the person paying it would participate in a sharing of the assets when the time arrived. On the evidence no charge was made by hotel members to guests for use of the facilities of the Club. The revenue to the Club was from hotel members and not from the guests at the hotel. If it appeared that a particular payment was not made by way of subscription but formed part of a trading transaction, that payment might give rise to taxable revenue. In the present case, however, neither the guests of hotel members nor the guests of ordinary members paid for the use they made of the Club. 20 30

In the circumstances, there was no making of profit from persons who were non-members: the payments by hotel members were membership subscriptions, notwithstanding the method of computation. The payments by hotel members were not, in the view of the learned Judge of Appeal, business transactions and did not constitute a trading so as to render the Club assessable to tax. The contributors were the members of the Club and they were the ones who would participate in the surplus or assets of the Club. Accordingly, in his opinion, the principle of mutuality extended to subscriptions paid by the hotel members so far as the said subscriptions were based on the audited house count. He would, therefore, dismiss the appeal. 40

7. (i) The Appellant applied to the Court of Appeal (Moody, Shelley, and Edun J.J.A), by motion under Section 110(1)(a) of the Constitution of Jamaica for leave to appeal to Her Majesty in Council against the judgment of the Court of Appeal. On the 31st July 1969 the Court of Appeal unanimously allowed the application.

10 (ii) The judgment of the Court was given by Moody J.A. The learned Judge of Appeal took the view that the question in dispute was the proper treatment for income tax purposes of subscriptions amounting to £1,720 from hotel members. The dispute, in the view of the Court, involved directly not only a question respecting a right in the Appellant to have it determined how this sum of £1,720 should be treated for income tax purposes but also a question respecting personal property of a value of £1,720. They could not agree that the issue between the parties was whether the Commissioner was entitled to the amount of tax in dispute. There was no dispute as to the amount of tax that might ultimately have to be paid. The application, accordingly, was granted.

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p.78 l.11
p.82 l.16

30 8. (i) The preliminary issue for the determination of your Lordships' Board is whether the Commissioner is entitled to the amount of tax in dispute, that is £145.2.6d. Thus, it is respectfully submitted that the matter in dispute on the present Appeal is not of the value of five hundred pounds or upwards and that the Appeal does not involve directly or indirectly a claim to or question respecting property or a right of the value of five hundred pounds or upwards. Accordingly the Court of Appeal were wrong in deciding that the Appellant had leave to appeal to Her Majesty in Council as of right.

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(ii) It is further respectfully submitted that the issue under Appeal does not raise a matter of sufficient importance to warrant the grant by Your Lordships of leave to appeal.

Record

(iii) As regards the substantive issue in the present Case, it is common ground that the subscriptions of ordinary members do not fall to be taken into account in computing the taxable profits of the trade carried on by the Club. However, in so far as the Club grants to hotel members, in return for additional payment, the right to make commercial use of bathing facilities, the Club is, it is respectfully submitted, carrying on a trade profits of which are taxable. The sums paid by the hotel members to the Club based on the audited house count in accordance with the amended Rule 8(c) of the Club are just as much trading receipts (and so subject to taxation) as payments made to the Club by visitors who buy admission tickets in accordance with Rule 20. 10

The payments made by hotel members in accordance with the audited house count computation are not, either in form or in substance, subscriptions on payment of which the hotel member qualifies as a member. The hotel member qualifies as a member on payment of the annual subscription of £1. 10s. The "aggregate amount based on the audited house count of its guests" is not a subscription but an additional payment to secure the enjoyment of the Club's facilities for and on behalf of the guests of the hotel member. By contrast to the ordinary member who joins the Club for his own individual benefit and pays his subscription in order to provide himself and such guests as he chooses to invite with the bathing facilities, the status of hotel membership was created by the Club in order to give the guests of hotel members the right to make use of bathing facilities in return for a specific additional payment. The guest of the hotel member is in effect a stranger to the Club and the revenue which his patronage of the hotel member provides for the Club is no less a taxable trading receipt of the Club than the green fees paid by non-members for admission to the golf course facilities in the case of Carlisle and Silloth Golf Club v. Smith, 6 Tax Cas. at pages 48 and 198. 20 30 40

The principle, known as the "mutuality principle", that a man cannot make a taxable profit out of trading with himself is not applicable to the present circumstances. That principle has been developed in and applied to cases concerned with mutual insurance and certain public utilities financed by rates, but is not applicable to a case such as the present which is concerned solely with the issue of whether the Club is carrying on a trade in so far as it grants bathing facilities to guests of hotel members for reward: see generally to speech of Lord Radcliffe in Sharkey v. Wernher, (1969) A.C.58, and the judgment of Lord Normand in English and Scottish Joint Co-operative Wholesale Society Limited v. Commissioner of Agricultural Income Tax, Assam, (1948) A.C. 405.

Alternatively, and on the assumption that the mutuality principle as developed in New York Life Assurance Company v. Styles, (1889) 14 A.C. 381, and subsequent cases can prima facie apply to the present circumstances, it should be applied to the present arrangement only if the facts of the arrangement comply closely and in substance with the conditions governing that principle. It is submitted that the present arrangement fails to comply with each of the three essential conditions, summarised by Lord Normand in the English and Scottish Joint Co-operative Wholesale Society case at page 419, which must be satisfied for exemption from tax by virtue of the mutuality principle to be obtained.

- (a) The first such condition requires there to be common identity between the contributors to the "fund" and the recipients from the "fund". This condition is here fulfilled in form only and not in substance. While it is accepted that hotel members and ordinary members stand to participate equally in the common "fund", the contributions of each of the hotel members are so much greater than the £1. 10s. contributions of the numerous ordinary members, that the common identify of contributors and recipients is no more than a formality.

Record

(b) The second such condition requires the company (in the present case - the Club) to be no more than a mere entity for the convenience of the members and the policy holders (in the present case - the users of the bathing facilities). Under the present arrangement the Club is admittedly an entity for the convenience of the ordinary members as users of the facilities; the hotel members, however, though members join not for their own convenience but for the convenience of third parties, that is their guests. 10

(c) The third such condition requires that it should be impossible for contributors to derive profits from contributions made by themselves to a fund and that the fund could only be expended or returned to themselves. In the present case all members, whether ordinary or hotel, stood to participate equally in such part of the fund as should be returned; as the contributions made by each of the hotel members were so much greater than those made by each of the ordinary members, the arrangement would result in the ordinary members, on a return of the fund, making a profit out of their membership. 20

It is respectfully submitted that the learned Judge (Edun J.) erred in Law in regarding the mutuality principle as applicable to the present case. He was also wrong in concluding that the additional payments made by the hotel members under the audited house count arrangement were membership subscriptions and that as such the Club could not be said to have been trading with non-members. 30

It is further submitted that Moody J.A. was wrong in law in concluding that there was no making of profit from persons who were non-members. 40

(iv) As regards the substantive issue in the present Case, it is further submitted that Section 10(1) of the Income Tax Law 59 of 1954 applied to the circumstance of the Case: that

the amendment of the Rules of the Club at the Special General Meeting on 14th October 1963 constituted a transaction which purported to reduce the amount of tax payable by the Club: that such transaction was artificial or fictitious; that, therefore, the Respondent is entitled to disregard the form of the arrangement brought about by the amendment of the Rules and assess the Club to tax accordingly.

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It is respectfully submitted that the learned Judge (Edun J.) erred in law in deciding that the amendment to the Rules did not constitute a transaction for the purposes of Section 10(1), and that he further erred in law in deciding that, even if such amendment did constitute a "transaction", that "transaction" was neither artificial nor fictitious.

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9. The Respondent humbly submits that this Appeal should not be entertained or alternatively that the majority decision of the Court of Appeal should be upheld and that this Appeal should be dismissed with costs for the following among other

R E A S O N S

(1) BECAUSE the Appellant is not entitled to leave as of right to appeal to Her Majesty in Council.

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(2) BECAUSE the payments received by the Club from hotel members under the audited house count arrangement are trading receipts of the Club and, as such, must be brought into the computation of profits chargeable to income tax.

(3) BECAUSE the principle of mutuality has no application to the arrangement in issue in the present Appeal.

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Record

- (4) BECAUSE Section 10(1) of the Income Tax Law 59 of 1954 applies to entitle the Respondent to disregard the transaction consisting of the change of the Rules of the Club and to assess the Club to tax accordingly.
- (5) BECAUSE the decision of the majority of the Court of Appeal (Luckhoo and Shelley JJ.A.) was right.

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MICHAEL NOLAN

S.J.L. OLIVER

31 OF 1970

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N:

WALTER FLETCHER

on his own behalf and on the
behalf of TRUSTEES AND
COMMITTEE OF DOCTOR'S CAVE
BATHING CLUB Appellant

and

THE COMMISSIONER OF
INCOME TAX Respondent

CASE FOR THE RESPONDENT

CHARLES RUSSELL & CO.
Hale Court,
21 Old Buildings,
Lincoln's Inn,
London W.C.2.