IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE REVENUE COURT

REVENUE APPEAL NO.: 2 OF 2004

BETWEEN	SWEPT AWAY RESORTS LIMITED	APPELLANT
AND	THE COMMISSIONER OF TAXPAYER APPEALS	RESPONDENT

Mr. Alan Wood instructed by Livingston, Alexander & Levy for Appellant;

Ms. Kathy Pyke and Ms. Janice Beaumont for Respondent

Heard on September 19, 20 , 2005 and January 30, 2006

ANDERSON: J

This is an appeal by Swept Away Resorts Limited, ("the Appellant") against a decision of the Commissioner of Taxpayer Appeals ("the Respondent") made 24th August, 2004, whereby the earlier decision of the Commissioner Taxpayer Audit and Assessment, was affirmed. The decision so affirmed was to the effect that interest earned by the appellant on bank deposits of surplus cash flow in the years of assessment 1995-1999, was not exempt from income tax by virtue of the provisions of the Hotels (Incentives) Act, ("the Act") under which the Appellant operated during the relevant period. The Appellant seeks an Order from this court "that it be declared that interest on deposits earned by the Appellant for years of assessment 1995 to 1999 is exempt from tax pursuant to the provisions of the Hotels (Incentives) Act and the Approved Hotel Enterprise (Swept Away Resort Hotel Enterprise) Order 1991, as such interest is properly to be treated as part of the profit arising or accruing from the operation of the enterprise". The grounds of the Appeal are set out below.

1. The Appellant is the owner and former operator of a hotel enterprise known as the Swept Away Resort (the Hotel), which hotel enterprise has been approved by the Minister pursuant to section 3 of the Hotel

(Incentives) Act by the Approved Hotel Enterprise (Swept Away Resort Hotel Enterprise) Order 1991, the commencement date of which was 26th March 1990. By section 9 of the Act, during the relevant years of assessment, the Appellant was accordingly entitled "to relief from income tax in respect of profits or gains arising or accruing... from the approved hotel enterprise." Hotel Enterprise is defined by section 2 of the Act as meaning "the business concerned with the establishment or operation of a hotel."

2. The Respondent failed to appreciate that in the normal course of carrying on the business operations of the hotel, the Appellant maintained interest bearing accounts to which surplus cash flow has been deposited and interest has accrued thereon. The maintenance as aforesaid of such interest bearing accounts was carried on as part of the usual and normal operations of the Appellant's hotel and was not a separate or distinct business activity from which profit or gain was derived. Accordingly, the Respondent erred as a matter of law in failing to treat such interest earnings for years of assessment, 1995 to 1999 as profits arising or accruing in the course of carrying on the business of operating the hotel and subject to the exemption from tax conferred by the Hotel (Incentives) Act.

3. Further or alternatively, the Respondent erred as a matter of law in failing to appreciate that in the normal course of operating the business of the hotel, the Appellant would maintain interest bearing accounts and interest would be earned on surpluses in such accounts, which would be taken into account in determining the profit or gain arising or accruing from the hotel enterprise. It would be an artificial and flawed application of the Hotel (Incentives) Act to treat such earnings as deriving from a business other than the business concerned with operating the hotel. In addition any such finding that the Appellant carried on a separate business from that concerned with operating the hotel from which interest income derived is wholly unreasonable and contrary to the facts.

4. The Respondent failed to appreciate that by section 9 of the Hotel (Incentives) Act, relief from income tax is enjoyed in respect of profits or gains arising or accruing from the approved hotel enterprise. On the Respondent's interpretation of that provision, simply for the purpose of importing a limitation on the exemption granted by the Act, interest from interest bearing accounts maintained in the normal course of operating the hotel must be treated as separate from other income arising or accruing from the normal course of the hotel's operations. Such an interpretation could only be arrived at by straining the language of the Act to have the wholly artificial result of treating part of the Appellant's income as deriving from the business

> concerned with the hotel operation while treating interest income as deriving from a separate business or enterprise when in fact the Appellant carries on no other business than that of operating the hotel whereby interest is derived from the Hotel's normal business activity of operating and maintaining interest bearing accounts to which surplus cash flow is deposited. The Respondent failed to appreciate that such earnings remained part and parcel of the business concerning the operation of the hotel and was as a matter of law properly to be treated as part of the profits derived from that enterprise to which the benefit of the Hotel (Incentives) Act was applicable.

Shortly stated, the facts upon which this appeal was brought are that by an Order duly published in the Jamaica Gazette pursuant to Section 3 of the Act, the Appellant was declared to be an "Approved Hotel Enterprise". This order to which reference will be made later, "The Approved Hotel Enterprise (Swept Away Hotel Resort Enterprise) Order 1991", declared that the Appellant was entitled to relief from income tax in respect of profits or gains arising or accruing during the currency of that Order. Between the years 1995-1999, it was the practice of the management of the hotel enterprise to place in Interest-bearing accounts, all surplus cash flow which was not immediately required to meet day-to-day operating requirements. As a result of this practice, the hotel generated significant interest income. It was the contention of the Appellant that such income fell within the terms of the exempting order since it was "profits or gains arising or accruing from an Approved Hotel Enterprise". By section 2 of the Hotels Incentives Act, "Hotel Enterprise" is defined as "the business concerned with the establishment or operation of a Hotel". It was the Appellant's contention therefore that that term, in its ordinary meaning was wide enough to cover any profits arising from the "operation of a Hotel".

The Respondent on the other hand arrived at his decision on the basis that the interest which accrued to the Appellant did not derive from the operation of a Hotel but from a separate act; to wit, the investment of funds with a bank or banks and that therefore such income was not earned and did not arise or accrue from the business concerned with the establishment or operation of a Hotel. The narrow issue which the court must decide in this case is whether income arising from the

interest bearing accounts maintained by the hotel with the Bank, fell within the exemption from Income Tax or whether it was taxable.

It should be noted that initially the appellant in submitting his Income Tax returns for the relevant years of assessment had indeed treated the interest income as subject to tax and had made payments accordingly. Subsequently, on April 27, 2001 and May 8, 2001 amended returns were filed by its then accountants and tax advisors, KPMG Peat Marwick, which amended returns purported to treat the Interest income as not being subject to tax. The amended returns claimed refunds totaling $7,478,370.70 representing estimated tax paid of $7,271,856.30 as well as tax at source on interest of $206,514.40. By letter dated September 17, 2003 the Taxpayer Audit & Assessment Department advised that the interest income in question was taxable under Section 5 of the Income Tax Act as the interest "was not earned or arose/accrued from the business concerned with the establishment of the Hotel". The Appellant's accountant submitted a Notice of Appeal of the decision in accordance with Section 75(6A) of the Income Tax Act and the Revenue Administration (Appeals and Dispute Settlement) Regulations. It was contended that Section 9 of the Hotel (Incentives) Act was applicable to exempt the income from the application of the Income Tax Act. Section 9 of the Incentives Act is in the following terms:-

> Any Company to which Section 8 applies shall be entitled to relief from Income Tax in respect of profit or gains arising or accruing during the relevant concession period from the Approved Hotel Enterprise or of an approved extension of any Hotel of which it is owner, client or operator.

Counsel suggested that this subsection must be read in conjunction with section 2 of the Act which defines approved hotel enterprise as "a hotel enterprise approved by the Minister pursuant to section 3". There, "hotel enterprise" is defined as:

> "the business concerned with the establishment or operation of a hotel"

He further submitted that, in arguments before the Commissioner of Taxpayer Audit and Assessment, the attorneys for the Revenue had relied upon two (2) English decisions. These were firstly **NORTHEND V WHITE & LEONARD AND**

CORBIN GREENER (1975) 2 ALL E.R. 481 a decision of Templeman J. as he then was and an earlier decision **BUCKS V BOWERS (1970) 2 ALL E.R. 202**. However, he suggested that the reliance upon those cases was ill-founded in that they were directed at construing particular provisions in U.K. legislation which were materially different in its language to that of the Jamaican statute. In support of this submission he cited a passage from Templeman J's judgment at page 488 paragraph d of the Northend decision where he states the following:

> "The relevant relief was claimed under Section 211 of the Income Tax Act 1952 which provided for a deduction of Income Tax on a fraction of the earned Income of a Tax payment. Section S25 (1)(c) defined earned income as including:-
>
> > any income which is charged under ...Schedule D and is immediately derived by the individual from the carrying on or exercise by him of his trade, profession or vacation...in the case of his partnership, as a partner personally acting therein"
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> The taxpayer fits this description. The question is whether the deposited interest was derived by the firm from the carrying on or exercise by them of the profession of solicitors."

Mr. Wood submitted that it was clear that the U.K. Statute required the court there to consider the term *"Immediately derived from the carrying on or exercise"* of the taxpayer's trade or profession. In that case it was held that although the Interest Income had arisen by virtue of the carrying on by the taxpayer of his business or profession, the Interest Income had arisen because of an intervening event, that is the loan of money to the bank on terms that interest should be paid and it was from that intervening event that the income arose. Accordingly, it was not immediately derived from the carrying on the profession. Mr. Wood further submitted that to apply a case which was based on legislation from another county which was materially different from the Jamaican statutory provisions ignored, and even flew in the face of the recent decision of the Judicial Committee of the Privy council in **CARRERAS GROUP LIMITED V THE STAMP COMMISSIONER (2004) U.K.P.C. 16** which specifically held that the meaning of the legislation of one country could not be transposed to that of another, particularly when as in that case, the Jamaican Legislation had no equivalent provision to the U.K. Legislation.

He cited in particular the dicta of Lord Hoffman at pages 4-5 and paragraph 12 and 13 of the report.

> "On this basis, Mr. Goldberg submits that the transaction with which paragraph 6(1) of the Jamaican Schedule is concerned should be construed to mean the transaction with which paragraph 6(1) of the United Kingdom schedule would have been concerned, namely the exchange which happened on 27th April 1999 and nothing else. There is no equivalent of paragraph 11(2) in the Jamaica Statute.
>
> Their Lordships do not accept that meanings can be transposed in this way from the legislation of one country to that of another. The United Kingdom statute requires the exchange and the redemption to be considered separately, under paragraphs 6(1) with 4(2) and paragraph 11 respectively, because that is in accordance with the scheme of the tax. The Jamaica legislation, although it uses much of the same language, is concerned with a different kind of tax. A restricted interpretation of the transaction contemplated by paragraph 6(1) would produce the result that exemption from tax could be obtained by a formal step inserted in the transaction for no purpose other than the avoidance of tax. This would not be a rational system of taxation and their Lordships do not accept that it was intended by the legislature. They agree with the majority of the Court of Appeal that the relevant transaction for the purposes of this legislation comprised both the issue and the redemption of the debenture and that such transaction, taken as a whole, could not be appropriately characterized as an exchange of shares for a debenture."

Indeed Mr. Wood further submitted that an interpretation of the materially different provisions of the U.K. statute could not assist the Respondent and such an attempt must have led the Respondent into error as is apparent from the question and answer which the respondent posed in coming to his decision

> "Can income arising from the sources mentioned above, that is, investments in the open banking sector, be classified as income from the business concerned with or having to do with the operation of the hotel? Also, can investment of funds with the local banking sector be regarded as a normal business activity which one would reasonably expect to be undertaken in connection with the operation of a hotel? It is my opinion that it is not, as the investment is an activity totally removed from the business of operating a hotel."

Mr. Wood submitted forcefully that all that was concerned in this appeal was "the meaning or ambit of the phase business concerned with the operation of a Hotel". He submitted that as a matter of construction, words of a statute are to be given their ordinary and literal meaning, "so that where the words of the statute are not susceptible to doubt or ambiguity then the court must accept and apply the normal grammatical meanings of the words which are used. In support of this submission he cites Halsbury's Laws of England 4th Edition Vol 44 (i) and paragraph 1391 and 1932, and these are set out below.

> "**Plain meaning rule.** It is a rule of common law, which may be called the plain meaning rule, that where, in relation to the facts of the instant case, the enactment under inquiry is grammatically capable to one meaning only and, on an informed interpretation of that enactment, the interpretative criteria raise no real doubt as to whether that meaning is the one intended by the legislator, then the legal meaning of the enactment is taken to correspond to that grammatical meaning, but that in any other case the basic rule of statutory interpretation is to be applied.
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> **Commonsense construction rule.** It is a rule of the common law, which may be referred to as the commonsense construction rule, that when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, the court should presume that the legislator intended common sense to be used in construing the enactment."

He further cited the decision by the Jamaica Court of Appeal (Zacca J.A. as he then was) in **INCOME TAX COMMISSION V CHATANI [1980] 31 W.I.R. 337 AT 340**, where he said:

> "It may also be useful to recall some of the rules of interpretation to be applied which were quoted by Lord Donovan in **Mangin v Income Tax Commissioner [1971] AC 739 at 746**. These are:
> First, the words are to be given their ordinary meaning.
> Secondly, one has to look merely at what is clearly said. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. Per Rowlatt J in **Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 KB 64 at 71**, approved by Viscount Simon LC in **Canadian Eagle Oil Ltd v R [1964] AC 119 at 140.**

> Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended.

Mr. Wood also pointed out that care must be taken in ensuring that where the meaning of words have been subject to prior judicial pronouncement, a court in construing these words ought to relate the interpretation in those prior pronouncements to the specific issues and context being considered in these cases. He cited **OGDEN INDUSTRIES PARTY LIMITED v LUCAS 1970 A.C. 113 AT PAGE 127**. There Lord Upjohn delivered himself of the following dicta, which he adopts.

> "...in a common law system of jurisprudence which depends largely upon judicial precedent and the earlier pronouncements of judges, the greatest possible care must be taken to relate the observation of a judge to the precise issues before him and to confine such observations, even though expressed in broad terms, to the general compass of the facts before him, unless he makes it clear that he intended his remarks to have a wider ambit. It is not possible for judges always to express their judgments so as to exclude entirely the risk that in some subsequent case their language may be misapplied and any attempt at such perfection of expression could only lead to the opposite result of uncertainty or even obscurity as regards the case in hand.
>
> These general principles are particularly important when questions of construction of statutes are in issue.
>
> It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and courts must beware of falling into the error of treating the law to be that laid down by the judge in construing the Act rather than found in the words of the Act itself.
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> No doubt a decision on particular words binds inferior courts on the construction of those words on similar facts but beyond that the observations of judges on the construction of statutes may be of the greatest help and guidance but are entitled to no more than respect and cannot absolve the court from its duty of exercising an independent judgment.

In further developing his submissions, counsel for the Appellant referred to the decision of the Commissioner of Taxpayer Audit and Assessment in his conclusion, as set out in his letter of 17th September 2003, (and impliedly, later accepted by the Commissioner of Taxpayer Appeals) in which it was stated that the income in question was not exempt because, "it was not *earned or arose/accrued* from the business *concerned with* the establishment or operation of the Hotel. In view of the foregoing, interest is taxable in accordance with section 5 of the Income Tax Act". (Emphases mine) Counsel took issue with the Revenue's interpretation of both phrases. In relation to the former phrase he cited the Privy Council decision in **COMMISSIONERS OF TAXATION v KIRK AC 588 at 592** as support for the proposition that the words "*arising or accruing*" are synonymous with the word "*derived*", although in that case, the question of derivation was in respect from a geographical locality, rather than from a particular source of income. He submitted, in relation to the second phrase, that the ordinary meaning of the words "concerned with", has been the subject of judicial pronouncements. He refers to **Words and Phrases Legally Defined, Volume 1 pages 300-301**, and the case **Hill & Co v Hill (1886) 55 L.T. 769** as support for the proposition that the words "concerned in" could be construed to mean "having something to do with". He also cited the Australian case of **ASHBURY v REID (1961) WAR49 at p 51**, which accepted that the words "concerned in" could have the normal meaning attributed by the Oxford English Dictionary, namely, "to be in a relation of practical connection with, to have to do with, to have a part in, to be implicated or involved in". If this view is correct, then he would urge the Court to say that the interest income was clearly within the ambit of the meaning of the phrase "connected with".

To the same end, he cited the Australian case of **BERRY v FEDERAL COMMISSIONER OF TAXATION (1953) 89 CLR 653.** In that case, the taxpayer was assessed in respect of sums received as consideration for an agreement that the taxpayer would not compete with a business which he had sold. The question there was whether the sums so received were liable to tax as being "consideration

for or in connection with any goodwill attached to or connected with the land". Kitto J. stated in that case:

> The words 'for or in connection with' imply that a consideration may satisfy the definition as being 'in connection' with one of the subjects mentioned, although not 'for' it. Now, while it is true that a payment cannot be described as a consideration 'for' anything but that which is given in exchange for it, to speak of a consideration being 'in connection with' an item of property parted with is to use language quite appropriate to the case of a payment received as consideration 'for' something other than the property in question, so long as the receipt of the payment has a substantial relation, in a practical business sense, to that property. A consideration may be 'in connection with' more things than that 'for' which it is received."

It was held that the sum was subject to tax.

In another case, **CLARKE CHAPMAN -- JOHN THOMPSON LTD. V IRC (1976) CH 91 (CA)**, Mr. Wood finds support for a submission that the ordinary meaning of words or phrases may be displaced by the context of other language in which the words or phrases is used. He submits, however, that there is nothing in the language of the Hotels (Incentives) Act which militates against the acceptance of the ordinary meaning of the words in section 2 of the Act, defining hotel enterprise.

Finally, counsel for the Appellant submitted that the Respondent's view of what constitutes "income connected with the business of operating a hotel is narrow and inconsistent with commonsense and good business practice". He states: "The maintenance of interest-bearing accounts to which surplus cash flow is deposited is part of usual and normal hotel operations". He supported this submission with some citations from a publication of the American Institute of the Hotel and Lodging Association, **Uniform System of Accounts for the Lodging Industry, 9th Edition**, pages 3-5, 31-34 and 93-94, which indicated that it was standard practice for hotels to deposit excess cash flow into interest earning accounts as a matter of course. While he conceded that there was no one who could give evidence on this publication, Mr. Wood submitted that the information from the publication was nevertheless admissible under the general rule of evidence which permits use of published works of reference dealing with professional or scientific

practices: **(Phipson on Evidence 14th Edition at para 31-61)**. Counsel rejects Respondent's contention that section 9 of the Act, by stating that the relief applies to "profits or gains arising or accruing from the approved hotel enterprise" is itself a restriction on the application of the relief. He urges the Court to the view that the words of the statute must be looked at in order to derive its intention and one cannot import an intention into the statute which is not clearly there. He submits that the interpretation being urged by the Respondent would seem to suggest that the only exempt income would be income from room occupancy, as being "direct and immediate"; that the accretions from the deposit with a bank of the funds in question is an "intervening step" which removes such accretions from the hotel's business operations. He further submitted that the only purpose for straining of the language of the Act in this way to interpose a requirement of "direct and immediate" is to place a limitation on the relief from taxation for which the Appellant qualified. Such an approach introduces artificiality into the method of dealing with the exemption regime. He submitted that the fact that the logic of the statute resulted in a benefit to the taxpayer ought not to be a basis for the Court to strain the plain language of the exemption to deny that benefit and he cited the well-known dictum from **COMMISSIONERS OF INLAND REVENUE v THE DUKE OF WESTMINSTER (1936) AC 1 at page 19**, to the following effect:

> Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.

Accordingly, he submitted, the Appellant should succeed.

For the Respondent, Ms. Pyke submitted that there are two (2) issues which fall for determination by the Court; these are:

1. Whether interest earned on money by the Appellant from surplus cash flow deposited in interest bearing accounts is exempt from income tax pursuant to section 9 of the Hotel (Incentives) Act.

2. Whether the Appellant is entitled to a refund of income tax imposed on the said interest.

There is no dispute as to the facts alleged by the Appellant. It was submitted that the Act must be read in conjunction with the Income Tax Act which, in section 5, imposes a charge to tax on various sources of income. She referred to section 9 of the Hotels (Incentives) Act (quoted above) as being the relevant provision which the Court must construe. It is argued that in construing any statute, including a taxing statute, "the words of the section must be given their natural and ordinary meaning *in the context in which they appear*, *to give effect to the intention of Parliament*". (My emphasis) In support of this submission she cited the dictum of Lord Russell in **ATTORNEY GENERAL v CARLTON BANK (1899) 2 QBD 158 at 165.**

> "I see no reason why special canons of construction should be applied to any act of Parliament and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is in my opinion in all cases the same, whether the Act to be construed relates to taxation or to any other subject namely to give effect to the intention of the legislature as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed. The court must no doubt ascertain the subject matter to which the particular tax is by the statute intended to be applied, but when once that is ascertained it is not open to the court to narrow or whittle down the operation of the Act by seeming considerations of hardship or of business convenience or the like. Courts have to give effect to what the legislature has said."

It should be noted, en passant, that according to Lord Russell, it is the intention of parliament "*as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed*", to which effect must be given. She also finds support for this submission in Lord Wilberforce's pronouncement in **W.T. RAMSAY LTD. v INLAND REVENUE COMMISSIONERS (1984) 54 T.C. 101** at page 184 where he stated the following:

> "The subject is only to be taxed on clear words, not on the intendment or equity of an Act. What are "clear words' is to be

> ascertained on normal principles; these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act maybe as a whole and its purpose indeed ought to be regarded."

The view expressed by Lord Wilberforce in **Ramsay** and more clearly articulated by Lord Steyn in **COMMISSIONERS OF INLAND REVENUE v McGUCKIAN (1997) 3 All ER 817** is, in Ms. Pyke's submission, authority for the proposition that there has been an increasing rejection of the "literalist method of construction of taxing statutes". According to Lord Steyn, under the influence of the narrow Duke of Westminster doctrine, "tax law remained remarkably resistant to the new non-formalist methods of interpretation". As he observed in McGukian: "During the last thirty years, there had been a shift away from literalist to more purposive methods of construction". Indeed, this more purposive method found its fullest flowering to date, in the Carreras decision of the Privy Council referred to above, in Mr. Wood's submissions to which reference was made by the Appellant.

It was, secondly, the submission of counsel for the Revenue that the Act is an exempting statute and is to be strictly construed against the taxpayer. (See Courtenay Orr J in **SANGSTER'S BOOKSTORES LTD. v COMMISSIONER OF GENERAL CONSUMPTION TAX RCA #1 OF 1993**) (Unreported). Put another way, the taxpayer must show that his claim for the exemption falls clearly within the exemption. For support, counsel also cited a Privy Council decision, **MONTREAL v COLLEGE STE. MARIE (1921) 1 AC 283**. There is no material difference between the positions of the Appellant and the Respondent as set out in the Respondent's fundamental submission which is in the following terms:

> The question as to whether interest income is exempt from income tax pursuant to section 9 is dependent upon whether it comes within the meaning of profits or gains arising or accruing during the relevant concession period, from *the approved hotel enterprise.*

However, while the Appellant insists upon an approach based upon the literal meaning of the words in the section, counsel for the Respondent uses as a point of departure the question: *"What is the meaning to be given to the words of the section in light of the context and scheme of the Act"?* It was submitted that in

construing the words of section 9 of the incentive legislation, one principle that commended itself was that "words, and particularly general words cannot be read in isolation; their colour and content are derived from their context". (Per Viscount Simonds in **ATTORNEY GENERAL v PRINCE ERNEST AUGUSTUS OF HANOVER [1957] A.C. 436**. The Respondent's submission refers again to the definition of "hotel enterprise" as set out in the exempting legislation. This is, as already noted, "the business concerned with the establishment or operation of a hotel". Hotel is defined as "any building or group of buildings within the same precinct containing or intending to contain when complete an aggregate number of not less than ten bedrooms and facilities for meals for the accommodation of transient guests including tourists, for reward, together with the precinct thereof and all other buildings and structures within such precinct". Ms. Pyke submits that in considering the phrase "concerned with" or "concerned in", one "must look at the facts of the particular case and look at the business meaning of these words" (Per Lord Hanbury L.C. in **CORY (WILLIAM) & SON LTD v Harrison [1906] A.C. 274**). She argues that the phrase "business concerned with the operation of a hotel" in the context of the Act, denotes "a business whose inherent character and activity is the provision of services such as accommodation, meals and entertainment for reward". She says that this approach is supported by the activities set out in the Appellant's financial statements as referred to in the affidavit of Merrick Saddler. By this analysis she concludes: "The appellant is not entitled to relief from income tax if the profits or gains are derived from any activity other than those having to do with the specific operation of the Hotel". With respect, this seems to beg the question. It was also pointed out that the Appellant had failed to provide "source documentation evidencing the source of funds invested". As I point out below, this allegation seems to come late in the day and I accept the affidavit evidence of Glen Lawrence for the Appellant, that as the financial controller at the relevant time, he had first hand knowledge of the source of the funds, even if the documents were not available.

Finally, the Respondent submits that the use of the word "from" in section 9(1) of the Act must be taken to mean that "the source of the income must originate from the operation of the hotel, (as previously narrowly defined) *rather than any other activity or work in which the Appellant may engage, or apply its resources. The relief will only be afforded to the profits and gains arising from such activity*". *(Emphasis mine)* From this premise, the Respondent proceeds by way of analogy with United Kingdom statutes and case law, (See **Bucks** and **Northend** above) to submit that arising or accruing (read "derived") meant, "immediately derived". **BUCKS v BOWERS [1969] 46 T.C. 267** is cited as support for this. The head-note in this case is instructive. It reads as follows:

> The Appellant was a partner in a firm of merchant bankers. In the ordinary course of its trade the firm acquired securities carrying interest or dividends payable under deduction of tax. The Appellant claimed earned income relief for the tax year 1964-65 in respect of so much of the interest or dividends as was within the charge to tax under Case 111, IV or V of Schedule D.
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> On appeal, the Appellant contended (*inter alia*) that the interest or dividends received by the partners in respect of the securities acquired in the ordinary course of trade was immediately derived from the carrying on of the trade and therefore, so far as charged to tax under Schedule D, were earned income. For the Crown, it was contended, (*inter alia*), that income charged to tax by way of deduction could not be treated as income immediately derived from a trade for the purpose of earned income relief. The General Commissioners dismissed the appeal. Held, that the Appellant was not entitled to the relief claimed.

One of the contentions of the Crown in **Bucks** was that in order to qualify as "earned income", the income to be relieved should not only be charged under Schedule B or D but should also be immediately derived from the carrying on or exercise of the taxpayer's trade. This double requirement meant that income charged to tax by way of deduction without regard to the carrying on of a trade or any resulting profit or loss, was necessarily excluded from the definition of "earned income"

As Pennycuick J. stated at page 272 of the **Bucks v Bowers** decision:

> The Appellant contends that he is entitled to earned income relief in respect of so much of the share of profits as is properly allocable to interest charged under Case 111 of Schedule D or income charged under Case IV or Case V of Schedule. Admittedly, having regard to the definition of "earned income" contained in section 525 of the Act, he is not entitled to earned income relief in respect of so much of his share as is properly allocable to dividends. It is not in dispute that the Appellant bona fide worked full-time in the business of the firm during the year 1964-1965, and thus in any ordinary commercial sense earned his share of profit. The question is whether this share constitutes "earned income" the definition in section 525.

He then sets out section 525(1).

> Subject to the provisions to subsection (2) of this section, in this Act "earned income" means, in relation to any individual-
>
> (a) any income arising in respect of any remuneration from any office or employment of profit held by the individual, or in respect of any pension, superannuation or other allowance, deferred pay or compensation for loss of office, given in respect of the past services of the individual--------.....
>
> (b) any income from any property which is attached to or forms part of the emoluments of any office or employment of profit held by the individual; and
>
> (c) any income which is charged under Schedule B or D and is immediately derived by the individual from the carrying on or exercise by him of his trade, profession or vocation, either as an individual or, in the case of a partnership, as a partner personally acting therein

The United Kingdom Income Tax Act 1952, section 525(1) as it then stood was being considered in that case. His Lordship observed that there was little authority on the interpretation of the section in isolation and indeed, in the instant case, no local or Caribbean authority in respect to the term was cited. But he concluded that based upon the statutory provision there were two (2) requirements which had to be satisfied for the income in question to be earned income. First, it had to be charged under Schedule B or D, and secondly, it had to be "immediately derived" from the carrying on or exercise of the trade, profession or vocation. He also referred to the definitions of "investment company" and "investment income"

The learned Judge also cited in his decision, the House of Lords decision in **F.S.SECURITIES LTD. v COMMISSIONERS OF INLAND REVENUE [1965] A.C. 631, 41 T.C. 666,** in which their Lordships considered the definitions of investment company and investment income referred to in what was then section 257 of the UK Act. Section 257(2) was in the following terms

> In this section, and in the subsequent provisions of this Chapter, 'investment company' means a company the income whereof consists mainly of investment income, and 'investment income' means, in relation to a company, income which, if the company were an individual, would not be earned income.

He concluded that in the **F.S. Securities** Case, Lords Reid and Radcliffe had "made a thorough examination of the basis on which a trading company in receipt of income taxed by deduction should make up its accounts for the purposes of tax, and concluded that such income being separately charged by deduction, could not properly be brought into account as a receipt in the trading account".

He continued:

> It is clear beyond argument that the reasoning applies to interest no less than to dividends: and indeed, Lord Radcliffe more than once used the expression "interest and dividends". The decision of the House of Lords in the **F.S. Securities** case is conclusive that interest and dividends cannot be brought into a trading account for the purpose of tax so as to form a component of the trading profit charged under Case 1 of Schedule D, and so constitute earned income under that head".

The Respondent in the instant case submitted that the income to which the relief applies must be only that income which is "the direct result of the Appellant carrying out the relieved activity, that is the operation of the hotel. Interest income derived from the investment of surplus cash is not exempt because it does not constitute profits or gains arising specifically from the operation of the hotel business. It is not directly derived from the provision of accommodation, meals and so on". The Revenue's submissions cited in further support of this proposition, the UK case of **NORTHEND (INSPECTOR OF TAXES) v WHITE & LEONARD AND CORBIN GREENER (A FIRM) AND OTHERS [1975] STC 317**. In that case, the question again to be decided was whether the taxpayer, a solicitor, was entitled to

earned income relief on his share of the interest accrued on the firm's Clients' deposit account. It was held in that case, on the authority, inter alia, of **Bucks v Bowers** (supra), that the income in question was not "earned income" for the purposes of section 525 of the UK Income Tax Act as *it was not immediately derived from the carrying on of the trade or profession as a solicitor*. The submissions adopt, for the purposes of the instant case, the reasoning of the Court in Northend to the following effect:

> "If the firm had not carried on the exercise of the profession of solicitor there would have been no deposit account and no interest but it does not follow that the interest was immediately derived from the carrying on the profession to produce the interest there must be an intervening event which could not be described as the carrying on of the profession of a solicitor; namely the loan of money to a bank on terms that interest should be paid. The fact that the money lent did not belong to the customer did not prevent the interest deriving from the intervening event; namely the loan and the contract between the customer and the bank".

The Respondent submitted that the Appellant's claim to be entitled to the exemption on the basis that, since the holding of Bank accounts is a normal incident of the business of operating a hotel, the interest income derived there from is exempt under the incentive legislation, is wholly misconceived. That interest income, it is submitted, has its source not in the exempted activity, but in the intervening contract with the banks. Moreover, where the proceeds of overseas deposits are withdrawn and re-deposited in local banks to further earn interest, this becomes another intervening event. Respondent's closing submissions end on the following note, which is where I believe the analysis must begin:

> The Appellant's contention that it carries on no other business and that the earnings remained part and parcel of the profits of the business is not conclusive on the issue, because for tax purposes the income earned from a particular business, may be derived from several different sources, although earned in the course of that business. (See **Bucks v. Bowers** supra p. 7).

Having carefully examined the submissions, I have come to the conclusion that the Appellant must succeed in this appeal for reasons which I set out below. Let me

start by saying that I hope I do no injustice to the positions of the protagonists herein if I summarize their submissions in the following terms: For the Appellant, the following propositions emerge:

- The income of the Appellant from the operation of a hotel is exempt from income tax by virtue of the wording of the exemption given by the Act.
- The interest derived from putting surplus cash-flow for which there is no immediate demand on deposit *is* income *from the operation of the hotel*.
- Therefore that income is also exempt as any other income earned by the operator.

For the Respondent, the propositions resolve themselves into the following:

- The Hotels (Incentives) Act exempts income from operation of a hotel
- The interest earned on deposits of surplus cash-flow is *not income from the operation of the hotel* since not directly derived therefrom, but rather is the result of another intervening event, namely a contract with the bank.
- As such, the interest income is not exempt from the application of the Income Tax Act, and is taxable.

The starting point of the analysis is a re-stating of the provisions contained in section 9 of the Act.

> 9 (1) Any company to which section 8 applies shall be entitled to relief from income tax in respect of *profits or gains arising or accruing during the relevant concession period, from the approved hotel enterprise,* of an approved extension of any hotel, of which it is the owner tenant or operator. (Emphasis Mine)

The companies referred to in section 8 are:

> (a) any company which is for the time being the owner or tenant of the premises comprising any hotel in relation to which an order under section 3 or under section 4 has been made, whether or not such company is the operator or is entitled to receive any profits arising from the operation of the hotel; and
>
> (b) any company which, not being the owner of such hotel, operates it in accordance with an agreement made between itself and the owner or tenant and certified by the Minister to be acceptable for the purposes of this Act.

The provisions of section 8 and 9 of the Act, therefore, circumscribe the persons who qualify for the relief and delineate the ambit of that relief. In that regard, it needs to be borne in mind that section relieves the section 8 company from *"income tax in respect of profits or gains arising or accruing during the relevant concession period, from the approved hotel enterprise"*. "Profits or gains" are exhaustively defined in the charging section, section 5, of the Income Tax Act, to include various heads of income including trading income, employment income interest, dividends, rental income, income from the provision of consulting services or "similar services or facilities", all of which are subject to the charge to tax, unless exempted by any special provision.

The Appellant was an "approved hotel enterprise", having been the subject of the appropriate ministerial order under the Act, the "**Approved Hotel Enterprise (Swept Away Resort Hotel Enterprise) Order 1991"**. That order provided that "The Swept Away Resort Enterprise which relates to a hotel established at Long Bay in Negril in the Parish of Westmoreland is hereby declared ... to be an approved hotel enterprise". The date from which the operation of the hotel was deemed to commence for the purposes of the order, was March 26, 1990. Pursuant to the provisions of section, the concession period for the relief was a period of ten years, although in the circumstances where the concession related to an approved hotel enterprise within a "development area", the period could be extended by the Minister, to a period of between eleven and fifteen years. It is clear that the years 1995 to 1999, the years in respect of which the taxable status of the interest income is the subject of the dispute herein, are within the concession period. The Income Tax Act in section 12 provides from "exemptions". In particular, section 12(l) provides for the exemption of:

> (l) any moneys paid or income received, which is exempted from the payment of income tax by any enactment of the Island;

The Act is such an enactment. It is clear that it is the effect of the statutory provisions, section 12 of the Income Tax Act and section 9 of the Act that must be determined. It is to these provisions that we must look, at least initially, to ascertain

the extent of the relief. The taxpayer says, simply, that the interest represents "profits or gains" as defined by section 5 of the taxing statute; that the income is from "the approved hotel enterprise", since that is the only business which was being operated, and the profits or gains arose during the concession period. The Respondent would circumscribe the relief by denying it to the interest income and extending it only to income directly arising or accruing to income from the "operational side" of the hotel business. Its two principal objections to the Appellant's claims are that the income is not from the "source" mandated by the Act and, secondly, that the interest income is attributable to an unrelated "intervening event". I do not agree on either count.

In the case of **WEST INDIES MANUFACTURING COMPANY OF JAMAICA v THE COMMISSIONER OF INCOME TAX (Revenue Appeal No: 3/78)** Marsh J. had to construe a provision in the Industrial Incentives Law 1956 similar to that in section 9 of the Act. He held that "relief from income tax" meant "relief from the tax payable under the law for the time being relating to income tax". He said:

> It follows, therefore, that in order to determine the extent of the tax relief granted to the Appellant, the Respondent must, in each year, determine the amount of the tax which would be payable under the law relating to income tax. In other words, the Respondent is required to examine the returns and accounts of the Appellant against the background of the income tax law and arrive at the tax which otherwise would have been payable by it, but for the exemption granted it by section 11 of the Industrial Incentives Act".

The relief in the instant case is the "relief from profits or gains arising or accruing during the concession period". There is no question that, absent the exemption, the interest income would be subject to tax just as any other income under section 5. In my view, the interest, in any commercial sense, was derived from the "approved hotel enterprise" in the sense that that was the only business carried on by the enterprise. The Respondent argues that section 2 of the Act defines "hotel enterprise", as "the business concerned with the establishment or operation of a hotel". It is said that the *policy* behind the statute was to encourage the tourist

industry and it could not have been the contemplation that interest income as arose here, would benefit from the relief. The "source" of the relief must be the income *directly arising or accruing* from the establishment or operation of the hotel. It is necessary to observe that the Jamaican Income Tax Act does not have a Schedular system such as the United Kingdom. Section 5 of the Jamaican Income Tax Act charges tax in respect of "all income profits or gains respectively described hereunder". It is common ground that income tax is charged on chargeable income, that is, the aggregate income from all sources remaining after allowing the appropriate deductions and allowances. It does not matter the "source" of the income as long as it falls within the provisions of section 5 of the Income Tax Act. It seems to follow logically from the dicta of Marsh J above that the better view is that the interest is not subject to income tax.

In **INCOME TAX COMMISSIONER v HANOVER AGENCIES LTD. [1966] 10 W.I.R. 295**, a decision of the Privy Council, the learned law lords rejected the Revenue's contention that a taxpayer was not entitled to wear and tear allowance on a building which it owned and in respect of which it received rental income. It was argued that the taxpayer, a company which had been formed to take over another business, was not carrying on a "business", on the profits of which they were taxed, but that the profits on which they were taxed arose from rents. Their lordships expressly distinguished the case of **FRY v SALISBURY HOUSE ESTATE LIMITED [1930] A.C. 432**, for the reason that whereas the English Tax Law was a schedular one which taxed different heads of income under different schedules, with different tax consequences, and the schedules are mutually exclusive, the Jamaican Income Tax Act in its charging section imposes an omnibus charge regardless of the type of income. All "profits or gains" are treated together. I take the view that parliament in relieving the taxpayer from income tax on all "profits or gains of the approved hotel enterprise" under the Incentives Act, must have been aware of this. As Marsh J. said in the **West Indies Manufacturing** case above in relation to that taxpayer: "Since Parliament is presumed to know the

law, it must equally be presumed to have intended that the relief granted would produce such a result".

In **ANTILLES CHEMICAL COMPANY v COMMISSIONER OF INCOME TAX [1982] 19 JLR P 311**, the court had to consider a similar question as is raised in the instant case, that is: What is covered by the relief given under the incentive legislation? In the Court of Appeal, Campbell J.A. {(Ag) as he then was}, referred to the submissions of counsel for the Revenue, as he sought to articulate the issues before the court below. The first question raised in the matter was as follows: "What income was relieved under the Act? Was it chargeable income or income per se? That is to say, was it chargeable income under section 13 of the Income tax Act, or the income mentioned in section 5 of the said Act"? The learned judge, in answering this question, came to the view that other provisions in the Industrial Incentives Act made it clear that the relief was in respect of income tax which would have arisen on "the manufacture of approved products", and thus the relief was not on total aggregate income under section 5. In this regard, he found support for that conclusion in section 12 of the Industrial Incentives Act. He said:

> What, in my view, section 12 of the (Industrial Incentives) Act does, is make explicit the fact that the chargeable income mentioned in section 3(4) of the Act is to be ascertained from one source of income only, namely the profits or gains from the manufacture of the approved product. Once it is recognized that chargeable income can exist where there is only one source of income in like manner as where there are two or more sources of income, the legislative intent becomes clear, namely that the benefit of the act is to be considered only in relation to the source of income mentioned in section 12. The income from this source, when adjusted under section 13 of the Income Tax Act, becomes chargeable income on which at the appropriate rate of tax the approved enterprise would, but for the income tax relief accorded by section 3(4) be liable to pay income tax".

For completeness, I believe that it may be useful to set out a couple of the provisions of the Industrial Incentives Act with which that case was concerned. Section 3(4) was in the following terms:

> When approving a product for purposes of this Act, the Minister may, by the same order, declare that all approved enterprises manufacturing the

> approved product shall be entitled either to one hundred per centum or to fifty per centum of the benefits of this Act; that is to say in regard to relief from income tax, relief in respect of the whole of the chargeable income of the company (as the case may be) which, but for the provisions of this Act, would be chargeable with income tax.

Section 12 of that Act so far as relevant stated:

> The second option referred to in section 12 shall, subject too the conditions specified in section 10 and in this section and to the terms of any order made under sub-section 4 of section 3 comprise the relief from income tax following, that is to say;-
>
> (a) relief from income tax in respect of profits or gains earned from the manufacture of the approved product for the first four years of a period of six years from such date as the approved enterprise may select
>
> (b) .....

I confess to some level of uncertainty as to the usefulness of the analysis of the learned Judge of Appeal and the implications of what he refers to as the "source" of income. However, what is clear is that the Industrial Incentives Act which pre-dated the Hotels (Incentives) Act, provided significantly more assistance in seeking to define the nature of the benefits available under that statute. Regrettably, the Act with which we are concerned herein, does not provide nearly as much in the way of seeking to define the limits, if any, of the relief available. I accordingly come to the view that the wording of section 9, speaking as it does to relief from tax on "profits or gains" is intended to encompass the wider concept of the aggregate income in section 5, that is income from all sources mentioned therein, and not the narrow approach which Campbell J.A. deduced from the provisions of the Industrial Incentives Act and which the Respondent would have us accept.

In advancing the argument that the income, not being directly from the establishment or the operation of the hotel meant that it was not included in the income the subject of the relief, the Respondent cited dicta from **Bucks** and **Northend** which indicated that the English Court viewed the concept of immediate derivation as important in determining under which Schedule the income was

properly taxable. There was a time when the Jamaican Income Tax Act provided some relief by way of allowance for "earned income", while such relief did not apply to "unearned" or "investment" income. That distinction has long ceased to be of importance in the statute. Given the disappearance of the difference, one must view with a jaundiced eye, the usefulness of the cases last referred to and cited by the Respondent. I say, with respect, that in the instant circumstances, I agree with Appellant's counsel, as I also do not find them helpful. I also agree that, in any event, there is no compelling reason why the word "from" in the exempting statute, should be narrowly interpreted to mean "immediately derived from". Section 9 of the Act, as noted above, provides relief on the "profits or gains" of the "approved hotel enterprise" and such profits or gains under the Income Tax Act, may be earned or unearned income. The wording of the section gives no indication that the legislature intended to impose any distinction on the tax relief afforded to earned, as opposed to un-earned income.

One of the objections raised by the Respondent is that the evidence of the source of the funds which gave rise to the interest has not been forthcoming from the Appellant. In that regard, reference is made to the Affidavit of Austin Edman and in particular exhibit AE 1 and AE 3 of that Affidavit. These exhibits are a letter from the Taxpayer Audit & Assessment Department and secondly, the Affidavit of Mr. Glenn Lawrence. This latter document acknowledged that the files containing the investment documentation could not be located. The Respondent puts this forward as a reason to resist the Appeal. It is note worthy that Mr. Lawrence in his Affidavit makes the point that he was the Financial Controller of the Resort at the relevant time and therefore he was able to give evidence from his own knowledge as to the source of the funds which led to the receipt of interest. I accept this evidence as it seems to me that the allegation that the taxpayer failed to provide the relevant information has come about, as I stated above, rather late in the day.

Given that the essential difference between the parties turned upon their view of the meaning of the words in the legislation it was not surprising that both parties

spent a considerable amount of time in their submissions on the meaning to be ascribed to particular words and phrases. I have already adverted to the submissions above and will not restate them here. However, in light of the view which I have expressed, I wish to refer to the submissions focusing on the meaning of the phrase "*concerned with*".

As noted previously, the expression "hotel enterprise" is defined to mean "the business concerned with the establishment or operation of a Hotel". The expression "approved hotel enterprise" is stated to mean "a hotel enterprise approved by the Minister". The Appellant had submitted that the words "*concerned with*" simply means "*a practical connection with.*" For the Appellant it was also submitted that the phrase was synonymous to the phrase "in *connection with*", which phrase has itself been the subject of judicial consideration. In the Australian case of **BERRY v FEDERAL COMMISSION OF TAXATION (1953)89 CLR 653**, Kitto J. stated that the phrase "*in connection with*" was similar to the phrase "connected with." In the English case, **CLARKE CHAPMAN, JOHN THOMPSON v THE I.R.C.(1976) CH 91** heard in the Court of Appeal, the following was stated in the Judgment of Russell L.J.

> "It is not, we think disputed that the ordinary meaning of "*in connection with*" in the context of a matter such as a scheme is not in reference to parts of the whole in relation to each other but to matters outside connected with the whole".

On the other hand, the Respondent had cited and adopted the view of Lord Halsbury LC in **CORY (WILLIAM) AND SON LIMITED v HARRISON (1906) A C** 274 that:

> "It would be absolutely impossible to lay down with precision what is or is not comprehended in such words as interested or concerned. You must look at the facts of the particular case and look at the business meaning of the words".

It was their view, therefore, that the expression "business concerned with the operation of a hotel" in the context of the Act, denotes a business whose inherent character and activity is the provision of services such as accommodation, meals and entertainment for reward. For myself, I am prepared to adopt the reasoning of the learned Lord Chancellor in **Cory** and to look at *the business meaning* of the words. I have little doubt in my mind that upon a business reading of the words, the maintenance of prudent bank accounts is a practice which is very much "concerned with" the running of a hotel.

Counsel for the Respondent has argued that in interpreting the words of the statute, regard must be had to the intention of the legislature, but this must be *as it appears from the words used and their context*. Indeed that is precisely what Lord Russell said in the **Attorney General v Carlton Bank** cited by her in her submissions. The learned law lord did say "*as that intention is to be gathered from the language employed having regard to the context* in connection with which it is employed", I agree with the submission and for these purposes would emphasize the words: "*to be gathered from the language employed*". It is my view that any analysis still starts with the words used in the statute and I find no compelling reason to change my view that the words do not mean what the respondent is urging us to believe they do.

Another main plank of the Respondent's opposition to the appeals was its submission that the principle that where a taxpayer claims to be the beneficiary of an exempting provision in any Revenue statute, he must bring himself squarely within the terms of that provision, operated to deny the Appellant success here..(See Courtenay Orr J in **SANGSTER'S BOOKSTORES LTD. v COMMISSIONER OF GENERAL CONSUMPTION TAX** referred to above) I agree that there is such a principle but have reservations as to its application here. Here the taxing statute is the Income Tax Act and the exempting provision is found in the Act. Section 12(l) of the former provides for the exemption from income tax of "any moneys paid or income received which is exempted from the payment of

income tax by any enactment of the Island". The enactment granting the exemption in this case is the Hotels (Incentives) Act. I have formed the view that the interpretation to be given to the provisions of the exempting statute must be determined by looking primarily at that statute and the context and the intention as far as may be determined from the words used therein. What this court has to do is to consider whether, by virtue of a proper interpretation of the Act, the income in question is exempted. The analysis is, on this view, different from one in which the taxing statute says, for example, "All income from carrying on a trade shall be subject to income tax except income which fulfils the following conditions", which conditions are then set out. These conditions may include time constraints, source, residence of the recipient, or applications. That is not the case here.

In addition to my views above, there is also support for the proposition that where the company has business objects and carries them out, it carries on business. This was a view expressed by Lord Guest in the **Hanover Agencies** case and adopted by Marsh J. in the case **West Indies Manufacturing Company Ltd.** In the case of the Appellant company, the Memorandum and Articles of Association which formed part of the documentation submitted with the application for the incentives clearly provides that it was one of the objects of the company "to lend money and to make advances to customers and others with or without security and upon such terms as the company may approve", and also "*to invest in and deal with the moneys of the company whether or not immediately required for the purpose of its business in or upon such investments or securities or in such manner from time to time may be determined".* (See paragraphs 3(9) and 3(11)) of the Memorandum of Association of Swept Away Resorts Limited). It seems to me that, if it were the intention to prevent the Appellant company from benefiting from the relief in relation to such interest income, it would have been easy to provide in the relevant order for such exclusion. No such exclusion is apparent. I therefore form the view that the ordinary meaning of the expression "*concerned with*" does include the interest Income in question.

But there are also some other reasons why I believe this appeal must succeed. I accept the view that the legislation is intended to encourage and facilitate investment in the Tourist Industry. It is safe to assume that efficient investment and operation would be preferred to inefficient investment and operation. Given the limitations upon distribution of profits, to which I will revert to again below, it seems that any interest accruing as in this case would necessarily go towards reducing either the debt or the equity requirement (more likely the former) of the investment. It would seem that any reduction in the debt burden of the investment without a corresponding increase in the equity requirement must contribute toward the efficiency of the investment. Is the inference to be drawn from the Revenue's treatment that an approved hotel enterprise which has surplus cash flow and keeps it in a non-interest bearing current account and so earns no interest with which it could reduce its reliance on debt, is to realize a preferred tax position to a company like the Appellant which uses its resources more efficiently?

With respect to distributions of profits, it will be recalled that section 10 of the Act, requires that where an approved enterprise intends to pay a dividend to its shareholders out of profits, it has to maintain a separate account in which all such profits are kept. Pursuant to section 10 (2), the company which makes such a dividend payment is required to withhold tax and pay it over to the Revenue. Subject to certain limitations as set out in section 10 (4), a Jamaican resident shareholder who receives such dividends may also be relieved of personal liability for income tax in respect thereto. There is no indication from the accounts, nor was any evidence provided, that any dividend had been paid to anyone during the period in question; no stockholder individually benefitted. In those circumstances, it would seem that the only beneficiary of the acccrual of interest to the deposited funds would be the Swept Away Hotel Enterprise itself. Mr. Wood, counsel for the Appellant, makes an interesting observation with respect to the Revenue's approach to this issue. He suggests that the inexorable logic of the Revenue's position is as follows: if an approved enterprise incurred operational losses during the concession period (which it could then carry into the post-concession period for

use against any taxable profits that arise), the extent of the available losses would be increased because the interest, income not being "from" the approved hotel enterprise, would not have been available to reduce those losses in determining the chargeable income. Indeed, even if the losses from the approved enterprise exceeded the interest earned in these circumstances, (say five million dollars ($5,000,000) losses and four million dollars ($4,000,000) of interest income, split evenly over the concession period) the taxpayer would still have to pay tax on the interest income, although in a non-incentive situation, its tax computation would show no chargeable income. This seems to me to be quite curious and inconsistent with the taxpayer's obligation to pay tax only on chargeable income as defined in the interpretation section of the Income Tax Act.

One further question may be raised here. If the interest income is chargeable to income tax, is the taxpayer to be allowed to deduct as proper deductions, "all expenses wholly and exclusively incurred" in earning the interest income? Ought the Appellant to be allowed to allocate a proportion of its overhead and other expenses, including staff charges, in determining the extent of its liability? And since the statute specifically denies the taxpayer the right to claim annual allowances as an incident of the tax relief, should some share of those allowances be now available, if the taxpayer must pay tax in determining the chargeable income from this "non-approved-hotel source"? This would seem to be a proper inference from the decision in **Hanover Agencies**.

It is also pertinent to ask whether, there would be any difference in the approach of the Revenue if the interest arose only on the Appellant's balances in its current accounts maintained at their banks. Note that it is not unusual these days for banks and other financial institutions to pay interest on current account balances. Clearly, the maintenance of a bank account must be part of the operation of the approved hotel enterprise. How would such interest be treated? Logically, and based upon the reasoning of the Respondent in the instant case, such income would also have to be taxed.

Given what I have stated above, I have, as I have indicated, come to the conclusion that the Appeal must succeed, and accordingly, I grant judgment for the Appellant in terms of the declaratory orders sought.

I also award costs to the Appellant, to be agreed or taxed.

ROY ANDERSON