Judgment Book.

INCOME TAX APPEAL

Appeal No. 1 of 1976

BETWEEN

Adeeb Mahfood - Appellant

AND

The Commissioner of Income Tax - Respondent

For the Appellant : Mrs. A.C. Hudson-Phillips and Dr. Adolf Edwards.

For the Respondent : Mr. M. Hamilton instructed by Crown Solicitor.

The Appellant is appealing against three Decisions of the Respondent which were made on the 8th December, 1975 in respect of his chargeable income for the Years of Assessment 1970 to 1972, inclusive.

The facts are not in dispute and are as follows:

(1) The Appellant was at all material times an employee and Director of Messrs. H. Mahfood & Sons Limited, a limited liability company incorporated and registered in Jamaica with its registered office at Harbour Street in the parish of Kingston. (Hereinafter referred to as the company.)

(2) The Appellant's contract of employment with the company stipulated that as part of his remuneration as an employee he would be provided by the company with free housing accommodation. That accommodation consisted of a house standing in its own grounds and

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described as - "a fully serviced and maintained residence including the services of domestic help" for the residence.

(3) In accordance with that contract the employer/company procured premises and provided the necessary domestic staff for its maintenance and upkeep, and the Appellant, in due course, took up residence therein and resided there throughout the period relevant to this Appeal.

(4) All the expenditure incurred by the company in the provision of this amenity for the Appellant was accepted by the Respondent as expenditure wholly and exclusively incurred by it in acquiring its income during the years of assessment in question.

(5) In his return of income for each of those years, the Appellant included as part of his emoluments from his employment by the company, an amount said to represent the taxable value of the free accommodation provided by it as his employer. The actual amount was a sum equal to ten percent of his total salary and bonus for each year respectively. The figures were:

(i) for Year of Assessment 1970 - $481
(ii) for Year of Assessment 1971 - $538, and
(iii) for Year of Assessment 1972 - $635.

These figures were, according to the Appellant, arrived at in compliance with the Third Proviso to Section 5(1)(c) of the Income Tax Act which states, in effect, that the annual value of any

quarters/.....

quarters or residence granted in respect of employment - "shall be deemed not to exceed ten percentum of the total emoluments (other than the value of the quarters or residence) paid or payable for the year of assessment".

(6) The Respondent, however, upon an examination of the Appellant's Return, took the view that the provision of domestic staff for maintenance and upkeep of the residence was a <u>separate benefit</u> from the provision of the residence itself, and, therefore, ought not to be included in the estimated annual value of the residence, but separately returned as an <u>additional</u> perquisite accruing from the employment; and raised assessments upon the Appellant in accordance with that view.

(7) The Appellant objected to the assessments, arguing that the cost of maintenance and upkeep of the premises could not be separately taxed as a perquisite because that cost had been already included in the estimated annual value of the premises as set out in his Return. He further argued that to so treat the matter would be tantamount to taxing the same income twice. The Respondent refused to accept that view and, in due course, issued Decision Notices confirming the assessments.

The Appellant now appeals.

As will be seen from the foregoing, the point is a short one, namely, is the provision of staff for the maintenance and upkeep of the residence occupied by the Appellant in the

circumstances outlined above, to be separately assessed as an "other allowance granted in respect of employment"; or, is it to be included in the estimated annual value of the residence occupied by the Appellant in respect of his employment. It is to be noted that the Appellant does not dispute that the provision of free quarters is a taxable perquisite in his hands, he is merely disputing the method adopted by the Respondent in computing the quantum thereof.

In my judgment, the answer to the question arising on the foregoing is to be found in the Income Tax (Valuation of Housing Accommodation) Regulations 1964, published on 4th December, 1964 in the Jamaica Gazette Supplement No. 152 - Notice No. 378. Those Regulations were published pursuant to a power conferred upon the Minister by, what was then, Section 73(1)(f) of the Act, which provided as follows:

> "(1) The Minister may make regulations with respect to the assessment, charge, collection and recovery of Income Tax in respect of emoluments to which paragraph (c) of sub-section (1) of Section 5 of this Law applies, being Income Tax for the year of assessment, and those regulations may, in particular, include provision for -
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> (f) determining the factors which may be taken into account by the Commissioner -
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> (i) in ascertaining whether or not any value should be attributed to any quarters or residence occupied in connection with employment; and
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> (ii) in estimating where necessary, the annual value which should be attributable to quarters or residence occupied as aforesaid."

The Third Proviso to section 5(1)(c), to which reference has already been made (apart from limiting the charge for the perquisite of free quarters to ten percent of the total emoluments) also provides that the estimated annual value of any such quarters or residence is to be determined by the Respondent/Commissioner having regard to such

regulations/.....

regulations (if any) as may be prescribed by the Minister. Clearly therefore, in determining estimated annual value the Respondent must have regard to such regulations, if any, as may be in force at the date of the assessment. In other words, since the Income Tax (Valuation of Housing Accommodation) Regulations 1964 are the regulations which were prescribed by the Minister pursuant to Section 73(1)(f) of the Act and were in force during the relevant period, and since the Third Proviso to Section 5(1)(c) requires the estimated annual value of free accommodation to be determined by the Respondent by reference to those regulations, then, it must necessarily follow that all questions touching upon the valuation of that accommodation for purposes of section 5(1)(c), are to be determined by him by reference to, and in accordance with, those regulations. If no regulations had been prescribed different considerations might have applied, but that need not detain us here since regulations were in fact prescribed in 1964 and covered the period relevant to this appeal. Regulations having been prescribed, the Respondent must in my opinion be guided exclusively thereby, and he is not at large to introduce any subjective notions for determining estimated annual value.

If therefore, I am right in that view it only remains to examine the 1964 Regulations in order to see whether they support the Appellant's or the Respondent's approach to the problem.

In that regard, I think Regulation 3 is the most relevant. That regulation provides inter alia:

> "3 - In estimating the annual value which should be attributed to quarters or residence occupied in connection with employment, the Commissioner may take into account on the one hand -
>
> (a) the rent which might be reasonably be expected to be obtained on a letting from year to year, at arm's length, of the quarters or residence if the landlord undertook to bear the costs of the repairs, insurance, taxes and other expenses necessary for maintaining the quarters or residence in a state to

command the rent;

(b) .....

(c) the provision by the employer of any services in relation to the quarters or residence not directly connected with the maintenance thereof,

and on the other hand -

(d) the extent to which the occupancy is as representative of the employer rather than beneficial to the occupier or is for any other reason on such terms as to be not capable of being converted into money or money's worth;

(e) any rent paid by the occupier in respect of the quarters or residence;

(f) any obligation of the occupier to occupy the quarters or residence for the purpose of performing the duties of his employment and the extent to which such obligation would reasonably be expected to cause inconvenience to the occupier;

(g) the location of the quarters or residence within the compound of any institution or establishment and the extent to which such location would reasonably be expected to cause inconvenience to the occupier."

Regulation 3 supra, moreorless speaks for itself. It sets out a number of factors which the Respondent may take into account in determining value. In so doing it anticipates that no two cases are likely to be exactly the same, and so, the Regulation merely sets out the guidelines under which the various permutations of circumstances likely to arise in practice are to be dealt with. During the hearing there was some discussion whether or not the word "may" in Regulation 3 was to be construed as "must". I do not however think that much turns on this. In my view all it amounts to is that where, in any given case, one of the circumstances mentioned in the Regulation exists, then that circumstance must be taken into account in determining value, because the Third Proviso states that value, shall be determined by reference to the Regulations, but that's as far as it goes.

Basing myself therefore on that basic approach to the

interpretation/.....

interpretation of the 1964 Regulations, I find, as a fact, that two of the circumstances existing in the instant case are included in Regulation 3 at paragraph (a) and paragraph (c). I refer, of course, to the provision in the Appellant's contract of employment for the maintenance of the residence and for the supply of other services in connection therewith. These two factors are among those which the Respondent was required by the 1964 Regulations to take into account in determining estimated annual value in the instant case; and in so doing he would have exhausted (subject to some express statutory direction to the contrary) his power to determine the income of the Appellant from that particular source during the period now under review. If, therefore, the Respondent is claiming a further power to further assess the Appellant in respect of emoluments, then one would expect to find some clear indication of this in the statute. However, the only authority suggested by counsel is the general power, under section 5(1)(c), to include in "emoluments" - any allowance granted in respect of employment other than that of free quarters or residence. It was suggested that this reference to an "other allowance granted in respect of employment" in section 5(1)(c) was sufficient to enable the Respondent to treat the cost of maintenance and other services supplied in the instant case, as an "other allowance granted in respect of employment", and tax it separately. I cannot accept that the sub-section confers any such power on the Respondent and I therefore reject the argument on the point. In my judgment, estimated annual value is to be determined solely by reference to the regulations and such reference, in the instant case, required the Respondent to take into account, in fixing annual value, the two factors now in dispute. Whether or not he did so he is nevertheless deemed to have done so, and he has no further authority to increase the Appellant's income from emoluments by seeking to treat those two factors as separate perquisites accruing from his office of employment with the company.

In summary therefore, the position as I see it is that the

Respondent...

Respondent is bound by the criteria delineated in the 1964 Regulations, and, where the circumstances so warrant, has a statutory duty to take them into account in fixing the estimated value of the perquisite. Once he has done so he has no further power to take them into account in some other context in determining the total emoluments of a taxpayer. He is, in this respect and if you will pardon the expression, functus officio, so far as that particular source of income for that year is concerned. If the Respondent did not in fact take into account any of the criteria aforesaid, he is nevertheless deemed to have done so and cannot therefore seek to include them as some other species of perquisite accruing to the taxpayer. Had there been no limit placed upon the value of free quarters by the Third Proviso to section 5(1)(c), different considerations might have applied in that the total taxable emoluments of the Appellant would have been the same whether the two disputed factors were included in the Appellant's assessment as part of the value of the residence or as a separate perquisite. However, that is not the case and in my view the Respondent is limited by the combined effect of the Third Proviso and the Regulations. His attempt, therefore, to tax the cost of maintenance of the residence etc. as a separate perquisite cannot stand.

The limitation on the estimated value of free quarters imposed by the Third Proviso is a clear statement of policy by the Legislature. It means, simply, that in no circumstance is the value of free housing to exceed ten percentum of the gross emoluments of a taxpayer. For these reasons the Respondent in seeking to tax separately the cost of maintenance and other services relating to the residence occupied by the Appellant, would be acting not merely without statutory authority, but also, contrary to the clearly stated policy of Parliament. I can find no justification in the statute for any such approach and I therefore reject it.

There is one further point which I should mention before

leaving this matter and it is this. There was some dispute during the hearing as to whether some of the staff who worked on the premises were providing services which were personal to the Appellant and his family and so had no connection with the premises. I refer to such persons as kitchen and laundry staff. Counsel for the Appellant, quite properly, conceded that this could have been so in relation to those two categories and the parties agreed this portion of the expenditure at ten percentum of the total amount claimed by the employer/company. This matter will therefore have to go back to the Respondent for him to make the necessary adjustments in accordance with the agreed figure. On the main point, however, the Appellant succeeds.

Appeal allowed with costs to be agreed or taxed.

(Dermot Marsh)
Puisne Judge
Revenue Court

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