HIGH COURT OF JUSTICE (CHANCERY DIVISION)—11TH, 12TH, 13TH AND 24TH JULY 1967

COURT OF APPEAL—29TH AND 30TH APRIL AND 15TH MAY 1968

HOUSE OF LORDS—9TH AND 10TH JUNE AND 23RD JULY 1969

Mapp (H.M. Inspector of Taxes) *v.* Oram[1]

Income Tax—Child allowance—Income of child—Foreign employment—No remittance to United Kingdom—Whether child "entitled . . . to an income"—Income Tax Act 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *s.* 212(4).

During the year 1965–66 *the Respondent's son was an undergraduate reading modern languages at the University of St. Andrews. On his tutor's advice he had taken a teaching post in France from October* 1964 *to June* 1965, *after which he resumed his degree course at the University. His gross emoluments in* 1965–66 *from his French appointment were* £150, *which was wholly spent in France on board, travelling, etc.*

The Respondent claimed child allowance for 1965–66 *in the full amount of* £165. *On appeal, he contended* (inter alia) *that "entitled in his own right to an income" in s.* 212(4), *Income Tax Act* 1952, *meant only income chargeable to income tax. For the Crown it was contended that that expression must be read in its commonsense or everyday meaning. The General Commissioners held that the Respondent was entitled to the allowance claimed.*

In the High Court the Crown abandoned its contention before the Commissioners but contended that "an income" meant income as computed for the purposes of Schedule E after deducting expenses allowable under para. 7 *of Sch.* 9, *Income Tax Act* 1952. *In the Court of Appeal and the House of Lords the Crown contended that, although para.* 7 *of Sch.* 9 *had no direct application, it should be applied by analogy.*

Held, that the Commissioners' decision was correct.

Prince *v.* Phillips (1961) 39 T.C. 477 *approved.*

CASE

Stated under the Income Tax Act 1952, s. 64, by the Commissioners for the General Purposes of the Income Tax for the Division of West Goscote in the County of Leicester for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners holden on 19th May 1966 for the purpose of hearing appeals Leonard Murray Oram (hereinafter called "the

[1] Reported (Ch. D.) [1969] 1 Ch. 293; [1968] 2 W.L.R. 267; 111 S.J. 636; [1968] 1 All E.R. 643; (C.A.) [1969] 1 Ch. 293; [1968] 3 W.L.R. 442; 112 S.J. 488; [1968] 3 All E.R. 1; (H.L.) [1970] A.C. 362; [1969] 3 W.L.R. 557; 113 S.J. 797; [1969] All E.R. 215.

Respondent") appealed against the refusal of the Inspector of Taxes to allow a claim to child allowance for the year ended 5th April 1966 in the full amount of £165. The sole question for our determination was whether the allowance should be allowed in full, or whether it should, by virtue of s. 212(4), Income Tax Act 1952, be restricted.

2. The following facts were proved or admitted:

(i) The Respondent has a son (hereinafter called "the son") who, being over the age of 16 years, was at the commencement of and during the year of assessment 1965–66 an undergraduate at the University of St. Andrews, where he was reading modern languages.

(ii) The son had been advised and encouraged by his tutor to reside in France and to work there as an English assistant (or temporary teacher) at a *lycée* in order to perfect his knowledge of French.

(iii) The son obtained such an appointment, which he held from October 1964 until June 1965 (the French academic year), and in October 1965 he returned to St. Andrews University to resume his degree course. During the year of assessment 1965–66 the son carried out the duties of such appointment for a period of two and one-half months, receiving therefor in France a gross emolument equivalent to £150.

(iv) During the son's period of residence in France board was not provided, and he was required to provide temporary board and travelling and necessary incidental expenses at his own sole charge.

(v) Hence the son spent in France all that he had earned and none of the emolument of £150 was remitted to or enjoyed in the United Kingdom.

3. We were therefore called upon to decide whether in the year of assessment 1965–66 the son was entitled in his own right to an income exceeding £115 within the meaning of s. 212(4), Income Tax Act 1952.

4. It was contended for the Respondent that:

(*a*) "income in his own right" within the terms of s. 212(4) of the Income Tax Act 1952 meant income computed in accordance with the Income Tax Acts: that is to say, income for income tax purposes (citing *Prince* v. *Phillips* (1961) 39 T.C. 477);

(*b*) the French emolument was not chargeable to income tax under Case I, II or III of Schedule E; though the son was resident in the United Kingdom his duties had been carried out entirely abroad and no part of the emolument had been remitted to or received in the United Kingdom;

(*c*) the emolument was not, therefore, chargeable to income tax at all;

(*d*) in the alternative, if (which the Respondent did not admit) "income in his own right" did not mean "chargeable income" but meant income in some other and more popular sense, it still fell to be reduced by the amount of such expenditure as was essential to enable the emolument to be earned, which expenditure on the facts of the present case manifestly exceeded £35.

5. It was contended by the Inspector of Taxes as follows:

(*a*) "income" was nowhere defined in the Income Tax Acts, and the words "entitled in his own right to an income" in s. 212(4) referred to income actually received by the son which was his own; the expression was not confined to income for income tax purposes, but must be read in its commonsense or everyday meaning: he cited *Lady Miller* v. *Commissioners of Inland Revenue*[1] 15 T.C. 25, at page 49;

[1] [1930] A.C. 222.

(*b*) (i) the expression "who is entitled in his own right to an income exceeding £115 a year" in s. 212(4), Income Tax Act 1952, was to be contrasted with the expression in s. 216(1) of the Act (which provides for dependent relative relief) "whose total income does not exceed £285 a year";

(ii) the expression "total income" is defined in s. 524 of the Act;

(iii) the provisions for child allowance and dependent relative relief had first been enacted in ss. 21 and 22, Finance Act 1920;

(iv) if, for the purposes of s. 212(4), it had been intended to limit the relevant income of the child to income for the purposes of the Income Tax Acts, then the Legislature would have used the expression "total income", as it had done in s. 216;

(*c*) he cited *Miles* v. *Morrow* (1940) 23 T.C. 465, at page 469; *Johnstone* v. *Chamberlain* (1933) 17 T.C. 706, at page 715; and *Scottish Shire Line Ltd.* v. *Lethem* 6 T.C. 91[1], at page 99, in support of the contention that the intention of s. 212 as amended was to give child allowance to the claimant subject to a straightforward means test against the child in question; if "income" meant "chargeable income" there would have been no need in s. 212 specifically to exclude income from scholarships and bursaries, since such income was already exempt from charge by virtue of s. 458, Income Tax Act 1952;

(*d*) though the gross emolument of £150 was not assessable to income tax under Schedule E or at all, that gross sum had been received by the son as income to which he was "entitled in his own right", so that the Respondent's child allowance should be reduced from £165 by deducting therefrom £35 (being the excess of the gross emolument of £150 over the statutory limit of £115);

(*e*) the Commissioners should determine that the Respondent was entitled to child allowance in respect of the son for the year of assessment 1965–66 in the sum of £130 (being £165 less £35).

6. We, the Commissioners, having found that the son's emolument was not assessable to income tax under Schedule E or at all, were of opinion that:

(*a*) *Prince* v. *Phillips* 39 T.C. 477 seemed to support the contention that "income" in s. 212 was not a loose expression but meant income in the same general sense as it meant elsewhere in the Act, that is to say, income for income tax purposes. It appeared to us that the Crown had so submitted in that case and that Buckley J. had accepted the submission.

(*b*) So far as it was permissible for us to examine (as we were invited to do by the Inspector of Taxes) what might have been the intention of the Legislature, whether the relevant expression should have the more precise meaning of "income within the meaning of the Income Tax Acts" (that is to say "income chargeable to United Kingdom income tax") on the one hand or the looser meaning of "income actually received by the son which was his own" on the other:

(i) if income were intended to mean "chargeable income" it was then easy by the application of the Schedule E rules and of such cases as *Ricketts* v. *Colquhoun*[2] 10 T.C. 118 and many related Schedule E cases to determine what deductions (if any) might be made from a child's gross income in order to ascertain his chargeable income constituting his "income in his own right";

(ii) *per contra*, an intention by the Legislature to substitute the looser definition seemed to imply a further intention that there should be an absence of definition whether any and what deductions might ever be made from a child's gross emolument in order to arrive at his "income in his own right";

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(1) 1912 S.C. 1108. (2) [1926] A.C. 1.

(iii) thus in the present case the son had incurred travelling expenses and the excess cost of his living at the place of his employment (which is notoriously high in France), both incurred essentially and manifestly totalling more than £35. An adoption of the looser definition appeared to involve the acceptance of the proposition either that the Legislature intended that for the purposes of child allowance a child's income must always be taken at its gross figure without deduction or that, whilst some deduction might be possible, it should be unspecified. We did not see how we could very properly look for assistance to the Schedule E rules and cases in determining what might be proper deductions from an emolument which was not chargeable to Income Tax under Schedule E or at all.

For these reasons we considered it unlikely that the Legislature intended the looser definition to prevail.

7. We accordingly allowed the appeal and determined that the Respondent was entitled to a child allowance for the son in the sum of £165.

8. Immediately after our determination the Inspector of Taxes declared to us his dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a Case for the opinion of the High Court of Justice, which Case we have stated and do sign accordingly.

9. The question for the opinion of the High Court is whether our decision was correct in law.

E. F. Winser
W. H. Towle.
W. H. Dickinson.
J. Clegg.

Commissioners for the General Purposes of the Income Tax for the Division of West Goscote in the County of Leicester.

30th November 1966.

The case came before Ungoed-Thomas J. in the Chancery Division on 11th, 12th and 13th July 1967, when judgment was reserved. On 24th July judgment was given against the Crown.

F. Heyworth Talbot Q.C. and *J. Raymond Phillips* for the Crown.

H. H. Monroe Q.C. and *Stewart Bates* for the taxpayer.

The cases cited in argument are referred to in the judgment.

Ungoed-Thomas J.—This appeal raises the question whether the child allowance for 1965–66, to which the Respondent is entitled in respect of his son, a boy of over 16, who is a full-time undergraduate at St. Andrews University, should be restricted by reference to the amount of the son's earnings for $2\frac{1}{2}$ months as a teacher in a French school.

This question turns on the Income Tax Act 1952, s. 212, which reads:

"(1) If the claimant proves that he has living at any time within the year of assessment any child who is either under the age of sixteen years or who, if over the age of sixteen years at the commencement of that year, is receiving full-time instruction at any university, college, school or other educational establishment, he shall, subject to the provisions of this and the next following section, be entitled in respect of each such child to a deduction from the amount of income tax with which he is chargeable equal to tax at the standard rate on the appropriate amount for the

A child". I need not read the rest of that subsection. "(1A) The appropriate amount for the child shall vary according to the age of the child . . . and subject to subsection (4) of this section—(*a*) for a child shown by the claimant to have been then over the age of sixteen, shall be £165 . . . (4) In the case of a child who is entitled in his own right to an income exceeding £115 a year the appropriate amount for the child shall be B reduced by the amount of the excess, and accordingly no relief shall be allowed under this section where the excess is equal to or greater than the amount which apart from this subsection would be the appropriate amount for the child: Provided that in calculating the income of the child for the purpose of this subsection no account shall be taken of any income to which the child is entitled as the holder of a scholarship, C busary, or other similar educational endowment."

It is common ground that the earnings of the child are *prima facie* income to which he is entitled in his own right within the meaning of subs. (4). The difficulty in this case arises over the two words in subs. (4) "an income".

The son was advised by his tutor to seek an appointment as a temporary teacher at a *lycée* to improve his French, and he obtained such a post. In D 1965–66 he earned the equivalent of £150 in the $2\frac{1}{2}$ months that fell into that year of assessment. That £150 was spent in France on lodgings and incidental outgoings, with the result that nothing remained to be brought into this country when he returned here. The Inspector of Taxes took the view that in 1965–66 the son had been entitled in his own right to an income exceeding £115, from which it followed that the £165 mentioned in s. 212(1A)(*a*), on E which deduction at the standard rate of tax would *prima facie* be calculated, would be reduced under subs. (4) by the amount by which £150 exceeded £115—that is, £35—making £130.

The Respondent's contention before me was the same as before the Commissioners, namely, that "an income" in s. 212(4) meant income chargeable to income tax; or, as he said, in other words, income for income tax purposes. F This was identified as the net income chargeable to tax after deduction of expenses but before deduction of allowances. As the son's foreign income was not brought into this country, it is common ground that it was not chargeable to tax, and therefore, if the Respondent's contention is correct, it was not an income of the child limiting his parent's child allowance.

The Crown's contention before the Commissioners was that the expres- G sion "entitled in his own right to an income" in s. 212(4) "was not confined to income for income tax purposes, but must be read in its commonsense or everyday meaning". This contention was abandoned before me, and in the course of argument the Crown instead identified "an income" in s. 212(4) as income computed in accordance with Schedule E, Sch. 9, para. 7; that is, as equivalent to "the emoluments to be assessed" mentioned in that paragraph, H after deduction of the narrowly specified expenses to which the paragraph refers. Para. 7 reads:

> "If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, I or otherwise to expend money wholly, exclusively and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed."

It was suggested that para. 7 was not directed to charge to tax but to calculation of emoluments, and therefore defined the son's emoluments although they

(Ungoed-Thomas J.)

were not subject to charge to tax. It is true that para. 7 does not itself charge tax, but it does not exist except as a cog in the machinery which produces charge to tax. Section 1 of the Income Tax Act 1952 provides for tax being charged in respect of profits and gains described in, *inter alia*, Schedule E and in accordance with the provisions of the Act applicable to that Schedule. Schedule E, in s. 156, provides that tax shall be charged in respect of any office or employment on emoluments therefrom falling under one or more of the Cases which are set out. It is for the purpose of ascertaining the tax to be charged on these emoluments that we have the "Rules applicable to Schedule E" in Sch. 9, including para. 7. So para. 7 has no *raison d'être* or existence except to calculate the charge to tax on emoluments. It is not concerned with emoluments which are not subject to a charge to tax; and it is common ground that the son's French emoluments in this case are not subject to a charge to tax. So para. 7 does not directly define the son's emoluments or income. It is then submitted that para. 7 is merely declaratory of what "income" would be apart from the paragraph. Assuming that "income" must mean net income, I for my part am at a complete loss to understand why net income must necessarily (and, of course, on the hypothesis that para. 7 never existed) be income from which the only permissible deductions are the extremely limited expenses specified in para. 7. The narrowness of those expenses has been the subject of so much criticism that I trust there is no need to elaborate this.

So it seems to me that "the emoluments to be assessed" mentioned in para. 7, after deduction of the expenses therein specified, (1) has no place in the Act except to ascertain emoluments on which tax is to be charged, and (2) is not declaratory of what income or even net income would be apart from para. 7. If, however, para. 7 does not apply directly to the calculation of the son's income in this case nor indirectly as being truly declaratory of what income is apart from para. 7, then it seems to me that the Crown's definition of "an income" by reference to the para. 7 emoluments collapses. Even if it were sought to define "an income" as net income independently of para. 7, there would be the formidable difficulty of identifying what deductions from gross income should be made in arriving at net income—which, very understandably, may well be why no attempt was made to do so and the Crown's case was rested exclusively on para. 7.

I have now dealt with what appears to me to be the nub of the case, but I will consider how far other matters canvassed in the very able arguments addressed to me affect this conclusion. It was conceded by the Crown that the Income Tax Act 1952 has references to "income" where income means income chargeable to tax. Thus, Lord Macmillan in *Perry* v. *Astor*[1] 19 T.C. 255, at page 290, referred to "any income" in the Income Tax Act 1918 as being reasonably construed to mean any income chargeable with tax. The Crown, however, pointed out by reference to ss. 458, 412 and 227 that "income" was also used to refer to income not chargeable to tax. But in those cases the character of the income was clearly identified by the Statute. It was suggested that the reference in the proviso to s. 212(4) to "any income to which the child is entitled as the holder of a scholarship", etc., shows that "an income" in the paragraph preceding the proviso must include income not chargeable to tax, on the ground that scholarships are not chargeable to tax. But this suggestion fails, as it appears that all scholarships are not free of charge to tax.

Reference was made to *Martin* v. *Lowry*[2] 11 T.C. 297, where, at page 315, it is pointed out that, particularly in the Income Tax Acts, words do not always have the same meaning, and that in construing them regard must be

(1) [1935] A.C. 398. (2) [1927] A.C. 312.

had to their context; and to the statement of Lord Salvesen in *Scottish Shire Line Ltd.* v. *Lethem*(1) 6 T.C. 91, at page 99, that:

> "Even in a taxing statute it is legitimate to consider which of two possible constructions is most in accordance with the spirit and intention of the Act."

Lord Macmillan thus states the law in *Perry* v. *Astor* 19 T.C. 255, at page 288:

> "So far as the intention of an enactment may be gathered from its own terms it is permissible to have regard to that intention in interpreting it, and if more than one interpretation is possible, that interpretation should be adopted which is most consonant with and is best calculated to give effect to the intention of the enactment as so ascertained. More especially, where two sections forming part of a single statutory code are found, when read literally, to conflict, a court of construction may properly so read their terms as, if possible, to effect their reconciliation."

The second sentence which I have quoted from Lord Macmillan's speech states a principle of construction that is very familiar and regularly applied in these Courts. The first sentence makes it clear that the Court is to regard the intention of the Act in so far as it is established by the terms of the Act interpreted in accordance with the well-established principles of construction. The intention is itself ascertained by construction. It is, as any judicial conclusion must be, ascertained by an objective process of reasoning which can be tested, and not established by guesswork or some mystique of determination which would make legislators of judges.

The suggestion which is persuasively made here is that the spirit and intention of s. 212 is to alleviate the burden of taxation on a parent who has to pay for the maintenance of a child, and to recognise that, if a child has money of his own, the need to lessen the burden is correspondingly diminished, and therefore "an income" in s. 212(4) should be construed as including income of the child not brought into the United Kingdom at all and not chargeable to tax. But the conclusion does not follow from the premises. If the spirit and intention were to reduce the relief where the child has money of his own, not only a child's income but his capital also should fall within it. Why should a child's money which he has earned and worked for be counted, but not a windfall? The answer which would immediately occur would be, "Because the Act is an Income Tax Act". But if the child's money is thus to be limited to his income, this is a qualification to the suggested spirit and intention; and if there is that qualification because the Act is an Income Tax Act, why should not the qualification go to the income which such Acts tax and not to the income which they do not tax? An interpretation so governed, as the Crown suggests, by the spirit of the Act might in some respects, at any rate, as pointed out by the Respondent, be reasonably considered to defeat that very spirit. Thus, if the son in this case were, in his second year in France, to send home earnings of his first year, the son would be chargeable to tax in that second year on earnings in respect of which his father would have suffered deduction from allowance in the first year. As so often, particularly in tax Statutes, the spirit and intention of the Act in this case is subject to such uncertainty, at any rate in its application to this particular provision, that it may provide a misleading rather than a reliable guide, and in any case affords a less certain guide than the construction of the words without resort to conceptions of spirit and intention.

(1) 1912 S.C. 1108.

(Ungoed-Thomas J.)

It was said that throughout the Income Tax Acts income had some clearly defined characteristics. But the difference between the parties arose not so much over some characteristics of income as in identifying and defining the particular income within s. 212(4). Even so, however, the taxpayer countered the Crown's contention that income in the Acts did not include fortuitous payments by reference to s. 376, under which fortuitous payments are deemed to be income for income tax purposes. This emphasised the difficulty of treating as income within the Act income which the Act itself does not provide means of defining. This brings us back, of course, to the wisdom of the Crown in basing its case on the definition provided by para. 7—and to the danger of attempting to base it on some conception of income which the Act does not make precise.

The history of the category of reliefs which includes s. 212(4) is of assistance. Child allowance goes back to s. 68 of the Finance (1909–10) Act 1910, where it depended not in any way on the income of the child but on the total income of the parents. Section 9 of the Income Tax Act 1918 similarly made relief of various kinds, including relief in respect of children, dependent on the amount of the parent's income, namely, "his total income from all sources for the year of assessment, estimated in accordance with the provisions of this Act". This total income clearly means the net income chargeable to tax in respect of which relief to the extent specified is given; and the references in later sections in which relief is given to limits of "the income" of the taxpayer clearly referred to the "total income" mentioned in s. 9. However, in the case of relief in respect of dependent relatives the relief was by s. 13(1) limited to those "whose income from all sources does not exceed twenty-five pounds a year". So in the case of these relations the relief was limited, not only by reference to the taxpayer's income, but also by reference to the income of the person in respect of whom relief was given; by reference in the case of the taxpayer to "his total income from all sources for the year of assessment", and in the case of the person in respect of whom relief was given to his "income from all sources". This appears clearly to echo "total income from all sources for the year of assessment", and to have the same meaning, that is, income chargeable to tax.

When this section was replaced by s. 22(1) of the Finance Act 1920, that later section referred to the dependent relative's income as "total income from all sources". "Total income from all sources" was a term of art before these Acts, and was first defined by Statute in the Finance Act 1927, s. 38(2), replaced with immaterial modification by s. 524(1) of the Income Tax Act 1952. Section 524(1), reads:

> "In this Act, 'total income', in relation to any person, means the total income of that person from all sources estimated, as the case may be, either in accordance with the provisions of this Act as they apply to income tax chargeable at the standard rate or in accordance with those provisions as they apply to surtax."

The Finance Act 1920, s. 17 and Sch. 4, replaced the relief provisions in ss. 9 to 13 of the Income Tax Act 1918 by the provisions of ss. 17 et seq. of the 1920 Act. In s. 21(3) there first appears the provision corresponding to s. 212(4) in this case. It reads:

> "No deduction shall be allowed under this section in respect of any child who is entitled in his own right to an income exceeding forty pounds a year".

So we have in s. 21(3) of the Finance Act 1920 the extension to relief in respect of children of the principle of limitation by reference to the income of the

dependant in respect of whom relief is given contained in s. 13(1) of the Income Tax Act 1918 and s. 22(1) of the 1920 Act. This limitation on the relief in respect of the dependent relative is by reference to his chargeable income, so it would be strange if the limitation on the relief in respect of a child by reference to the child's income were by reference to some other income than chargeable income. Section 17(1) of the Finance Act 1920, which introduces the relief sections, is in these terms:

> "An individual who, in the manner prescribed by the Income Tax Acts, makes a claim in that behalf and who makes a return in the prescribed form of his total income shall be entitled for the purpose of ascertaining the amount of the income on which he is to be charged to income tax (in this Act referred to as 'the taxable income') to have such deductions as are specified in the five sections of this Act next following made from his assessable income."

"Assessable income" is defined by s. 33 as follows:

> "The expression 'assessable income' in the case of any income other than earned income means the amount of that income as estimated in accordance with the provisions of the Income Tax Acts."

And "taxable income" means income after deductions for relief.

The Crown recognises that if "an income" in s. 212(4) of the Income Tax Act 1952, replacing s. 21(3) of the Finance Act 1920, was either such income, the taxpayer would be entitled to succeed. But it is suggested that the omission in s. 21(3) to refer to any such income instead of to "an income" indicates that "an income" does not bear either of these two meanings. But even so this would still leave open the question what meaning it does bear. And, for the reasons which I have given, it seems to me that the history of this relief legislation supports the conclusion, to which I would have come even apart from it, that "an income" means chargeable income.

Reference was made to *Perry* v. *Astor* 19 T.C. 255 and *Whitney* v. *Commissioners of Inland Revenue*[1] 10 T.C. 88, and particularly to the observations of Lord Dunedin in the latter case, at page 109, that:

> " . . . income of a non-resident in the United Kingdom accruing out of the United Kingdom and not brought within the United Kingdom does not fall to be estimated according to the provisions of this Act."

It seems, for reasons already given, that that observation would be as applicable to the income of a person in respect of whom relief is claimed as to the income of the person claiming the relief. There is no provision in the Act for estimating any such income which is not chargeable for tax.

The latest case which bears on this issue is *Prince* v. *Phillips* (1961) 39 T.C. 477. In that case a claim for relief was made by a parent in respect of a child who earned wages; the parent claimed to deduct from those wages the cost of the child travelling to and from work and of his midday meal. Buckley J. observed, at page 480:

> "It has been submitted on behalf of the Crown that 'income' in Sub-section (4) must mean income in the same sense that it means elsewhere in the Act, that is to say, income for Income Tax purposes; and my attention has been drawn to two cases, *Ricketts* v. *Colquhoun*[2] . . . and *Sanderson* v. *Durbridge*[3] . . . which establish that for the purpose of tax under Schedule E the taxpayer is not entitled to deduct from his income expenses which do not arise actually in the performance of his

[1] [1926] A.C. 37. [2] 10 T.C. 118; [1926] A.C. 1.
[3] 36 T.C. 239; [1955] 1 W.L.R. 1087.

(Ungoed-Thomas J.)

> office or employment, such as the cost of travelling to and from his work or the cost of providing himself with food during that part of the day when he is at work. I think that that submission is sound. Indeed, if it were not so, it seems to me that it would be exceedingly difficult ever to arrive at the amount of income which the child is said to be entitled to in his own right, because it would be extremely difficult to determine precisely what expenditure really was so essential as to be a proper deduction. I think travelling expenses and the cost of providing himself with a midday meal is something which the child has to provide out of his income, not something which has to be deducted before ascertaining his income."

In that case the child's income was chargeable to tax under Schedule E and fell within Sch. 9, para. 7; and in the circumstances of that case there was no occasion for considering whether para. 7 provided for the calculation of income not chargeable to tax. But Buckley J. did hold that "income" in s. 212(4) meant income for income tax purposes. That income for income tax purposes was income from which, as stated by Buckley J., at page 479, the Crown admitted National Insurance contributions to be a legitimate deduction. Section 377(2) of the Income Tax Act 1952 provides that:

> "the total income of that person"—namely, the taxpayer who pays the contribution—"for that year of assessment shall be calculated accordingly for all the purposes of this Act".

So it seems to me that Buckley J. was treating "income for income tax purposes" as income chargeable to tax. Further, he emphasised that unless the Act provided for the calculation of an income it would be extremely difficult to determine it. And in the view which I have expressed, the Act does not provide for the calculation of income not made chargeable to tax.

So my conclusion is that the taxpayer is entitled to succeed on this appeal.

Bates—As for costs, my Lord, it will be remembered that there was an agreement that the Revenue would pay the taxpayer's costs in any event, and if the amount of the Respondent's costs is not agreed they should be taxed on a common fund basis. The point of that is that we have an order for taxation, and can go before the Master on *quantum* if the Respondent's costs are not agreed.

Phillips—That is in line with the agreement, my Lord.

Ungoed-Thomas J.—Very well; it is ordered accordingly.

The Crown having appealed against the above decision, the case came before the Court of Appeal (Danckwerts, Salmon and Fenton Atkinson L.JJ) on 29th and 30th April 1968, when judgment was reserved. On 15th May 1968 judgment was given in favour of the Crown (Danckwerts L.J. dissenting) on the question whether the word "income" in s. 212(4), Income Tax Act 1952, included income outside the charge to United Kingdom tax, but against the Crown on the question of the expenses to be allowed in computing such income.

F. Heyworth Talbot Q.C. and *J. Raymond Phillips Q.C.* for the Crown.

A *H. H. Monroe Q.C.* and *J. Holroyd Pearce* (for *Stewart Bates*) for the taxpayer.

The following cases were cited in argument in addition to those referred to in the judgments:—*Special Commissioners of Income Tax* v. *Pemsel* 3 T.C. 53; [1891] A.C. 531; *Martin* v. *Lowry* 11 T.C. 297; [1927] A.C. 312; *Johnstone* v. *Chamberlain* (1933) 17 T.C. 706.

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Danckwerts L.J.—This is an appeal from a judgment of Ungoed-Thomas J. dated 24th July 1967 dismissing an appeal of the Crown from a decision of the General Commissioners of the Division of West Goscote in the County of Leicester on 19th May 1966. The date of the Case stated by the Commissioners is 30th November 1966.

C The question to be decided arises upon the provisions in the Income Tax Acts relating to children's allowances obtainable in certain circumstances. It will be convenient to set out the relevant provisions of s. 212 of the Income Tax Act 1952 at the beginning. Section 212 provides as follows:

> "(1) If the claimant proves that he has living at any time within the year of assessment any child who is either under the age of sixteen years
D or who, if over the age of sixteen years at the commencement of that year, is receiving full-time instruction at any university, college, school or other educational establishment, he shall, subject to the provisions of this and the next following section, be entitled in respect of each such child to a deduction from the amount of income tax with which he is chargeable equal to tax at the standard rate on the appropriate amount for the child.
E In this provision 'child' includes a stepchild and an illegitimate child whose parents have married each other after his birth. (1A) The appropriate amount for the child shall vary according to the age of the child at the commencement of the year of assessment, and subject to subsection (4) of this section—(*a*) for a child shown by the claimant to have been over the age of sixteen, shall be one hundred and sixty-five pounds . . .".

F Then in subs. (4) comes the provision which raises the question in the present case:

> "(4) In the case of a child who is entitled in his own right to an income exceeding £115 a year the appropriate amount for the child shall be reduced by the amount of the excess, and accordingly no relief shall be allowed under this section where the excess is equal to or greater than
G the amount which apart from this subsection would be the appropriate amount for the child: Provided that in calculating the income of the child for the purpose of this subsection no account shall be taken of any income to which the child is entitled as the holder of a scholarship, bursary, or other similar educational endowment."

The facts as found by the Commissioners in the Case Stated are as
H follows:

> "(i) The Respondent has a son who, being over the age of sixteen years, was at the commencement of and during the year of assessment 1965–66 an undergraduate at the University of St. Andrews, where he was reading modern languages. (ii) The son had been advised and encouraged

(Danckwerts L.J.)

by his tutor to reside in France and to work there as an English assistant (or temporary teacher) at a *lycée* in order to perfect his knowledge of French. (iii) The son obtained such an appointment, which he held from October 1964 until June 1965 (the French academic year), and in October 1965 he returned to St. Andrews University to resume his degree course. During the year of assessment 1965–66 the son carried out the duties of such appointment for a period of two and a half months, receiving therefor in France a gross emolument equivalent to £150. (iv) During the son's period of residence in France board was not provided, and he was required to provide temporary board and travelling and necessary incidental expenses at his own sole charge. (v) Hence the son spent in France all that he had earned, and none of the emolument of £150 was remitted to or enjoyed in the United Kingdom."

The question, therefore, is whether in the year of assessment 1965–66 the son was entitled in his own right to an income exceeding £115 within the meaning of s. 212(4) of the Income Tax Act 1952. It must be appreciated, of course, that no part of the earnings of the son in France in the circumstances was taxable in the United Kingdom, as no part thereof was remitted to that country.

The Crown claimed that the amount of the £165 allowance should be reduced by a sum of £35, being the difference between £115 and £150. Both the General Commissioners and the learned Judge rejected the Crown's claim and held that the taxpayer was entitled to the full allowance of £165. Only a sum of £35, of course, is at stake, but the Crown objected to the decisions because they upset a practice, adopted by the Inland Revenue, so we were told, over the last 40 years, by which, though they could not tax such foreign income, they treated the income receivable abroad, reduced only by the limited expenses allowable under rule 7 of the Rules applicable to Schedule E of the Income Tax Act 1952, as operating to produce a reduction in any children's allowance for the purposes of s. 212.

The idea behind the provisions of s. 212 no doubt is that it is not equitable or reasonable that a taxpayer should receive the allowance under the section when by reason of his son's income in his own right the parent is not being put to any expense or not the whole expense of his son's education. The real point, however, is whether income of the son which is not taxable, and may be said, therefore, not to be income for the purposes of the Income Tax Acts at all, should be taken into account for the purposes of any provision of the Income Tax Act in the absence of any express provision to that effect.

A very strong point against the contentions of the Crown is that Schedule E and rule 7 of Sch. 9 to the Income Tax Act 1952 have no application, and there was, so far as I can see, no lawful justification for the Inspector to apply that Schedule or that rule to the foreign income of the son in the present case. There was therefore no method of ascertaining the relevant income of the son, and the application of the rules relating to Schedule E to such income was arbitrary and unlawful. There is no relevant provision for the purposes of this case, as there is in Sch. 5 to the Finance Act 1957 in relation to the income of overseas trade corporations. However, it is necessary to consider the arguments which were put forward for and against the claim of the Crown.

Our attention was called to s. 458, a general provision exempting scholarship income from income tax, and it was suggested that if income exempted from income tax was not within the terms of s. 212(4) the proviso to that

A subsection was otiose. I am not impressed by the argument, because it may well have been thought convenient in dealing with children's allowances to make the point clear. The provisions of s. 212 have their origins in the Finance Act 1920, ss. 21 and 28. Section 21(3) is in similar terms to s. 212(4) (though the figure then was £40), and contains a similar proviso excluding scholarship income. Section 28 contains a provision, similar to s. 458, providing for exemp-
B tion of scholarship income from tax. An argument was attempted to be founded on the fact that the two provisions were contemporaneous, but I could not find any relevant deduction from this occurrence. I do not find this of any help to the problem which has to be solved.

It is common ground (1) that "entitled in his own right" refers to income to which the child is legally entitled, in contradistinction to voluntary allow-
C ances in respect of which the child has no enforceable legal rights, (2) that "an income" covers earned income, even if that income is the earnings of short-term employment, (3) that any earnings which are not remitted to this country are not chargeable with income tax.

Admittedly, in some cases in the Income Tax Act "income" does mean nothing but taxable income: see *Perry* v. *Astor*[1] 19 T.C. 255. That case
D concerned the income of two settlements with New York trustees created by a British resident in respect of funds in New York, and it was held that the settlor, who was entitled to the income of the settlements and had a power to revoke the settlements, was not liable to income tax under s. 20(1) of the Finance Act 1922 except in respect of income of the settlement which was remitted to the United Kingdom. Lord Macmillan, at pages 289–90, said:

E " ... he pays on the amount actually brought home. It is with this existing scheme that Section 20, which is to be read along with it, has to be reconciled. I have shewn how on the Crown's reading these enactments come into conflict. The reconciliation is, I suggest, to be effected by reading Section 20 as designed to effect a notional amalgamation of two existing incomes both charged to Income Tax by the existing law. If the
F words 'any income' are construed, as they reasonably may be, to mean any income chargeable with tax under the British Finance Act of the year, the difficulties of the Crown's interpretation to a large extent disappear. For the income of the American trustee, being the income of a foreign non-resident, is not brought into charge, while the income so far as received by the resident in this country is, consistently with the scheme of
G the Income Tax Acts, brought into charge under its appropriate head—in the present instance Rule 2—and is by force of Section 20 amalgamated with the resident's income derived from sources within the United Kingdom."

Of course, the facts of that case in the House of Lords were different from those of the present case, but I find Lord Macmillan's words very helpful,
H because, when it is found that there are no Schedules of the Income Tax Act—Schedule E or Schedule D or any other Schedule—that are applicable, because the foreign income is not subject to tax under the Income Tax Acts, so that it is impossible for the Inland Revenue to establish what proportion of the gross income should be assessable, then the difficulty disappears if, as Lord Macmillan says, the "income" referred to in the relevant section or subsection is
I construed to mean income chargeable with tax under the British Income Tax or Finance Acts.

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[1] [1935] A.C. 398.

(Danckwerts L.J.)

Again, in *Whitney* v. *Commissioners of Inland Revenue*(2) 10 T.C. 88, it was said in the House of Lords, in the case of a non-resident American who received income from the United Kingdom, that the word "income" in the Income Tax Acts means "such income as is within the Act taxable under the Act"; *per* Lord Wrenbury, at page 113.

This makes sense to me. As I have already indicated, if the Inspector cannot lawfully assess the income to tax, he cannot apply the rules of Schedule E or any other Schedule, and he cannot compute the income for the purposes of the Income Tax Acts. In my view, it is not admissible, by speculatively attributing to Parliament an intention on the ground that it might be fair and reasonable, to bring into a Statute provisions which are not to be found in the Statute. The provisions of the Statute must be taken as they are, and the Court is not at liberty to improve them because a situation which might be anticipated is not provided for.

We were referred in argument to a number of sections where special words occurred, either in regard to other exemptions or reliefs or allowances or in regard to cases where there are special provisions with the object of bringing the income of non-residents within the ambit of the Income Tax Acts. In s. 22 of the Finance Act 1920, which provides for allowances in the case of dependent relatives, the phrase "whose total income from all sources does not exceed £50 a year" appears, and it was said that, as "total income from all sources" is a well-known phrase used in regard to income chargeable with tax, the words "an income" in s. 21(3) could not mean a taxable income. This I found unconvincing and a *non sequitur*. A reference was also made to s. 26(1), where there is a reference to "total income ... from all sources estimated in accordance with the provisions of the Income Tax Acts". It was said that "income" in s. 21 of the 1920 Act denoted income which has certain well-known characteristics—a receipt or incoming—a net profit as distinguished from a gross income, and not of a capital nature, and receivable as a matter of right and not bounty. Well, of course, all that is very true—capital is not income—and I should have thought that taxation in the Income Tax Acts was directed to profits and not to gross income. But I am unable to see how this solves the problem in the present case. We were referred to s. 412, which is designed to prevent persons residing in this country evading income tax by transferring assets to persons resident abroad. But this is a very special provision dealing with a particular situation which involved special foreign income, and I do not find it in the least material to the problem which we have to consider. Mr. Heyworth Talbot pointed out to us that since 1927 there has been a change by which allowances in respect of children are no longer given by way of deduction in assessing income but are instead given by way of claims for relief against taxation. I do not find that this makes any difference to the result of this case.

In my view, the income received by the son in France and not remitted to the United Kingdom is not relevant for the purposes of s. 212 of the Act. I think that the General Commissioners and the learned Judge reached the correct decision and the appeal should fail.

A further point was discussed. It was said that in any event, if the French income of the son was material for the purposes of s. 212, expenses were incurred such as travel expenses and other allowable expenses which would reduce the £150 earned below £115. There was a finding by the Commissioners in para. 6(iii) of the Case Stated in these terms:

(2) [1926] A.C. 37.

A "thus in the present case the son had incurred travelling expenses and the excess cost of his living at the place of his employment (which is notoriously high in France), both incurred essentially and manifestly totalling more than £35."

But *Prince* v. *Phillips* (1961) 39 T.C. 477 shews (in a case that did not involve foreign income) that for the purposes of s. 212(4) no more deductions can be B claimed than those allowable to an ordinary taxpayer. It was not clear, therefore, in the finding of the Commissioners what particular expenses they were referring to. In relation to the view which I have formed on the case, this point does not arise. If it did, it would be necessary to refer the case back to the General Commissioners to specify the details of the expenses to which they were referring.

C **Salmon L.J.**—For the purpose of the Income Tax Acts, income has three essential characteristics: (1) it represents net gains and not, for example, gross takings; (2) it is received as of right and not as bounty; (3) it is received by way of revenue and not as capital. In the Income Tax Acts the word "income" is used sometimes to denote only income which is chargeable to tax and sometimes to include income which is not so chargeable. Undoubtedly it is D used far more often in the former than in the latter sense, for, alas, in most cases income is chargeable to tax. The word "income" is certainly wide enough in its ordinary and natural meaning to cover non-taxable income. The context in which it is used may, however, require that word to be given a restricted meaning.

The problem which arises in this case is, what does the word "income" E mean as used in s. 212(4) of the Income Tax Act 1952? The taxpayer contends that is must be given a restricted meaning, that is to say, income chargeable to tax. The Crown contends that it must be given its ordinary and natural meaning, that is to say, any income whether or not chargeable to tax. In order to solve this problem I think that the Courts are entitled and indeed bound to look for the legislative purpose behind s. 212 and its precursor, s. 21 of the Finance F Act 1920.

This purpose must be ascertained from the language of the Statutes themselves. If this language does not reveal the purpose of the Legislature, the Courts are not entitled to guess at it or to assume some purpose which seems to them reasonable. Sometimes it is very difficult, if not impossible, to discover the purpose of the Legislature, and the Courts must then construe the language G of the section concerned without this aid. In the present case, however, there is no difficulty in discovering the legislative purpose—and indeed it is not disputed by the taxpayer. Parliament recognised that the maintenance of children imposes some financial burden upon parents and accordingly allowed deductions for children from the income tax with which parents are chargeable. In the present case the deduction to which the taxpayer would admittedly be H entitled but for subs. (4) is a sum equal to the tax chargeable at the standard rate on £165: see s. 212(1) and (1A) of the 1952 Act. Parliament, however, also recognised that if a child had an income of its own, at any rate above a certain figure, its maintenance would be less of a financial burden to its parents than otherwise; the higher the child's income, the less the financial burden would be. Parliament accordingly provided for a reduction of the amount I which the parent might deduct from his tax in respect of the child without an income. Apparently it was thought that if the child's income did not exceed £115 a year, this should not affect the parent's right to a deduction from tax

(Salmon L.J.)

under s. 212(1), but that "in the case of a child who is entitled in his own right to an income exceeding £115 a year" the deduction for the child should be reduced by the amount of the excess: see s. 212(4). A

In the present case the taxpayer's son received £150 in the year of assessment from earnings as a temporary teacher in a French *lycée*. He had gone there in order to perfect his French, on the advice of his tutor at St. Andrews University. He managed, I imagine with little difficulty, to spend the whole of the £150 during his sojourn in France. Since this sum had been earned wholly outside the United Kingdom and none of it had been remitted to the United Kingdom, it was clearly not chargeable to income tax. The taxpayer claims, and the learned Judge and the Commissioners have decided, that because these earnings were not chargeable to tax they cannot be "income" within the meaning of that word in subs. (4). I am afraid that I am unable to agree. I can see no reason for giving the word "income" such a restricted meaning in this subsection, particularly when in other parts of the Act it is clearly used in its wider sense. B C

It would in my view be very strange that a father whose son earns, say, £150 a year subject to tax is obliged to make a reduction in the amount he is entitled to deduct for his son's maintenance, yet a father whose son earns £150 a year tax free is not obliged to make any such reduction. This would make no sense to me, for the father whose son has a tax-free income is presumably better placed *qua* his son's maintenance than the father whose son's income is chargeable to tax. Certainly I cannot understand why any distinction should be made in favour of the former. D

I hope that I am not importing into the Statute any provisions that are not there, nor altering any words used in subs. (4)—nor adding to them. On the contrary, I think that the taxpayer's contention involves adding the words "and which is chargeable to tax" after the words "an income exceeding £115 a year" in the subsection. I am not prepared to do this. In my view the word "income" in subs. (4) bears its ordinary and natural meaning, that is to say, income whether or not chargeable to tax. In my judgment it is not permissible to give the word the restricted meaning for which the taxpayer contends, particularly as in my view such a meaning is entirely out of harmony with the manifest intention of the Legislature. It is upon this ground that I base my judgment. E F

Some additional grounds were relied upon by the Crown, and I will deal with them shortly. It was said, quite rightly, that the word "income" in s. 212(4) must have the same meaning as that which it bears in s. 21 of the Finance Act 1920. The proviso to s. 21(3) is substantially in the same terms as the proviso to s. 212(4) of the Act of 1952: G

> "Provided that in calculating the income of the child for the purposes of the foregoing provision no account shall be taken of any income to which the child is entitled as the holder of a scholarship, bursary, or other similar educational endowment." H

For the first time income from scholarships and the like was exempted from income tax by s. 28 of the Act of 1920, which is reproduced in s. 458 of the Act of 1952. It was argued on behalf of the Crown that unless "income" in s. 21 covered income which was not chargeable to tax the proviso would be otiose. I agree. I do not think, however, that this argument lends much support to the Crown's case. Otiose provisions are not uncommon in Statutes, and it may well be that this proviso was inserted *ex abundanti cautela*. Its existence has not influenced me in the conclusion at which I have arrived. The I