-1284

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 12/82

BEFORE: The Hon. Mr. Justice Rowe - P.
The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Ross, J.A.

BETWEEN	THE COMMISSIONER OF INCOME TAX	APPELLANT
AND	THE BANK OF NOVA SCOTIA TRUST COMPANY JA. LIMITED	RESPONDENT

H. Hamilton and Miss C. Batts for the Appellant

Mrs. A. Hudson-Phillips for the Respondent trust company as agent for Susan Greene

November 20, 21, 22, 23, December 6, 7, 1984
& October 2, 1985

ROSS J.A.

Assessments were made by the appellant in respect of the income of Mrs. Susan Greene for the years of assessment 1977 and 1978. Mrs. Greene is the non-resident beneficiary under trusts established here by her grandfather, H.V. Lindo, her grandmother, J. Lindo, and her mother, T. McGregor. The National Commercial Bank was appointed trustee of the trust established by her grandfather, the Royal Bank of Canada trustee of the trust established by her grandmother and mother, and the respondent Bank of Nova Scotia Trust Company Jamaica Limited is the agent in Jamaica for Mrs. Greene. During the relevant years of assessment Mrs. Greene was, and still is, the beneficiary of the whole of the income of the trusts known as Estate H.V. Lindo deceased, Estate J.R. Lindo deceased and Estate Thelma McGregor deceased. Further, Mrs. Greene is beneficially entitled as sole

life tenant to the residuary estate of her grandmother, J. Lindo and her mother T. McGregor; she is also entitled absolutely and beneficially to one quarter of the residuary estate of her grandfather H.V. Lindo.

The respondent contended that refunds of $19,270.62 and $17,020.38 for the years of assessment 1977 and 1978 respectively should be made by the appellant and this contention was rejected by the appellant. The basis of this contention is that the trust income is made up of interest and dividends and the respondent claims that that portion of the trust income which consists of interest should attract tax at the rate of 12½% as provided by section 31 (2) of the Income Tax Act instead of 37½%, the rate at which tax was paid by the trustees under section 31 (1).

The respondent appealed from the assessment of the Commissioner to the Revenue Court, seeking a declaration that the respondent is entitled to the refunds set out above. This appeal was allowed and now the Commissioner of Income Tax has appealed to this Court to set aside the judgment of the Revenue Court.

We are indebted to the attorneys on both sides for the detailed and lucid arguments adduced before us, as well as for their industry and research to produce the authorities cited during the course of the hearing.

The grounds of appeal are:

(1) That the learned trial judge erred and/or misdirected himself in law in holding that the decisions in the English cases (Williams v. Singer and Archer Shee v. Baker) were still good law and established principles which were applicable to the construction of section 6 (6) of the Income Tax Act.

(2) That the learned trial judge erred and/or misdirected himself in law in holding that the nature of the beneficiary's entitlement under the trust was determined not by section 6 (6) (b) but on principles established in the aforementioned English cases.

(3) That the learned trial judge erred and/or misdirected himself in law in construing sections 6 and 42 of the Income Tax Act to the effect that these sections dealt merely with the quantum and not the nature of the beneficiaries entitlement.

(4) That the learned trial judge erred and/or misdirected himself in law in holding that trust income could only be taxed if shown as a separate source under section 5 of the Income Tax Act.

In opening Mr. Hamilton submitted that the real issue to be decided is whether the appellant was correct in determining that the tax liability of Mrs. Susan Greene should be computed in accordance with the statutory provisions of the Income Tax Act or with the principles enunciated in the English cases Williams v. Singer and Archer Shee v. Baker. Mr. Hamilton then pointed out that what had given rise to the issue in this case is that section 31 (1) and (2) of the Income Tax Act provides a special rate for non-residents, but that since income in the form of interest is taxed only at 12½% and other income at 37½%, the non-resident is naturally anxious to get all the money that could be considered interest so considered. Mrs. Greene not only received income in the form of interest from her own investments here (on which she paid tax at the rate of 12½%) but also income from the trusts, consisting partly of interest and partly of dividends, and so the question is whether the interest she received directly is to be considered differently from interest received through the trusts. He went on to say that when a

beneficiary receives income from a trust he/she does not receive interest or rent or dividend, it is trust income that is received and one should not enquire whether it is profit, rent, interest or dividends.

On behalf of the respondent Mrs. Hudson-Phillips stated that her submissions would be similar to those made in the Court below under the following heads (as set out in her grounds of appeal before the Revenue Court.)

"1. That the effect of sections 5, 6 (6) and 42 of the Income Tax Act is that trust or estate income is only liable to bear income tax once and that the burden of such taxation falls on the beneficiary of the income. Consequently, where the rate of taxation borne by the aforementioned residuary estate during the relevant years of assessment exceeds the rate of taxation at which Mrs. Greene is liable, she is entitled to a refund of the tax over-paid in respect of those years of assessment.

2. That when a residuary estate has been ascertained, its income ceases to be the income of the executors and becomes, in law, the income of the beneficiaries. The aforementioned residuary estate having been ascertained, Mrs. Greene is, as the sole beneficiary, liable to be taxed on the income received by her from these estates during the relevant years of assessment at her personal rates of taxation.

3. That where, as in the circumstances of the present case, the residuary estates have been ascertained and there is only one beneficiary entitled to the income therefrom, the trustees merely act as a conduit pipe for the income of the beneficiary. Consequently, any income which passes through the estates to the beneficiary retains the character, whether as interest or dividend, in which it was paid to the trustees, and is liable to suffer taxation at the rates for which Mrs. Greene is liable.

> 4. That Mrs. Greene being a non-resident individual, is liable to be taxed on her interest and other income arising in Jamaica during the relevant years of assessment, at the rates prescribed by section 31 of the Income Tax Act. Consequently, interest income received by her during the relevant years of assessment, whether directly or through any of the aforementioned residuary estates is only liable to suffer income tax at the rate of $12\frac{1}{2}$%."

In her opening submissions counsel for the respondent observed that this was not a case of a taxpayer disputing liability as the taxpayer admits that she is liable to pay Jamaican Income Tax, but that since she is a non-resident and the Act provides special benefits for non-residents, she is claiming those benefits. Counsel went on to say that the judgment which is the subject of this appeal does not create and is not intended to create a precedent for the taxation of trust income where there are several beneficiaries entitled to the trust fund, as this case turns on its own facts and the learned judge came to his decision on the particular facts of this case; the decision in this case was only possible because of the confluence of a set of facts, chief of which was that in the relevant years 1977 and 1978 the tax payer was entitled to the whole of each trust fund.

Included in the record are trust certificates issued by the banks which state that Mrs. Greene is entitled to the whole of the income of each of the three trusts for the relevant years 1977 and 1978. In respect of each year this income consisted of interest and dividends. The interest came from three sources: (1) deposit interest paid by Bank of Nova Scotia Trust Co., (2) interest paid by Royal Bank of Canada Trust Co., in regard to Mrs. Greene's mother's and grandmother's trust, (3) interest from National Commercial Bank in regard to her grandfather's trust. The dividends were received directly from Carreras Ltd and United Estates Limited, as well as from the Royal Bank of Canada Trust Co., and the National Commercial Bank.

There were fees charged by the banks and the trust companies, and these fees were apportioned between the income derived from interest and that from dividends. The accounts prepared by the banks showed clearly the income derived from interest and that from dividends. This is important as counsel for the appellant was saying that when one gets income from a trust it is the balance after payment of expense with which we are concerned, whereas the respondent's counsel points out that the income from interest and that from dividend has each been ascertained and is shown in the accounts.

It was contended on behalf of the appellant that the provisions of the United Kingdom Income Tax on which Williams v. Singer 7 T.C. 387 and Archer Shee v. Baker 11 T.C. 749 were decided are materially different in language and concept from the Jamaican Income Tax provisions: that the Jamaican Act in concept is aggregative, that is, that in Jamaica what is charged is the aggregate of income from all sources remaining after all exemptions and deductions have been made, while in the United Kingdom there is a schedular system or concept and different computations are made under the different schedules. To this the respondent's attorney replied that there is no basic difference between the manner in which the law in Jamaica and in the United Kingdom deals with income tax as in both jurisdictions the primary liability is on the beneficiary and not on the truste[illegible] on the trust; in both cases machinery exists to make the trustee liable to pay.

In Section 2 of our Income Tax Act "chargeable income" is defined as "the aggregate amount of income of any person from all sources remaining after allowing the appropriate deductions and exemptions under this Act."

The charging section of our Income Tax Act is section 5 which provides:

> "(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) the annual profits or gains accruing to any person .....
>
> (b) profits or gains accruing in or derived from the Island or elsewhere ....
>
> in respect of:
>
> (i) dividends ....
>
> (ii) rents, royalties ....
>
> (iii) any employment or vocation
>
> (c) All emoluments ...."

As we understand this section it imposes liability on persons in respect of income received from all sources.

In her submission Mrs. Hudson-Phillips referred to Whiteman and Wheatcroft on Income Tax and Surtax in the United Kingdom in which in the introduction at page 10 paragraph 1 - 18 it states:

> "Income tax is a tax on income from various sources, estimated according to sets of rules which vary according to the source of the income."

Mrs. Hudson-Phillips pointed out that in both jurisdictions income tax is a tax on income; that "chargeable income" means the aggregate amount of income of any person, and that is why income tax is payable only by persons, whether as individuals or certain kinds of companies or other bodies corporate which in law have the status of persons. Further, a company or body corporate is distinguishable from a trust as the company pays a tax on its profits and its shareholders on their dividends, but this is not applicable to a trust as no charge can be made on the

trust under section 5 since the trust is not a person. The imposition of liability is on the beneficiary under the trust even though provision is made to collect tax from the trustee.

Mrs. Hudson-Phillips went on to say that although the Act uses the machinery of assessing the trustee for the tax payable, what has to be paid is what the beneficiary is liable to pay, and the applicable rate is the beneficiary's personal rate - as provided in section 54. The position of executors in relation to beneficiaries pending the conclusion of the administration of the estate is to be distinguished from that of trustees in relation to beneficiaries under a trust, as in the former case the income of the estate is the income of the executors while in the latter it is the income of the beneficiaries.

In Corbett v. Commissioners of Inland Revenue (1937) 21 T.C. 449; [1938] 1 K.B. 567 Sir Wilfred Greene M.R., in his judgment at p. 460 said:

> "I myself attach great importance to the distinction drawn between the position and estate of executors and the position and estate of trustees, for this reason, that where trustees are in receipt of income which it is their duty to pay over to beneficiaries, either with or without deduction of something for trustees' expenses on the way, that income is at its very inception the beneficiaries income. It is perfectly true that for assessment purposes the trustees may fall to be assessed, but the income is the beneficiaries' income from the very first and the expenses so paid out of it are paid out of it, so to speak, on the way. But in the case of executors, it is not true to say .... that the income when received by executors pending the conclusion of the administration is the income of the beneficiaries in that sense."

Again at p. 464, ibidem, Sir Wilfred Greene said:

> "Mr. Stamp submitted that what the tenant for life here received was in exactly the same position as a sum of income paid to a beneficiary under a trust out of a fund which had borne tax before it reached the hands of the trustees. I am unable to accept that argument. It seems to me that in such a case the income, when it came into the hands of the trustees, was the income of the beneficiary, and the tax which it bore was the beneficiary's tax. True that the trustees' hand was the hand to receive it. True that the trustees, after receiving it, might have to pay expenses out of it, with the result that the tenant for life only received a not sum. Nevertheless, the right and interest of the beneficiary in the dividends so received by the trustees under a trust of that kind appear to me to differ in every fundamental respect from the right and interest of a residuary legatee in dividends received by executors during the period of administration."

This is strong support for the position of the respondent that the trustee merely acts as a conduit pipe for the income of the beneficiary. A trust is not a person, nor is it income, and so it would not be caught by section 5 of the Act. But this does not mean that income from trust property would escape the tax net as the beneficiary or beneficiaries who receive the income would be liable for the tax thereon. As collection at source is always preferred, when the "machinery" provisions were being set out the trustees were made liable for the payment of the tax on the trust income. Section 6 of the Act is described as a "machinery" section, being a section providing the machinery for the collection of income tax.

Section 6 (6) provides:

> "(a) The profits and gains arising or accruing to a trustee from a trust estate or to a personal representative from the estate of a deceased person shall be laible to the payment of income tax on the statutory income at the rate of 37.5 cents in the dollar, and the trustee or the personal representative, as the case may be, may deduct any payments made under this subsection out of the trust estate or out of the assets and effects of the person deceased.

Provided that the Commissioner may authorise any trustee or personal representative to pay or to sanction payment to or on behalf of a beneficiary without deducting the tax where he is satisfied that such beneficiary is not liable to make a return in accordance with the provisions of this Act.

(b) The income of a beneficiary in the estate or trust for the purposes of this Act shall be the share of the statutory income of the estate or trust to which he is entitled."

Section 31 of the Act provides:

"(1) Subject to the provisions of this Act, in lieu of tax at the rates specified in section 30, there shall be levied and paid in each year of assessment upon such part of the income of a non-resident individual as is chargeable with income tax under this Act, other than income to which sub-section (2) is directed to apply, tax at the following rates:

for every dollar of the first $1,700 ... 12.5 cents

for every dollar of the remainder ... 37.5 cents

(2) Subject to the provisions of this Act, where the Commissioner so directs, in lieu of tax at the rates specified in sections 30, 32 and 33, there shall be levied and paid in each year of assessment, upon such part of the income of a non-resident person (whether or not an individual) as is chargeable with income tax under this Act and consists of interest of money or film royalties, tax at the rate of 12.5 cents in the dollar:

Provided that ...."

Counsel for the appellant submitted that section 6 (6) (a) above makes it mandatory for the trustee to find the statutory income of the trust and withhold tax at 37½%, and that that statutory income is the aggregate income from all sources after deductions, so that it is a balanced sum, and neither "interest" nor "dividend;" that section 6 (6) (b) provides the machinery to identify the entitlement of each

beneficiary under the trust, and so it is not therefore open to a beneficiary to go behind the balanced sum to enquire how much of it is made up of interest and how much of dividends, rents, etc.

For the respondent it was submitted that section 6 (6) (a) merely provides for the collection at source of a certain amount of tax on account of the final amount which the beneficiary will be liable to pay, and the proviso makes it clear that where the beneficiary does not owe any tax at all there is no need to collect any tax at the source; further, that the mere fact that one has to do a computation or deduct expenses to arrive at the chargeable income does not mean that the income loses its character as interest or dividend, since a computation is always involved in arriving at the chargeable or statutory income.

In his oral judgment the learned judge said, inter alia:

> "The respondent/Commissioner contends that only that portion of the interest income which accrued to Susan Greene in her own right is eligible to be taxed at the special rate provided for in section 31 supra
>
> On behalf of the appellant (B.N.S. Trust Co.) it was submitted that all of her interest income, and not merely that portion which accrued to her in her own right, should be taxed at the special rate set out in the section. Reliance for this proposition was placed on two well-known and leading decisions of the House of Lords, namely, Williams v. Singer [1920] 7 T.C. 387 [1921] A.C. 41 and Archer Shee v. Baker [1927] 11 T.C. 749; [1927] A.C. 844.
>
> Having read these case I am satisfied that, unless there is some material difference in the language of the Jamaican statute, then these decisions would clearly establish that Mrs. Susan Greene is entitled to have all her interest income aggregated and taxed at the special rate of 12½ per cent. See section 31 (2) which provided in effect that all income of a non-resident which consists of "interest" is to be taxed at 12½%.

> "Without going into the cases in detail, it is clear from judicial comment therein that in any enquiry of this nature the Court must have regard to the substance of the matter and must therefore look through the trust to see what is the real nature of the income which accrues to the beneficiary thereunder, If therefore, in doing so one discovers that the trust income consists wholly or in part of interest then that portion which consists of interest is to be taxed as interest and so qualify for the special rate."

We find no merit in the argument that the "balanced" sum referred to above by the appellant's counsel is quite different from its conponents (in this case, interest and dividends, each of which can be identified and ascertained). No sufficient reason has been adduced to persuade us that the interest and dividends making up the balanced sum should lose their character. As stated earlier Mrs. Greene had received interest on her own investments and that interest had been taxed at the rate of 12½%; as she is a non-resident that income must have been collected by her agent who after deducting his commission, income tax and any other expenses would have sent her the balance. There may well have been income from other sources attracting a different rate of tax, but, whether that is so or not, it does not affect the source of the income as being interest. As Mrs Greene is the sole beneficiary under the trusts it seems to us that this balance or "balanced sum" is in no way different from the "balanced sum" left from the trust income after deduction of the trustees' commissions and expenses. It is therefore our view that the interest and dividends comprising the "balanced sum" do not lose their character in the instant case, and the taxpayer is entitled to pay tax on the interest at the rate of 12½%.

We find support for this view in Corbett's case referred to above and in the case of Archer Shee v. Baker [1927] 11 T.C. 749; [1927] A.C. 844 in the speech of Lord Atkinson at p. 775 where he says:

> "The trustees undoubtedly do not remit to the beneficiaries the income of the fund in specie, if that means, as I suppose it must mean, forwarding to them the dividend warrants, cheques, and such like things received by them in payment of what are debts due to the fund. It would be unbusinesslike and ridiculous to do so.
> What the trustees properly and rightly do is to cash those dividend warrants and cheques, etc, and pay into the bank of the beneficiaries the money they thus receive. If the trustees paid into the bank of the beneficiaries all the income of the fund which they received, retaining nothing, I assume, on the reasoning in these paragraphs, there would be no loss of origin, no loss of "parantage," of any portion of the sums paid in. If that be so, I am utterly unable to understand how the retention by the trustees in their own hands of a portion of the income which they receive in order to pay lawful claims upon the fund and charges which probably the lady herself would have had to pay or get paid for her, if she were resident in New York and which the trustees will have to account for fully, can change the 'origin or parentage of the residue of the income received, lodged with the bankers of the beneficiaries'. This residue has no doubt lost the shape of dividends, share warrants or the like, but so would the entire income of the fund if it had been lodged in the same way with the respondent's bankers."

Then at p. 776 Lord Atkinson said:

> "The trustees do not, I think, properly speaking, consider what is to be the income the beneficiary is entitled to receive. They lodge the whole income, less what they consider it is necessary to retain to discharge lawful claims upon the fund. I am unable to follow the reasoning that leads to the conclusion that, by the deductions of these sums, the character of the balance lodged changes, and acquires a character different from what the entire income would have borne if it had been lodged."

Lord Wrenbury at p. 779 of his judgment explained further:

> "The trustees of course have a first charge upon the trust funds for their costs, charges and expenses and American income tax will be a tax which they would have to bear and which would fall upon the beneficiary. But this does not reduce the right of property of the beneficiary to a right only to a balance sum after deducting these. If an owner of shares deposits them with his banker by way of security for a loan he is not reduced to being the owner of a balance sum being the difference between the dividends on the shares and the interest on the loan. He is the owner of the equity of redemption of the whole fund. If a landowner employs an agent to collect his rents and authorises him to deduct a commission he does not cease to be the owner of the rents. ....
> Her right is not to a balance sum, but to the dividends subject to deductions as above mentioned. Her right under the Will is 'property' from which income is derived. ....
> The Commission payable to the trust company is a debt due from the beneficiary to the trustee - neither the one nor the other is relevant to the title of the beneficiary as distinguished from the amount which the beneficiary is entitled to receive by virtue of her title."

In the instant case Mrs. Greene is the sole beneficiary under the trusts referred to earlier and entitled to receive the interest and dividends earned by the trust property. Such interest and dividends are received by the trustees and her agent, the Bank of Nova Scotia Trust Company Ja. Ltd on her behalf. They deduct their commission and the income tax payable and then pay over the remainder to the sole beneficiary, who does not cease to be the owner of the interest and dividends received by the trustees or her agent. We would therefore agree with the learned judge of the Revenue Court that the income from the trust fund which consists of interest does not in consequence of the deductions made from it lose its character as interest and that it attracts the same rate of income tax as the interest the beneficiary receives from her investments, viz., 12½%.

The question remains whether it is the trustee or the beneficiary who is primarily liable for the payment of income tax on the income from a trust fund. The Act provides for the deduction of the tax payable by the trustee before payment is made to the beneficiary, but this is merely a "machinery" provision whereby the tax is collected at the source. Although the legal estate in the trust property is vested in the trustees, it must be remembered that the beneficial ownership is in the beneficiaries, and so the trustees act as a "conduit pipe" (to use the respondent's words) to convey the trust income to the beneficiary or beneficiaries.

In the earlier case of Williams v. Singer (1920) 7 T.C. 387 (1921) A.C. 41 the respondents who were resident in the United Kingdom were trustees under a British trust for a cestui que trust who was resident and domiciled out of the United Kingdom. As trustees they held shares in a foreign company, in the books of which they were registered as the owners of the shares. The dividends on the shares were under mandate of the trustees paid direct to the account of the cestui que trust abroad and no part of the dividends was received in the United Kingdom. It was held "that the respondents were not assessable to income tax in respect of the dividends arising abroad."

The facts of this case are that the respondents were the trustees of a settlement under which the Princesse dePolignac was the beneficial tenant for life in possession. The settlement was in English form and the trustees were all domiciled and resident in the United Kingdom, but the Princesse (a widow) was a French subject by marriage, and resident and domiciled abroad. The settled fund consisted of certain foreign investments of considerable value, and under orders signed by the trustees the whole income from these investments was paid to the account of the Princesse at a bank in New York, no part thereof being

remitted to the United Kingdom. In these circumstances for the year ended 5th April, 1916, the trustees were assessed ≠ 60,000.00 in respect of foreign possessions and ≠5,000. in respect of foreign securities - these sums representing approximately the income from the foreign investments comprised in the settlement referred to above. The trustees objected to the assessments and appealed to the Special Commissioners who after argument discharged them; and on a case being stated for the opinion of the King's Bench Division Sankey J, confirmed the decision of the Special Commissioners. An appeal by the Surveyor of Taxes to the Court of Appeal was dismissed, so too was a further appeal to the House of Lords.

In the course of his judgment Viscount Cave at p. 411 said, inter alia:

> "The fact is that, if the Income Tax Acts are examined, it will be found that the person charged with tax is neither the trustee nor the beneficiary as such, but the person in actual receipt and control of the income which it is sought to reach. The object of the Acts is attained (speaking generally) by the simple and effective expedient of taxing the profits where they are found. If the beneficiary receives them, he is liable to be assessed upon them. If the trustee receives and controls them, he is primarily so liable. If they are under the control of a guardian or committee for a person not sui juris or of an agent or receiver for persons resident abroad, they are taxed in his hands. But in cases where a trustee or agent is made chargeable with the tax, the statutes recognize the fact that he is a trustee or agent for others, and he is taxed on behalf of and as representing his beneficiaries or principals."

Viscount Cave went on to say at p. 412:

> "In short, the intention of the Acts appears to be that, where a beneficiary is in possession and control of the trust income and is sui juris, he is the person to be taxed, and that, while a trustee may in certain cases be charged with the tax, he is in all such cases to be treated as charged on behalf or in respect of his beneficiaries, who will accordingly be entitled to any exemption or abatement which the Acts allow."

Lord Wrenbury in his judgment at p. 414, after dealing with the arguments and the relevant sections of the Income Tax Acts said:

> "These sections point to the conclusion that the person to be taxed is the beneficiary, not the trustee, and none-theless because under certain circumstances the beneficiary is to be reached through the trustee. If the trustee is a foreign subject resident abroad but the beneficiary is in the United Kingdom taxation will not be escaped and, if the trustee is a British resident in the United Kingdom but the beneficiary is a foreign subject resident abroad, taxation is not imposed by reason of those facts."

For the reasons set out above we are of the view that the judgment of the Revenue Court should be affirmed, and we would so order.

Costs taxed or agreed, are to be the respondent's.

CARBERRY J.A.

I agree with the judgment of Ross J.A. that this appeal from the judgment of Marsh J. sitting in the Revenue Court should be dismissed and his judgment affirmed with the usual consequential orders as to costs . Out of deference to the arguments put forward on behalf of the appellant (The Commissioner of Income Tax) and by the respondent on behalf of the tax payer Mrs. Susan Greene, I add a few words of my own.

Mrs. Greene is the non-resident beneficiary under three trusts established by her grandfather, grandmother and her mother, under which she now is entitled to the entirety of the beneficial income therefrom. She also has income accruing to her in her own right, that is directly and not from or through the three trusts. I bear in mind the observations made by Lord Guest as to the basic nature of the Income Tax law in Jamaica, as contrasted with that in the United Kingdom: See Income Tax Commissioner v. Hanover Agencies (1966) 9 J.L.R. 573. In the United Kingdom, to quote Whiteman and Wheatcroft on Income Tax and Sur Tax, page 10, para 1-18 "Income tax is a tax on "income" from various sources, estimated according to sets of rules which vary according to the source of the income; having defined each source, what flows from that source is then treated as "income." "The result is that in effect, depending upon how particular income is classified, the rates of income tax collected from the tax payer on that income may be materially affected, and he may pay more tax, or less tax, depending upon how that income is classified. These differences depend upon social policies set out or reflected in the Income Tax Act and its schedules; thus income flowing from investments may be taxed at a higher rate than income earned by the tax payer's personal efforts.

In Jamaica (until recently) we did not have these complications: income from all sources was lumped together and all was taxed at the same rate regardless of its source. However that simplicity appears to me to have been lost as the result of the enactment of section 31 of the present Income Tax Act. The marginal note of the Act describes it as "Rates of income tax payable by non-residents" and it appears to have been introduced by various amendments to the original Income Tax Act made in 1958, 1964, 1965 and 1969. It is not necessary to set out the section in full, it is I think sufficient to point out that the intention of the section seems to have been to encourage non-residents to invest in certain fields in Jamaica, for example in the film industry or the building of houses, and that in so far as this case is concerned section 31 (2) provided that non-residents should pay a lower rate, viz 12.5 cents in the dollar on "interest." Mrs. Greene has in her own name investments bearing interest, and pays at that lower rate on them. The trusts, under which she gets the entirety of the income, also have investments in which she gets "interest," and it is possible and in fact the accounts of the trust distinguish and clearly set out what portions of the trust income that goes to her represent "interest" as opposed to dividends from stocks and shares etc.

Mr. Hamilton for the Commissioner of Income Tax in his argument put the matter thus: "The real problem is whether the "interest" that comes to the beneficiary through the hands of the Trustees differs from "interest" paid to her directly. The Commissioner of Income Tax is saying that the beneficiary got "income" from a trust, and that there is no reason or warrant to examine further and see whether part of that income is "interest," i.e. a return on money lent. "Trust Income" is a species sui generis, and one should not enquire whether it comes from rents, profits dividends or interest."

In short the argument is that once the trustee, (who is not a non-resident) collects this money it loses its original character and becomes merely "income" taxable at the higher rate, and though it goes in its entirety to the beneficiary, who is a non-resident and as such eligible to the benefit of the lower rate of tax on it, passing through the hands of the trustee it loses this characteristic and the non-resident beneficiary loses the right to claim that it is taxable only at the lower rate.

It appears to me that the problem involved is one of characterizing the nature of the beneficiary's right, and then seeing into what classification the income falls. In short, whether wittingly or not, these amendments have introduced into the pristine simplicity of the Jamaican Income Tax Act a problem similar in character to that experienced in the United Kingdom Acts, and dealt with in two House of Lords cases Archer Shee v, Baker (1927) 11 T.C. 749; (1927) A.C. 844 and Garland v. Archer Shee (1930) 15 T.C. 693.

The problem there was whether one was entitled to look at the character of the beneficiary's income, and say that this income came from securities, stocks and shares, and therefore fell under a particular classification, which attracted a higher rate of tax, or whether it lost this character by passing through the hands of the Trustees and became just income from other property and so taxable at a lower rate. In this case (both concerned the same tax payer) the Revenue authorities argued vigorously that the true character of the beneficiary's income had not been lost by passing through the hands of the Trustees and that tax at the higher rate was chargeable. (In our own case the Revenue authorities argue the converse, but in both they consistently seek to recover tax at the higher rate.) The tax payer in the Archer Shee case argued that having

been mixed with income from other sources the income from Securities, stocks and shares had lost its identity, and become merely income from other property, Rowlatt J, in the first case, found for the Revenue, but was reversed (unanimously) by the Court of Appeal, however the House of Lords, by three to two reversed the Court of Appeal, and observing that the Estate out of which the Trust arose had been wound up and that the tax payer was now the sole beneficiary, held that the income of the trust that now went to her retained its characteristics, and tax was due at the higher rate. The decision was however made on the basis that the proper law of the Trust (it was a trust set up under the law of New York) was the same as English Trust Law. In the second case (which arose out of a different year of assessment) evidence was offered that the New York Law of Trusts differed from the comparable law in England, and that under the law of New York the beneficiary did not have the right to any specific interest or dividends. Acting on this basis of what was the proper law of the trust and the beneficiary's right as to its income, the House of Lords decided in the second case that the trust income had lost its character and could not be said to be income (as to an ascertained part) deriving from securities, stocks and shares.

What these two cases appear to show is that the problem of characterizing the income of the beneficiary under a Trust is to be decided upon a consideration of what is the proper law of the Trust, and further, if the proper law of the trust is English Law, then in such a situation the beneficiary is in such a case "entitled in equity specifically during her life to the dividends upon the stocks," and "under English Law she was the sole beneficial owner of the interest and dividends of all stocks and shares." See Lord Buckmaster in the second case

(Garland v. Archer Shee) (1930) 15 T.C. 693 at page 733, where he analyses the judgments in the earlier case and points out that the majority judgments were based on and decided what was the English Law of Trusts in such a situation. See too to the same effect Viscount Dunedin at page 734:

> "That view was rejected by the majority on the view that there was in the beneficiary a specific and equitable interest in each and every one of the stocks and shares etc, which formed the trust fund...."

I am of the view that as to Jamaica the proper law of the trusts is the same as it would be under English Law (and the contrary has not been argued) and that accordingly the beneficiary here would have been "entitled in equity specifically during her life" to the interest received by the trustees, and is therefore entitled when considering the income tax due from her to receive the benefit conferred by section 31 (2) and to have that interest charged at the lower rate there provided.

It should be pointed out that in Reid's Trustees v. Commissioners of Inland Revenue (1929) 14 T.C. 512 Lord Shand at page 529 observed of the dicta in the first Archer Shee case:

> "The dicta which might be founded upon .... as indicating that a trust may be regarded as a mere agency or conduit pipe, are strictly limited to the case where the circumstances are similar, viz., where there is one beneficiary and the estate is already realized and duly invested."

Mrs. Hudson-Phillips, relying on the two Archer Shee case, pointed out that logically, if the estate has been duly wound up and only the trust remains, it should make no difference whether there is one or more beneficiaries all entitled to the income, but she was content to accept the limitation suggested in the case of Reid's Trustees, a decision of the Court of Session in Scotland.

As against the logic of the two Archer Shee cases, Mr. Hamilton pointed out that they were decided upon the United Kingdom Income Tax Acts, and that these differed from that in Jamaica. This is true, but the basic problem in both the Archer Shee cases and the one before us was the same, did the trust income deriving from various specific heads lose its identity or character passing through the hands of the trustee, and the answer was that this depends upon analysing the nature of the beneficiary's interest in that income. For the reasons given by Ross J.A. I have been unable to find in any of the sections of the Jamaican Income Tax to which we have been referred anything that would alter or affect that view, and it is clear that the answer depends upon the analysis to be given in equity to the nature of the beneficiary's interest where the original estates have been wound up and administered and only the trusts remain, and that in this situation Marsh, J. correctly relied upon and applied the two Archer Shee cases.

Reference should also be made to the Judgment of Lord Greene M.R. in Corbett v. Commissioners of Inland Revenue (1937) 21 T.C. 449 (1938) 1 K.B. 567 where he discusses the difference between the position and estate of executors as contrasted with that of trustees, and the rights of the beneficiaries in the latter case, see the passages at pages 460 and 464 set out in the judgment of Ross J.A. above, and which I do not repeat. He points out that in the case of Trustees: the income is the beneficiaries' income from the very first, and that the tax which it should bear was the beneficiaries' tax.

ROWE, P.

I agree.