IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No GYCV2021/006
GY Civil Appeal No 60 of 2005

BETWEEN

JAMES RAMSAHOYE **APPELLANT**

AND

GUYANA REVENUE AUTHORITY **RESPONDENT**

Before The Honourable: **Mr Justice A Saunders, PCCJ**
Mr Justice J Wit, JCCJ
Mr Justice W Anderson, JCCJ
Mr Justice D Barrow, JCCJ
Mr Justice A Burgess, JCCJ

Appearances

Mr C V Satram, Mr R Satram and Mr Ron Motilall for the Appellant

Ms Judy Stuart-Adonis, Ms Hessaun Yasin-Nandlall and Ms Maritha Halley for the Respondent

Practice and Procedure - Appeals - Judgment - Execution of - Quashing order granted by the High Court - Respondent appealed decision of High Court to quash decision - Quashing order upheld by the Court of Appeal - Erroneous order of the Court of Appeal that appeal allowed in part - Enforcement of Quashing Order - Application to Court for payment out of court of a sum of money paid into court pending the determination of the appeal.

Income Tax - Tax unlawfully levied - Unjust enrichment - Whether Damages for breach of contract of employment are exigible to Income Tax - Whether taxpayer can enforce the return of a sum of money unlawfully deducted by a taxing body - Whether taxpayer entitled to Interest - Income Tax Act Cap 81:01, s 5b.

SUMMARY

Shortly after the hearing of this appeal, the Caribbean Court of Justice gave judgment in favour of James Ramsahoye ('the taxpayer') ordering the payment to him of moneys unlawfully withheld from him, which the Guyana Revenue Authority ('the Revenue') had garnished. The Court now delivers its Reasons for Decision.

In separate proceedings, in a judgment delivered on 2 March 2004 the Court of Appeal had awarded damages to the taxpayer of approximately G$78 million together with interest and costs to be paid by his former employer, Linden Mining Enterprise Ltd ('Linmine') for wrongful termination of his employment. Damages were awarded for loss of salary for 41 months and for pension for the period January 1972 to June 1998, together with interest.

In response to that award, the Guyana Revenue Authority ('the Revenue') wrote to the taxpayer on 18 August 2004 allegedly assessing income tax to be paid by him for the period 1997-99 for years of income 1996-98 and undertook to mail a formal notice of assessment shortly. The Revenue never mailed the formal notice of assessment but instead on 29 September 2004 wrote directly to Linmine demanding that Linmine pay to the Revenue the sum of G$45,132,975.00 representing income tax due and owing by the taxpayer for the years 9 January 1990 - 31 May 1998; and on the damages awarded by the Court of Appeal for loss of salary for 41 months pursuant to ss 93 and 102 of the Income Tax Act, Cap 81:01 ('the Act').

Linmine paid the Revenue the stipulated sum by deducting it from the damages it owed the taxpayer without informing the taxpayer. The taxpayer only found out about Linmine's payment to the Revenue when he sought to enforce the judgment against Linmine. The taxpayer therefore was totally denied his right to dispute the Revenue's assessment.

The taxpayer initiated proceedings in the High Court of Guyana asserting that the Revenue's actions were in breach of natural justice, in excess of jurisdiction, unreasonable and unlawful. Persaud J issued an order absolute of *certiorari* quashing the assessment of tax; however, he stayed immediate execution of his order.

The Revenue appealed to the Court of Appeal. The Court of Appeal upheld the quashing order of the High Court on the ground that the assessments and garnishment were unlawful in that the Revenue had failed to comply with the statutory procedure governing those matters. However, the Court of Appeal made no order for payment to the taxpayer of the money that the Revenue had garnished and that the court had ordered to be lodged with the Registrar of the Supreme Court.

Notwithstanding that it had upheld the quashing of the assessments and garnishment, in the formal Order that it subsequently issued, the Court of Appeal recorded:

> IT IS ORDERED THAT this Appeal be and is hereby allowed in part.
> IT IS FURTHER ORDERED THAT the provisions of the Income Tax Act Chapter 81:01 as to notice of assessment, objection and Appeal must be complied with in relation to the Respondent.

The taxpayer appealed against the order that allowed in part the appeal and sought an order that the moneys withheld be paid to him.

Barrow JCCJ delivered the Reasons for Decision of the majority of the Court. Those Reasons relied on the effect of and the Court of Appeal's decision upholding the quashing of the Revenue's assessment of income tax for (i) income for the years 1990-98 (ii) on the damages for the equivalent of 41 months' salary. The Court decided that the Court of Appeal had determined that the violation of the dispute resolution procedures under the Act (namely ss 72,78, 79, 82 and 86 dealing with the requirement for notice, the procedure for objecting to an assessment, appeals to the Review Board and then finally appeals to a Judge in Chambers) vitiated the two heads of assessment (Income tax for the years 1990-98, and income tax on damages for loss of 41 months of salary). Accordingly, the quashing of the unlawful taking of the taxpayer's money remained entirety effective and operating.

The Reasons noted that given the Court of Appeal had upheld the quashing of the assessment, the matter before the Court could have been resolved by a simple application to the court below for payment out of court of the sums lodged with the Registrar. The Court explained that success on a ground of appeal, in this case that the damages were taxable *in principle*, does not mean

that the appeal is allowed in part. The decision of a ground is part of the reasoning process that ends with a judgment that either grants or refuses the relief or remedy sought. The success or failure of a ground may impact the grant or refusal of the order for relief, or it may be incidental or inconsequential. In this case, the decision on the ground that the damages were taxable in principle had no effect on the result or outcome of the appeal. The Court therefore found that the order of the Court of Appeal that the appeal was allowed in part was wrong.

Wit JCCJ in his reasons agreed with the reasons of the majority and went further to consider the issue of whether damages for breach of contract of employment was exigible to tax. Wit JCCJ held that the damages paid to the taxpayer fell squarely under s 5(b) of the Act as they constitute compensation for the termination of a contract of employment. The damages were meant to compensate the taxpayer his salary *as if* he had not been wrongfully dismissed. The payment of the compensation exactly replaced the payment of his salary (his income) and there was no plausible reason why that payment should not be taxed.

Burgess JCCJ also agreed with the reasons of the majority but went on in his reasons to consider two issues: (i) whether the Revenue had authority to tax the damages as employment income; and (ii) whether the taxpayer can enforce the return of the sum of G$45,132,975. On the first issue, Burgess JCCJ held that in order for the damages to be chargeable to income tax the damages must be 'income' for the purposes of s 5(b) of the Act. Further, if the damages are construed as income, the income must be 'from the taxpayer's employment.' Burgess JCCJ considered that damages by their very nature are compensatory and held that s 5(b) of the Act extended the meaning of income and gains or profits of employment to include compensation for the termination of employment, therefore including the damages awarded to the taxpayer. The second element was the consideration of whether the gain or profit was 'from' any office or employment. Burgess JCCJ held that the word 'from employment' entails a search for the reason or causation for the payment. The employment must be shown to be a proximate cause of the payment, and not merely a circumstance without which the payment would not have been made. Burgess JCCJ concluded that the damages awarded in the instant case was not 'from' employment as (i) the Court of Appeal awarded the taxpayer income until he reached age 65 as the Court noted that the taxpayer may not have been able to attain comparable employment;(ii)

that the damages were not in respect of any services rendered but was as a result of the taxpayer's wrongful dismissal.

On the second issue, Burgess JCCJ held that the taxpayer could enforce the return of the sum unlawfully deducted by the Revenue, as a taxing authority who erroneously taxes a person could be ordered to repay the money taxed plus interest as a matter of common law. Burgess JCCJ therefore held that the principle of unjust enrichment applied as the Revenue was enriched; (ii) the enrichment was at the expense of the taxpayer; (iii) it was unjust; and (iv) the Revenue's defence that it was acting pursuant to the powers under the Act is not a defence.

The Appeal was allowed, and the Revenue was ordered to repay the taxpayer the sum of G$45,132,975.00 as well as costs in the sum of US$32,383.39 or its Guyanese equivalent.

Cases referred to:

A-G of Antigua and Barbuda v Goodwin (1999) 60 WIR 249 (AG CA); *A-G v Joseph* [2006] CCJ 3 (AJ) (BB), (2006) 69 WIR 104; *Bata Shoe Co (Guyana) Ltd v Commissioner of Inland Revenue* (1976) 24 WIR 172 (GY CA); *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783; *B G Credit Corp v DaSilva* (1965) 7 WIR 530 (GY PC); *British Transport Commission v Gourley* [1956] AC 185; *Canadian Broadcasting Corp v CUPE* [1987] 3 FC 515; *Comptroller-General of Inland Revenue v Knight* [1973] AC 428; *Goff Construction v R* (2009) 387 NR 325; *Henry v Foster* (1931) 16 TC 605; *Henley v Murray* [1950] 1 All ER 908; *Heywood v Comptroller-General of Inland Revenue* [1975] AC 229; *Hochstrasser v Mayes* [1960] AC 376; *Inland Revenue Commissioner v Lilleyman* (1964) 7 WIR 496 (BCCA); *Persaud v Plantation Versailles and Schoon Ord Ltd* (1970) 17 WIR 107 (GY CA); *Mayor & c of Southport v Morris* [1893] 1 QB 359; *Moses v Macferlan* (1760), 2 Burr 1005, 97 ER 676; *Mitchell v Ross* [1962] AC 813; *Mootoo v A-G of Trinidad and Tobago* (1979) 30 WIR 411 (TT PC); *Moorthy v Revenue and Customs Commissioner* [2018] 3 All ER 1062; *Peel v Canada* (1992) 98 DLR (4th) 140; *Ramsahoye v Linden Mining Enterprise Ltd, Bauxite Industrial Co Ltd* (Guyana CA, 2 March 2004); *Shilton v Wilmshurst* [1991] 1 AC 684; *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71; *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70.

Legislation referred to:

Guyana – Civil Law of Guyana Ordinance, 1953 Ed, Cap 2, Income Tax Act, Cap 81:01; **Malaysia** – Income Tax Act 1967; **United Kingdom** – Income Tax (Earnings and Pensions) Act 2003; Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66); Supreme Court of Judicature Act 1875 (38 & 39 Vict c 77).

Other Sources referred to:

Denbow C H, *Income Tax Law in the Commonwealth Caribbean* (2nd edn, Bloomsbury Professional 2013); Garner B and Black H C*, Black's Law Dictionary* (5th edn, West Publishing 1979); Grindle G, Appendix 1 (Model Income Tax Ordinance) of the *Report of the Inter-Departmental Committee on Income Tax in the Colonies not Possessing Responsible Government* (Cmd 1788, 1922); *Halsbury's Laws of England* (5th edn, 2019) vol 29.

REASONS FOR DECISION
of
The Honourable Justice Saunders, President and The Honourable Justices Anderson and Barrow

Delivered by
The Honourable Mr Justice Barrow

And of
The Honourable Mr Justice Wit

And of
The Honourable Mr. Justice Burgess

17th May 2022

REASONS OF THE HONOURABLE MR JUSTICE BARROW, JCCJ:

[1] On the day following the hearing, the Court gave judgment in favour of the appellant, James Ramsahoye ('the taxpayer') and stated that it would give reasons for its decision. These are the reasons for allowing the appeal and ordering the payment to the taxpayer of the sum of money due to him from his former employer, Linden Mining Enterprise Ltd ('Linmine') which the respondent, the Guyana Revenue Authority ('the Revenue') had garnished.

The Assessment and Garnishment

[2] In separate proceedings, in a judgment delivered on 2 March 2004 the Court of Appeal had awarded damages to the taxpayer of approximately G$78 million together with

interest and costs to be paid by Linmine for wrongful termination of his employment. By a letter to Linmine dated 29 September 2004 the Revenue, pursuant to ss 93 and 102 of the Income Tax Act, Cap 81:01 ('the Act') directed Linmine to garnish or deduct from the damages and pay over to the Revenue the sum of G$45,132,975 as tax due and owing by the taxpayer. Linmine complied with the demand. The letter to Linmine from the Revenue stated:

> Mr. Ramsahoye was in receipt of a salary of US$4330.00 and a taxable allowance of US$750.00 per month from 9th January, 1990 to the 31st May, 1998… [on which Linmine omitted to deduct tax.]
> His total income and taxable allowance for this period was US$513,080: and his taxable income after deducting his allowance … of US$75,750: would be US$437,330. The income tax payable on this sum is US$167,065.
> Mr. Ramsahoye was awarded the sum of US$174,032.49 being salary for 41 months. Income Tax is also payable on the sum less allowance of G$240,000: (US$1,188) for the period of 3 years and 5 months…
> The taxable sum is therefore US$503,942 and the income tax payable is US$223,431: its equivalent being G$45,132,975.

[3] The Revenue did not notify the taxpayer of the assessment, if indeed the letter may properly be regarded as an assessment, or of the demand, and the taxpayer was totally denied the right given by law to dispute the assessment.[1] The High Court quashed the assessment on the ground of that violation of the taxpayer's rights but stayed execution of its judgment for three weeks.

[4] The Revenue appealed against the quashing order, thus staving off payment to the taxpayer of the garnished amount. In an interim order, the Court of Appeal ordered the money be paid into court, and this was done. Even after the Court of Appeal upheld that quashing order, there was no order for the money to be paid out of court to the taxpayer. This continuing denial to the taxpayer of his money helps to explain what the objective of the taxpayer's appeal to this Court was, since there should have been no need for him to appeal given that the order quashing the assessments and garnishment of the money remained standing.

[1] In a letter of an earlier date to the taxpayer the Revenue had informed the taxpayer of his liability to tax in a different amount from the amount demanded from Linmine and had stated they would send a notice of assessment to the taxpayer, which they did not do. As the Revenue did not pursue or act upon that purported assessment, it is mentioned only for completeness; nothing turns on it.

The Order Appealed

[5] In the course of the hearing, the Court inquired of counsel whether there truly had been a need for the taxpayer to appeal the order of the Court of Appeal to this Court. It is apparent that the taxpayer thought he needed to appeal because he did and that was the course of prudence. But the matter was uncertain. It is an uncertainty that was appreciated by counsel for the Revenue, who rightly accepted that perhaps the release of the garnished sum could have been obtained by an application to the Court of Appeal for an order to pay it out of court.

[6] The uncertainty is understandable in the following context. In a High Court order entered on 8 June 2005, Persaud J had issued an order absolute of certiorari quashing: (i) the two purported assessments of tax[2] due from the taxpayer upon which the garnishment was based, and (ii) the direction by the Revenue to the employer to deduct certain sums from an award of damages due from the employer to the taxpayer.

[7] As stated in the High Court quashing order, the sums the Revenue had directed to be deducted were (a) US$167,065 as tax payable for the period 9 January 1990 to 31 May 1998, and (b) US$56,366 as income tax on the damages awarded to the taxpayer as compensation for loss of earnings for 41 months.

[8] As the order stated, it was made:

> … [O]n the ground that the said purported *assessments* of tax and the order directing the … [employer] to deduct and remit were made without or in excess of jurisdiction, are unreasonable, unlawful, unconstitutional, arbitrary, capricious, in breach of natural justice, ultra vires, null and void and of no legal effect … (Emphasis added)

[9] It is emphasised that what the High Court quashed were the purported assessments – in the plural – as the quashing order identified its target.

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[2] It produces clarity to recognise that the High Court judgment treated the letter of 29 September 2004 from the Revenue as comprising two assessments, for the two separate amounts due under separate heads of liability to tax. In the Court of Appeal, the letter is treated as one assessment that addresses two heads of liability to tax.

[10] The Revenue appealed the decision. Having upheld the quashing order as its decision of the appeal, the Court of Appeal subsequently issued a formal order, the relevant parts of which are as follows:

> IT IS ORDERED THAT this Appeal be and is hereby allowed in part.
> IT IS FURTHER ORDERED THAT the provisions of the Income Tax Act Chapter 81:01 as to notice of assessment, objection and Appeal must be complied with in relation to the Respondent.

With respect, the making of an Order in these terms, along with the failure to even mention payment to the taxpayer of the money wrongfully withheld from him, would naturally have produced uncertainty and, indeed, confusion.

[11] In addition, the second limb of the order, which stated that it is further ordered that the procedural provisions of the Act must be complied with in relation to the taxpayer, strongly suggests that it remained open to the Revenue to cure its procedural breaches. That proposition contains the notion that the Revenue remained entitled to retain the taxpayer's money that had been unlawfully taken because the Revenue could comply with the procedural steps it had previously violated and thereby lawfully keep the taxpayer's money.

Construing the Order of the Court of Appeal

[12] In the Decision of the Court dated 21 December 2020, the Court of Appeal had laid out the steps and reasoning that led to the making of the formal order, and a closer reading of the Decision produces an appreciation of the confusion that the Order generated. The part of the Decision in favour of the Revenue that inspired authorship of the minute that the appeal was 'allowed in part', appears at [28], where the Court of Appeal decided that:

> [28] … [T]he Commissioner was entitled, *in principle* to assess income tax on the award … of damages for loss of earnings for 41 months. (Emphasis added)

[13] The expression emphasised in that passage from the court's reasoning makes clear that the court was not deciding on the actual assessment, in this case. The court was pronouncing, in principle, on the liability to tax of the award of damages. So, the Revenue 'succeeded', in principle, in relation to this ground of appeal, by obtaining a decision of the Court of Appeal that the Commissioner, in principle, was entitled to assess income tax on the damages awarded as compensation for lost salary. The Court of Appeal made no contrary pronouncement, in its Decision, on the decision of the High Court to quash the assessment of income tax of US$56,366. Therefore, if the expression may be forgiven, the assessment/s of income tax due from the taxpayer remained quashed.

[14] Where the Revenue's appeal did not succeed, even in principle, was in relation to the assessment of tax for the period 1990-98. The Court of Appeal mentioned two issues with regard to this assessment, at [29]. These were whether the Commissioner had power under s 72 of the Act, to deduct income tax for this period and, more particularly, whether the statutory procedure for dealing with disputes and providing for review and appeals were afforded to the taxpayer.

[15] In its discussion that followed, of the liability to tax under this head, the Court of Appeal made no further mention of the s 72 provision, which establishes a time limit of seven years for the Commissioner to assess a person to tax for a given year of assessment. In combination with s 7 of the Act, the limitation period is effectively cut down to six years. The assessment, in this case, had been made in 2004 for the years 1990-98. As later was accepted by the Revenue, the assessment for the stated years was time barred when it was made.

[16] However, as noted, the Court of Appeal did not further mention s 72 and that the limitation period it specified rendered the assessment invalid. Instead, the court directed its attention to the vitiating breach by the Commissioner, of the statutory procedure, in making the assessment, and the court disposed of the appeal on the basis of that breach. To be clear, the Court of Appeal disposed of the validity of the entire

assessment on a global rather than a separate basis for each assessment or head of liability.

The Statutory Procedure

[17] At [30], the Court of Appeal stated:

> [30] We agree with the Hearing Judge that there was a breach of the processes provided in ss 72, 78, 82 (dealing with appeal to the Review Board), 86 (dealing with the right of appeal to a Judge or to the Full Court), and in the manner in which the powers were exercised under ss 93 and 102 and that these actions resulted in a breach of natural justice to the detriment of the respondent.

[18] That determination benefits from some expansion. Section 78 requires the Commissioner to serve a person whom he has assessed with the notice of assessment, so that the person has the opportunity of disputing the assessment by serving the Commissioner with a notice of objection. Once the notice of objection is served the Commissioner and the person can seek to agree on the assessment. If the person cannot agree with the Commissioner, it is then open to the person to appeal to the Review Board in accordance with the procedure set out in s 82 of the Act. Beyond that, an aggrieved person may appeal against the assessment to a Judge in chambers in accordance with the procedure set out in s 86 of the Act. It is unnecessary to reproduce the detailed procedure laid down in the Regulations as to the way this process operates because it is perfectly clear (and was later accepted) that the Commissioner substantially violated the procedure and the rights of the taxpayer; hence the determination by the Court of Appeal that there had been a breach of natural justice.

The Ambit of the Finding of Breach

[19] Following that finding of breach of natural justice, the Court of Appeal at [31] stated its disposition of the matter in the language that is readily understood and gives rise to no uncertainty. The court stated:

> [31] The substantive taxation issues as to the period for which the taxpayer was liable, and the amounts of the computations are matters on which the procedures for revision by the Commissioner, review by the Review Board and ultimately an appeal to a Judge in Chambers apply. The Commissioner therefore acted unlawfully when he instructed the deduction of the taxes and seemed to disregard the avenues available to the respondent in the event of a dispute. …

[20] Two clear propositions are contained in the court's statement. First, the procedures for review, revision and appeal apply to the 'substantive taxation issues', however they are described. Second, this is put beyond doubt by the statement that the Commissioner acted unlawfully '… when he instructed the deduction of the taxes …' There is no carve-out in that pronouncement: the unlawfulness applied to the taxes, without limitation: to the taxes for 1990 – 98 and to the taxes on the award of damages.

[21] The final sentences in that paragraph of the Decision of the Court of Appeal are dispositive. The court stated:

> [31] … In this regard we uphold the Trial Judge's findings and his quashing of the assessment by the Commissioner. We order that any assessment must comply with the procedures and processes established under the Act.

[22] At the risk of being superfluous, it is recalled that the High Court had quashed the entire assessment(s), which is to say in respect of both unpaid taxes for the period 1990-98 and for income tax due on damages for 41 months. The disposition the Court of Appeal made was to uphold that quashing, without reservation or exception.

Both Heads of Assessment Vitiated

[23] It is that clear decision by the Court of Appeal that led this Court to inquire of both counsel whether the matter of the taxpayer recovering the money that had been unlawfully garnished by the Revenue and later paid into court should not have been resolved by a simple application for the money to be paid out of court. That question arose because the determination by the Court of Appeal that the assessment was unlawful meant there was simply no lawful basis to keep the taxpayer's money.

[24] In this vein, this Court inquired of counsel for the Revenue whether the violation by the Revenue of the procedure for making and processing assessments vitiated the assessment only insofar as it imposed tax on income for the years 1990-98 but not insofar as it imposed tax on the equivalent of income for 41 months in the award of damages. To her credit, counsel conceded that the violation must have vitiated the two heads of assessment and the garnishment of both sums.

[25] It followed from that conclusion that the Revenue's assessment of income tax on the award of damages was incapable of rescue from the finding of unlawfulness and the operation of the quashing order. This Court, therefore, affirmed that the Revenue was not entitled to deduct or retain any part of the money. The Court ordered payment forthwith to the taxpayer of the income tax so garnished by the Revenue, with interest and costs. It had been perfectly open to the Revenue, on receiving notice of this appeal, to have stated to the taxpayer that the Revenue would not oppose an application for the taxpayer to be paid the sum withheld. This would have saved costs. Instead, the Revenue vigorously opposed the appeal, thereby forcing the taxpayer to prosecute it to the end and the incurring of costs.

A Final Observation

[26] This reasoning confirms that the appeal to this Court should have been entirely unnecessary because, as stated, the result of the judgment of the Court of Appeal was to uphold the High Court's order quashing the assessment and deduction. The quashing order was the remedy the taxpayer sought and obtained in the High Court and the order was upheld in the Court of Appeal. That result was greatly confused by the formal order entered by the Court of Appeal, that the Revenue's appeal was 'allowed in part.' As a matter of judicial principle and practice, that order was wrong.

[27] Behind the drawing up of the order in those terms, it may be deduced, was reliance on the fact that the Revenue succeeded on a *ground* of its appeal. That ground was that the award of damages was taxable. But that ground did not result in a judgment in favour of the Revenue. The Revenue 'won' on that ground but lost the appeal against

the quashing order. The decision of a ground is part of the reasoning process that ends with a judgment that grants or refuses the relief or remedy sought. The success or failure of a ground may impact the grant or refusal of the order for relief, or it may be incidental or inconsequential.

[28] In this case, the success of the ground of appeal, namely that in principle damages are taxable, did not affect the result of the appeal. The result of the appeal, the decision or judgment of the Court of Appeal, was that the assessment was properly quashed. The appeal against the order of the High Court quashing the assessment failed. It did not succeed in part. The statement in the formal order, that the appeal was allowed in part, was erroneous.

[29] In view of the foregoing consideration, it was not thought necessary to engage with, the no doubt, interesting question whether an award of damages is taxable, under the applicable legislation. While the question was addressed in principle by the Court of Appeal, it did not form part of that court's reasons for upholding the quashing order. It did not form part of this Court's reasons for deciding that the taxes were unlawfully deducted.

REASONS OF THE HONOURABLE MR JUSTICE WIT, JCCJ:

[30] I fully agree with the beautifully concise reasons of Barrow JCCJ and would have had nothing to add if Burgess JCCJ, although concurring in the result reached by the other members of this Court, had not explored a path not taken by the majority in which he addressed the important issue of the taxability of damages for breach of a contract of employment (or wrongful dismissal) and concluded that in this case the damages were not taxable, a conclusion I do not share. Given the general importance of this issue, I wish to put on record the reasons for my disagreement with Burgess' JCCJ conclusion, even though that disagreement is firmly situated in the realm of *obiter dicta*.

[31] Having departed from his starting point at s 5(b) of the Act, Burgess JCCJ in a reasoned and erudite statement of his reasons for decision has taken us on a scenic tour in the

sometimes-inhospitable world of tax law. Methodically progressing along a winding road, from [38]-[86], he has guided us through this difficult area of the law in a way that I was able to follow quite comfortably, only to lose him at the very last turn of his reasoning.

[32] As far as relevant for this matter, s 5(b) of the Act provides that:

> Income tax, subject to this Act, shall be payable at the rate or rates herein specified for each year of the assessment upon the income of any person accruing in or derived from Guyana or elsewhere, and whether received in Guyana or not, in respect of-
> (b) gains or profits from any office or employment, including *compensation for the termination of any contract of employment or service*...

[33] In his reasons, Burgess JCCJ convincingly shows that the damages received by the taxpayer can be properly characterised as 'income' for purposes of that subsection. I also agree with him that the words 'gains or profits *from* any office or employment' circumscribe the concept of 'compensation for the termination of any contract of employment or service.' It is clear from relevant literature[3] and the jurisprudence that was cited that not every such compensation is generally taxable. For example, where a payment is made as compensation for the loss of employment as a form of distress relief, usually in the form of an *ex-gratia* or lump sum payment, it is not taxable. It is here that the 'from' test described by Burgess JCCJ becomes relevant, although it must be said that, as is shown by the many glosses that have been developed around this test, the question of 'where exactly to draw the line' appears to remain the subject of some dispute.

[34] I agree with Burgess JCCJ that the text of s 5(b) puts beyond doubt that even where an employment source has ceased to exist, a compensation for termination payment may still be chargeable to income tax provided 'that the employment is the proximate cause of the post-cessation payment.'

[3] Claude H Denbow, *Income Tax Law in the Commonwealth Caribbean* (2nd edn, Bloomsbury Professional 2013) [5.11].

[35] The compensation in this case was thus calculated: the taxpayer was 62 when his service was (wrongfully) terminated and so he was awarded 'salary at US$4,330 per month as loss of earnings damages for the duration of his contractual period until he would have attained the age of 65, that period being 41 months.'

[36] It is at this point that I part ways with Burgess JCCJ. In my view, this is a perfect example of a compensation for the termination of a contract of employment that is taxable. Burgess JCCJ says that the circumstances that brought about the taxpayer's entitlement to the damages was not any services given or to be given by him but his wrongful dismissal. With the greatest of respect, I do not think that is relevant. The ratio of the compensation was found in his contract of employment which, in terms of damages, was deemed to have continued. The compensation was meant to pay him his salary *as if* he had not been wrongfully dismissed. Being paid *as if* his contract had continued, he also could have been taxed *as if* he had gained that payment from his employment. The payment of the compensation exactly replaced[4] the payment of his salary (his income) and there is no plausible reason why that payment should not be taxed.

[37] I do not think that more should be said about it. In the words of Coleridge LCJ:

> The Attorney-General has asked where we are to draw the line. The answer is that it is not necessary to draw it at any precise point. It is enough for us to say that the present case is on the right side of any reasonable line that could be drawn.[5]

In my view, this case is squarely on the taxable side of the equation.

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[4] See the Canadian *surrogatum* test: *Goff Construction v R* (2009) 387 NR 325.
[5] *Mayor & c of Southport v Morriss* [1893] 1 QB 359 at 361.

REASONS OF THE HONOURABLE MR JUSTICE BURGESS, JCCJ

Introduction

[38] This is an appeal from the Court of Appeal of Guyana wherein the taxpayer, challenged the authority of the Revenue, to assess him to income tax in the sum of G$45,132,975.00. As demanded by the Revenue, that sum was deducted and paid to the Revenue by Linmine from monies awarded to him against Linmine as damages for breach of his contract of service with them. The taxpayer also sought restitution of this sum with interest.

[39] Upon hearing the oral submissions of counsel for the taxpayer and the Revenue, this Court ordered that: (i) the purported assessment of income tax in the sum of G$45,132,975.00 was unlawful and having been quashed, the Revenue was not entitled to deduct or retain that sum; (ii) the Revenue must pay forthwith the sum together with interest to the taxpayer, and (iii) the Revenue must pay costs to the taxpayer in the sum of US$32,383.39 or its Guyanese equivalent.

[40] This Court informed counsel that written reasons for its decision would be issued later. The reasons given by my fellow Justices rest on a thorough construction of the orders made in the courts below. For my part, I support this Court's order on the basis of error of law on the part of the Court of Appeal and the consequential application of relevant principles of restitution to the sum deducted by the Revenue which were the grounds raised in the notice of appeal and argued in the written and oral submissions to this Court.

Background Facts

[41] The taxpayer entered the service of Guyana Bauxite Co Ltd, the predecessor of Bauxite Industrial Development Co Ltd (Bidco), in 1972. Bidco was subsequently renamed and reconstituted as a nationalised corporation called Linden Mining Enterprise Ltd

('Linmine'). Linmine is now defunct as it was dissolved in 2003 by an order under the Public Corporations Act 1988.

[42] In 1973, the taxpayer was posted overseas as Bidco's marketing representative and continued his employment with Linmine after the renaming and reconstruction of Bidco. While overseas, he received part of his emoluments in Guyana currency and part in foreign currency.

[43] In 1998, Linmine made a new arrangement for the marketing of its products overseas. The taxpayer was offered continued employment in an executive position in that company's offices in Linden, Guyana. The offer would have resulted in a reduction in his earnings. He refused the offer.

[44] On 31 July 1998, the taxpayer instituted an action in the High Court against Linmine and Bidco claiming damages for breach of his contract of service with them. This action was heard before Legall J, and he dismissed the action on 25 June 2001.

[45] On 26 June 2001, the taxpayer filed an appeal to the Court of Appeal against the judgment of Legall J. The appeal came on for hearing on 18 November 2002 and by judgment delivered on 2 March 2004, the Court of Appeal gave its decision in which it reversed the decision of Legall J. Damages amounting to G$78,000,000.00 were awarded to the taxpayer.

[46] The penultimate paragraph of the judgment of the Court of Appeal is important. It states as follows:

> The Appellant [taxpayer] was aged 62 at the time his service was terminated and might not have been able to secure comparable alternative employment. I therefore award him damages for the duration of his contractual period until he would have attained the age of 65. That period would have been reached 41 months later. Therefore, the Appellant is entitled to salary at US$4,330 per month for a period of 41 months, plus which is calculated in the Statement of Claim as amounting to US$174,032.49 together with his pension from 1972 to June 1998 a period of 26 years 5 months which calculated in accordance with the formula set out at paragraph 10 of the Statement of Claim would be US$4,330

> by 1.75% by 26.4167 equals US$2001.72 per month with effect from 1st July 1998.

The taxpayer was also awarded interest at the rate of 4% per annum from date of filing to date of judgment, and further at the rate of 4% per annum from the date of judgment until fully paid.

[47] By letter dated 18 August 2004, the Revenue wrote to the taxpayer alleging to assess income tax to be paid by him for the period 1997-99 for years of income 1996-98. Tax computations for each of those years were attached to the letter. According to the computation attached, the total income tax due for the years of Assessment 1997-99 was: G$2,786,451.00 + G$2,966,057.00 + G$1,554,763.00 = G$7,307,271.00. In the letter also, the Revenue undertook to mail 'formal notices of assessment' shortly.

[48] By letter dated 1 September 2004, the taxpayer wrote to Linmine calculating the 'Damages/ Judgment debt' due from Linmine to him as G$81,637,415.00.

[49] By letter dated 29 September 2004, the Revenue wrote directly to Linmine demanding that Linmine pay to the Revenue the sum of G$45,132,975 as tax due and owing by the taxpayer pursuant to ss 93 and 102 of the Act. In that letter, the Revenue calculated the total amount of tax due as follows:

> Mr. Ramsahoye was in receipt of a salary of US$4330.00 and a taxable allowance of US$750.00 per month from 9th January, 1990 to the 31st May, 1998… [on which Linmine omitted to deduct tax.]
> His total income and taxable allowance for this period was US$513,080: and his taxable income after deducting his allowance … of US$75,750: would be US$437,330. The income tax payable on this sum is US$167,065
> Mr Ramsahoye was awarded the sum of US$174,032.49 being salary for 41 months. Income Tax is also payable on the sum less allowance of G$240,000: (US$1,188) for the period of 3 years and 5 months…
> The taxable sum is therefore US$503,942 and the income tax payable is US$223,431: its equivalent being G$45,132,975.

The letter ended with a statement that the previous letter dated 14 September 2004 is superseded by this letter.

[50] The letter dated 29 September 2004 was not copied to the taxpayer nor was a copy of the letter served on the taxpayer prior to the assessment. The taxpayer also had no sight of the letter dated 14 September 2004, and never received the formal notices of assessment as promised in the 18 August 2004 letter. It was only when the taxpayer demanded from Linmine the sum outstanding and filed a request for a writ of execution before the High Court of Guyana that the taxpayer became aware that Linmine had paid the taxes demanded by the Revenue to it.

[51] On 12 October 2004, Linmine had deducted and paid over to the Revenue the sum of G$45,132,975 out of the monies awarded to the taxpayer in keeping with the demand made by the Revenue in their letter of 29 September 2004. It may be noted here that since 19 September 2005, pursuant to an order of Chang J, this sum was lodged with the Registrar of the Supreme Court for the sum to be deposited in an interest-bearing account with a commercial bank.[6]

History of Litigation

(i) The High Court

[52] On 26 October 2004, the taxpayer initiated prerogative writ proceedings in the High Court for an order or rule nisi or certiorari directed to the Commissioner General of the Revenue (Commissioner) to quash his decision made and contained in the letter of 29 September 2004 on the basis that the decision to deduct and remit were without or in excess of jurisdiction, unreasonable, unlawful, unconstitutional, arbitrary, capricious, in breach of natural justice, ultra vires, null, void and of no effect. Three main issues fell to be determined by Persaud J, the hearing judge. The first was whether the damages awarded fell within the definition contained in s 5(b) of the Act and was therefore taxable as income and consequently, whether the Commissioner had authority to deduct income tax from the damages. The second was whether it was within the Commissioner's powers, without proof of fraud, gross or wilful neglect, to

[6] The circumstances of this order are that, as appears later in these reasons, the taxpayer challenged the lawfulness of the Guyana Revenue Authority's (GRA) demand in the High Court and was successful there. The GRA appealed the decision of the High Court and applied for a stay of execution of the High Court's order. Chang J's order was stayed by this application.

assess income tax for a year of income which exceeded the seven-year limitation period as contemplated by s 72 of the Act[7]. The third was whether the Commissioner afforded the taxpayer the statutory procedures for dealing with disputes and providing for review and appeal.

[53] On the first issue, Persaud J held that, on a proper interpretation of s 5(b) of the Act, the damages awarded were not taxable income. Accordingly, there was no power in the Commissioner under the Act to tax the damages awarded. On the second issue, the learned judge held that under s 72 of the Act, the Commissioner had no power to assess the taxpayer to income tax for a year of income which exceeded the seven-year limitation without proof of fraud, gross or wilful neglect on the part of the taxpayer. Finally, on the third issue, the judge held that the Commissioner's purported assessment was in breach of the procedures provided for in the Act in ss 78, 79, 82 and 86 and could not be allowed to stand as it was without and in excess of jurisdiction and null and void. The judge also found that the Commissioner's assessment was unreasonable.

(ii) The Court of Appeal

[54] On 29 June 2005, the Revenue filed a notice of appeal in the Court of Appeal against the decision of Persaud J. The grounds raised by the Revenue were that Persaud J erred in law by finding: (i) that the Commissioner had no authority to deduct income from a sum awarded by the Court which was based on the taxpayer's salary and allowances; (ii) that the Commissioner had no authority to make PAYE deductions which ought to have been made by Linmine from the salary of the taxpayer during the period 1990-98 from the sum awarded as damages under ss 93 and 102 of the Act; (iii) that there was a breach of natural justice; (iv) that the Revenue could not demand and accept income beyond the limitation period under the Act; and (v) that the decision was unreasonable.

[7] Section 72 of the Act gives the Commissioner General the power to assess a person who has either not been assessed or who was assessed at an amount less than that which they ought to have been assessed to be assessed for such additional amount within a limitation period of seven years once the provisions as it relates to assessment, appeal, and other proceedings are complied with. The limitation period of seven years does not apply where there is evidence of fraud, gross or wilful neglect.

[55] In approaching the question of the Commissioner's authority to deduct income from the sum awarded as damages, the Court of Appeal drew an important distinction between damages awarded for loss of earnings for 41 months ('loss of earnings damages') and the award for pension ('pension award'). The Court of Appeal held, reversing Persaud J, that the Commissioner had authority to impose income tax on the loss of earnings/ damages awarded as those damages fell within the ambit of s 5(b) of the Act as 'compensation for the termination of the Taxpayer's contract of service'. However, the Court of Appeal held that the Commissioner had no authority to impose income tax on the pension award as that did not fall within the ambit of s 5(b) of the Act.

[56] On the damages award for pension, the Court of Appeal held as follows:

> [27] In relation to the award for pension calculated under a formula analogous to that provided in the Pensions Act, arguments in the Court below and in this Court did not address specifically whether that part of the award was also liable to be treated as income and liable to assessment of income tax under sec 5 (b). Pension is defined under sec 2 of the Income Tax Act as including any superannuation or allowance, or deferred pay given in respect of the past services of an individual or given to such person under such superannuation fund or scheme. We are not satisfied that as a superannuation benefit on retirement, this part of the Court's award should be considered as compensation for termination.

[57] As regards the Commissioner's authority to assess and deduct income tax under ss 93 and 102 of the Act for income years 1990-98, income which was earned in a period which exceeded the seven-year limitation period as contemplated by s 72 of the Act, the Court of Appeal upheld the decision of Persaud J that the Commissioner had no such authority. The Court of Appeal held further that the Revenue did not comply with the processes and procedures provided for in ss 72, 78, 82 and 86 of the Act and that the Commissioner's purported exercise of powers under ss 93 and 102 of the Act breached the principles of natural justice. The Court of Appeal upheld the High Court's order quashing the Commissioner's assessment. The Court of Appeal concluded its judgment with the statement: 'We order that any assessment must comply with the procedures and processes established under the Act'.

Appeal to this Court

[58] On 12 July 2021, the taxpayer filed a notice of appeal before this Court appealing 'the Judgment and Order' of the Court of Appeal. The taxpayer makes it clear in his grounds of appeal that he is not challenging the Court of Appeal's decision that the Commissioner had no authority to impose income tax of the pension award head in the damages awarded to the taxpayer. He also makes it clear that he is not challenging the Court of Appeal's decision upholding Persaud J's decision quashing the assessment raised by the Commissioner in respect of PAYE deductions from his salary during the period 1990-98. What the taxpayer was challenging were (i) the Court of Appeal's decision that the Commissioner had authority to impose income tax on the loss of earnings head of damages award, and (ii) the order of the Court of Appeal to the extent that it permitted the Commissioner to continue to hold the taxpayer's monies notwithstanding that Court's determination that the Commissioner demanded and received those monies pursuant to a process 'which was wholly outwit (sic) the Act.'

[59] In his notice of appeal, the taxpayer seeks the following relief:

> (a) an order reversing the decision of the Court of Appeal that the Revenue was entitled to raise an income tax assessment against and lawfully impose taxes on the loss of earnings damages.
> (b) a declaration that the imposition by the Revenue of PAYE on his income for the period 1990-98 is unlawful null, void and of no legal effect.
> (c) a declaration that the Revenue was not entitled to deduct and is not entitled to retain the sum of G$45,132,975 being income taxes purportedly assessed by the Commissioner.
> (d) an order directing the Revenue to return the sum deducted as income tax to the taxpayer with interest.
> (e) costs.

[60] The Revenue filed a cross appeal on 3 August 2021 but filed a notice of withdrawal on 28 September 2021. Accordingly, the only issues before this Court for its determination are those raised by the taxpayer. In my opinion, these issues resolve themselves into two basic questions. These are (i) whether the Commissioner had the authority to deduct income tax from the damages awarded to the taxpayer for breach

of contract of services, and (ii) whether the taxpayer can enforce the return of the sum of G$45,132,975 deducted and retained by the Revenue.

Analysis and Conclusion

(a) Whether Commissioner has authority to tax the damages as employment income?

[61] The Commissioner claimed to impose income tax on the sum awarded to the taxpayer against Linmine for his wrongful dismissal as employment income pursuant to s 5(b) of the Act. That subsection provides as follows:

> Income tax, subject to this Act, shall be payable at the rate or rates herein specified for each year of the assessment upon the income of any person accruing in or derived from Guyana or elsewhere, and whether received in Guyana or not, in respect of –
>
> > (b) gains or profits from any office or employment, including compensation for the termination of any contract of employment or service, the estimated value of any quarters or board or residence (after allowing in cases in which the quarters, board or residence is not free, for any sum paid or payable by way of rent, contribution or otherwise for such quarters, board or residence) or of any other allowance granted in respect of employment whether in money or otherwise, other than an allowance for medical or dental expenses, or for any passage to or from Guyana.

[62] The provisions contained in this subsection have their origin in the Model Income Tax Ordinance (UK) recommended by the Colonial Inter-Departmental Committee on Income Tax for the general use of colonial governments and which was enacted in Guyana in the 1929 Income Tax Ordinance. The Model Ordinance itself was based on the UK schedular system wherein there is no statutory definition of income, but rather, where receipts exigible to tax are classified according to their sources. In *Mitchell and Edon v Ross*[8], Radcliffe LJ described the operation of this system as follows:

[8] [1962] AC 813 at 838.

> Before you can assess a profit to tax you must be sure that you have properly identified its source or other description according to the correct Schedule; but once you have done that, it is obligatory that it should be charged, if at all, under that schedule and strictly in accordance with the Rules that are there laid down for assessments under it. It is a necessary consequence of this conception that the source of profit in the different Schedules are mutually exclusive.

[63] Section 5(b) of the Act expressly provides for income tax 'assessment upon the *income* of any person' in respect of 'gains or profits *from* any office or employment, including compensation for the termination of any contract of employment or service' as chargeable to income tax. On the plain words of that subsection, if the damages received by the taxpayer are to be chargeable to income tax pursuant to that subsection, the Commissioner must, satisfy two requirements. He must satisfy the requirement (a) that the damages received by the taxpayer can be properly characterised as "income" for the purposes of that subsection, and (b) that the damages, if income, were 'from' the taxpayer's employment. These are the rules laid down in s 5(b) of the Act and on settled authority the Commissioner may only raise an assessment under that subsection strictly in accordance with these rules.

[64] To be clear, the Court of Appeal did not advert to these requirements. Instead, at [24] and [25] of its judgment, that court seems to have assumed that damages are generally taxable and that the House of Lords decision in *British Transport Commission v Gourley*[9] recognised the '[t]ax liability on an award of damages for loss of earnings'. In *Gourley*, the defendant injurer argued that the plaintiff victim of an accident ought not to recover for the whole of the lost future income, since if the plaintiff had earned that income, he would have had to pay some of it in taxes. If the damages were not subject to tax, it was argued, the plaintiff would be unjustly enriched if he were to recover the whole sum. Thus, accurate compensation required a deduction for tax. This argument succeeded before the House of Lords. The principle laid down in that case therefore is that taxes should be taken into account by a court in assessing damages to ensure that a claimant is put in the same position that he would have been in had he not suffered the wrongdoing of the defendant injurer.

[9] [1956] AC 185.

[65] I agree with counsel for the taxpayer that *Gourley* is not authority for any general principle that damages for wrongful dismissal are taxable as employment income in Guyana. In fact, such authority as touches on the taxability of damages for wrongful dismissal as employment income seem to support the opposite principle. Thus, in *Henley v Murray*[10], Sir Raymond Evershed MR appears to have assumed as indisputable that damages were not taxable as employment income. He said there:

> In the course of the argument an extreme case was put to counsel for the Crown of an employer who wrongly breaks a contract of service and discharges a servant wholly therefrom and the servant then sues for damages for wrongful dismissal. Although, of course, it is true that if there had never been a contract the sum of damages could never have been awarded, counsel admitted that in a case of that sort, it would be impossible to suggest that the sum awarded to the servant for damages was taxable under sched. E.

[66] In the Privy Council decision of *Comptroller-General of Inland Revenue v Knight*[11], Wilberforce LJ cited *Henley v Murray*[12] with approval. Wilberforce LJ said at 433:

> Questions as to the taxability of payments received by employed persons at the end of their employment have frequently come before the courts: they have often been described as difficult, borderline and depending on narrow distinctions. Two propositions are accepted as common ground in the present case. First, where a sum of money is paid under a contract of employment, it is taxable, even though it is received at or after the termination of the employment: see for example *Henry v. Foster* (1931) 16 T.C. 605. Secondly, where a sum of money is paid as consideration for the abrogation of a contract of employment, or as damages for the breach of it, that sum is not taxable: see for example *Henley v. Murray* (1950) 31 T.C. 351.

[67] These dicta are made in respect of statutory provisions which have the same provenance as s 5(b) of the Act. This notwithstanding, I am of the firm view that damages are only taxable as employment income in Guyana if they fall squarely within the ambit of s 5(b) and not on general principles which may be culled out of these two cases.

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[10] [1950] 1 All ER 908 at 909.
[11] [1973] AC 428.
[12] *Henley* (n 10).

[68] And so, I now turn to considering whether the Commissioner satisfied these two requirements.

(i) Whether the damages can be properly characterised as 'income'?

[69] As has already been seen, in approaching this question, the Court of Appeal drew an important distinction between the two heads of damages in the damages awarded to the taxpayer. That Court distinguished, in my view correctly, between damages awarded for loss of earnings for 41 months (loss of earnings damages) and the award for pension (pension award). As has also been seen, that Court held that the pension award was not income for purposes of s 5(b) of the Act and therefore not exigible to income tax under that subsection. That decision is not challenged before us.

[70] The damages awarded for loss of earnings is challenged. Of these damages, the Court of Appeal held as follows:

> [26] We are satisfied that the intention of Parliament in the words in sec 5 (b) was to deem compensation for termination of employment to be a gain or profit and liable to income tax. What the Court of Appeal awarded as damages for loss of income for 41 months compensated Mr. Ramsahoye for the wrongful termination of his contract of employment and that portion of the award was in our view subject to tax. The Commissioner General therefore did not exceed his jurisdiction in claiming tax on that portion of the award.

[71] In my judgment, the conclusion by the Court of Appeal that the loss of earnings damages award was to be treated as compensation enjoys substantial support in the authorities. For instance, in the Guyana Privy Council decision of *B G Credit Corp v DaSilva*[13] damages were theorised in terms of compensation. In that case, Donovan LJ, delivering the judgment of the Board, observed that a claimant in a wrongful dismissal case is entitled only to such damages as will compensate him for the loss suffered through the breach to the extent that such loss was reasonably foreseeable as liable to result. Thus, for instance, where a contract is terminable by notice as in that case,

[13] (1965) 7 WIR 530 at 538 (GY PC).

damages for lost earnings are restricted to the amount payable during the notice period. Put simply, damages for wrongful dismissal are in pith and substance a payment in lieu of notice of termination and as such equivalent to compensation.

[72] Isaacs J in the Australian case of *Whitfield v De Lauret & Co Ltd*[14] at 80 made the theoretical connection between damages and compensation even more stridently. He said:

> Damages are, in their fundamental character, compensatory. Whether the matter complain of be contract or tort, the primary theoretical notion is to place the plaintiff in as good a position, so far as money can do it, as if the matter complained of had not occurred… [The] primary notion is controlled and limited by various considerations, but the central idea is compensation.

[73] It is noteworthy also that in *Canadian Broadcasting Corp v CUPE*[15], the Canadian Federal Court of Appeal accepted Black's Law Dictionary[16] definition of "compensation" which includes "payment of damages".

[74] The definition of damages in *Halsbury's Laws of England*[17] is also worth noting. It states there that:

> 'Damages' can be defined as the pecuniary recompense given by process of law to a person in order to make good the consequences of an actionable wrong (other than a wrong cognisable only in equity) that another has done.

[75] It is evident from the foregoing that the Court of Appeal was correct in treating the damages awarded for loss of earnings to the taxpayer as falling within the statutory meaning of 'compensation for the termination of any contract of employment or service'. The phrase 'compensation for the termination of any contract of employment

[14] (1920) 29 CLR 71 at 80.
[15] [1987] 3 FC 515 at 520.
[16] Bryan Garner and Henry Campbell Black, *Black's Law Dictionary* (5th edn West Publishing Co 1979).
[17] *Halsbury's Laws of England* (5th edn, 2019) vol 29, para 304.

or service' was used in s 5(b) of the Act to extend the meaning of 'gains or profits' under that subsection. Consequently, the damages awarded for loss of earnings, being compensation, was correctly characterised as 'income' within the extended meaning of 'gains or profits' for the purposes of s 5(b) of the Act. The treatment of the damages award as compensation also meant that, even though the award was a lump sum payment and therefore having some of the characteristics of a capital payment, it was nevertheless 'income' being statutorily classified as such.

[76] In sum, the Court of Appeal was correct in holding that the damages awarded to the taxpayer for loss of earnings for 41 months was income for the purposes of s 5(b) of the Act. However, to draw any conclusion on the taxability of that income, it was necessary to go further and show that those damages constituted income 'from' the taxpayer's employment. This is an essential requirement under s 5(b).

[77] The Privy Council case of *Heywood v Comptroller-General of Inland Revenue*[18] lends substantial support for this proposition. In that case, a company which was undergoing a reorganisation wrote to the appellant whose contract of service was being terminated: 'As compensation for loss of employment you have been accorded a sum of $32,000 ex gratia'. The question before the Board was whether that sum was liable to income tax as employment income under a provision in the Income Tax Act, 1967 of Malaysia similar to s 5(b) of the Act. The Privy Council, in holding that it was not, stated:

> A payment made as compensation for loss of employment cannot be made in respect of employment or in respect of having or exercising the employment. The two things are mutually exclusive.
>
> In their Lordships' opinion the facts of this case clearly establish that the payment in question was compensation for loss of employment and the respondent has wholly failed to show that it was in respect of having or exercising the employment.

[18] [1975] AC 229 at 238.

It may be noted that the Malaysian Act stipulated that the test for whether a receipt was 'from' an employment was whether it was 'in respect of employment'.

[78] Nevertheless, the Court of Appeal, without having any regard to the requirement that for the damages to be taxable as employment income under s 5(b) of the Act 'compensation for the termination of any contract of employment or service' it had to be shown that it was 'from' the taxpayer's employment, concluded 'that the Commissioner was entitled, in principle, to assess income tax on the award of the Court of Appeal which compensated the respondent by way of damages for loss of earnings for 41 months'. It therefore falls to this Court to determine whether that requirement was satisfied.

(ii) Whether the damages received by the taxpayer for wrongful dismissal was 'from' his employment?

[79] As already been noted, s 5(b) of the Act on its express language only charges to income tax 'gains or profits *from* any office or employment' including 'compensation for the termination of any contract of employment or service'. Consequently, a necessary requirement of the chargeability to income tax of the taxpayer's loss of damages earnings award is that that award was 'from' his employment. The Act does not provide any test as to how to decide the notoriously difficult question of what is meant by 'from'. In this regard, I recall that s 5(b) of the Act mirrors the provisions on taxation of employment income in English income tax statutes and that a considerable jurisprudence has developed in the English authorities on the test to be applied in deciding whether a receipt is 'from' an employment or 'from' some other source. Of course, these authorities are in no way binding on this Court. However, I find these authorities a useful jump off point in interpreting s 5(b) of the Act.

[80] The House of Lords case of *Hochstrasser v Mayes*[19] is widely regarded among tax lawyers as a leading authority on the 'from' test. In that case, Radcliffe LJ stated:

[19] [1960] AC 376 at 391, 392.

> The test to be applied…is contained in the statutory requirement that the payment, if it is to be the subject of assessment, must arise 'from' the office or employment. In the past several explanations have been offered by judges of eminence as to the significance of the word "from" in this context. It has been said that the payment must have been made to the employee "as such". It has been said that the payment must have been made to him "in his capacity of employee". It has been said that it is assessable if paid "by way of remuneration for his services," and said further that this is meant by payment to him "as such". These are all glosses, and they are all of value as illustrating the idea which is expressed by the words of the statute. But it is perhaps worth observing that they do not displace those words. For my part, I think that the meaning is adequately conveyed by saying that, while it is not sufficient to render a payment assessable that an employee would not have received it unless he has been an employee, it is assessable if it has been paid to him in return for acting as or being an employee.

[81] Radcliffe's LJ adumbration was applied in the later leading House of Lords decision in *Shilton v Wilmshurst*[20]. Lord Templeton restated the test as follows:

> …an emolument "from employment" means an emolument "from being or becoming an employee." The authorities are consistent with this analysis and are concerned to distinguish in each case between an emolument which is derived "from being or becoming an employee" on the one hand, and an emolument which is attributable to something else on the other hand, for example, to a desire on the part of the provider of the emolument to relieve distress or to provide assistance to a home buyer. If an emolument is not paid as a reward for past services or as an inducement to enter into employment and provide future services but is paid for some other reason, then the emolument is not received "from the employment." The task of determining whether an emolument was paid for being or becoming an employee or was paid for another reason, is frequently difficult and gives rise to fine distinctions.

[82] In my judgment, the tests propounded in these cases confirm that what the word 'from' in s 5(b) of the Act entails a search for the reason for the payment. Put another way, the question of whether income is 'from' employment is, to use the term found in earlier cases, one of causation. Accordingly, for the damages to be treated as being 'from' employment, the employment must be shown to be the proximate cause of the payment. The employment cannot be merely a circumstance without which the

[20] [1991] 1 AC 684 at 689.

payment would not have been made. In the words of Viscount Simonds in *Hochstrasser v Mayes*[21], the fact of the employment must be the *causa causans* and not only the *sine qua non* of the payment.

[83] I feel bound to note here that the Court of Appeal at [18] cited the England and Wales Court of Appeal decision of *Moorthy v Revenue and Customs Commissioner*[22] as providing 'guidance on the treatment of compensation for termination of employment for purposes of income tax'. In that case, a taxpayer who was dismissed from his employment on the ground of redundancy received an *ex-gratia* settlement sum as compensation for loss of his employment. A question arose as to whether the settlement sum was in principle subject to income tax as employment income under Pt 6, Ch 3 of the Income Tax (Earnings and Pensions) Act 2003. Section 401 of the Income Tax (Earnings and Pensions) Act 2003 treated 'payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with - (a) the termination of a person's employment' as earnings and thus taxable. It was held that the settlement sum fell within s 401 and was taxable as employment income. Based on this case, the Court of Appeal concluded at [21] of its judgment: 'Likewise in the instant case, s 5(b) has deemed compensation for termination of employment to be included as gain and profit of employment and therefore liable to income tax.'

[84] It is my judgment that this conclusion by the Court of Appeal was erroneous for this reason. It is a basic principle of tax law that a taxpayer can only be charged to tax on the express language of the statute which seeks to impose the tax. As is plainly evident, the wording of s 401 of the UK Income Tax (Earnings and Pensions) Act 2003 is palpably different from s 5(b) of the Act. The UK Act is drafted very broadly and taxes 'payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with the termination of a person's employment'. Section 5(b) is drafted very narrowly and taxes 'gains or profits *from*

[21] *Hochstrasser* (n 19).
[22] [2018] 3 All ER 1062.

any office or employment'. The *Moorthy*[23] case is therefore not helpful as a test for what is meant by 'from' as a requirement for chargeability to income tax under s 5(b) of the Act. I am of the firm view that *Hochstrasser v Mayes*[24] and *Shilton v Wilmshurst*[25] are far more helpful on the s 5(b) 'from' test.

[85] With respect to the application of the 'from' test to this case, counsel for the taxpayer points to the fact that the taxpayer's employment with Linmine had ceased to exist at the time the damages were awarded as a reason why the damages could not be 'from' his employment. Some cases support his argument that in such circumstances, there is no longer an employment "source" which could ground a charge to income tax on the damages award under s 5(b) of the Act and that therefore there cannot be any causal connection between the damages award and any employment. In my opinion, however, the express inclusion of 'compensation for the termination of any contract of employment' in 'gains or profits from any office or employment' in s 5(b) of the Act forestalls such an argument. That inclusion was intended to avoid the doctrinal difficulties hinted at by counsel and the fine distinctions in the cases dealing with termination payments. The inclusion means that even where an employment 'source' has ceased to exist, a compensation for termination of employment payment may still be chargeable to income tax if that payment is shown to be 'from' that employment in the sense that the employment is the proximate cause of the post-cessation payment. Accordingly, a determinative question on the taxability of the damages award in this case remains as to whether the proximate cause of those damages was the taxpayer's employment with Linmine.

[86] As has been seen, in making the damages award, the Court of Appeal stated as the basic assumption of the award the fact that the taxpayer 'was aged 62 at the time his service was terminated and might not have been able to secure comparable alternative employment[26]'. It was on that assumption that the Court of Appeal awarded him 'salary

[23] ibid.
[24] *Horchstrasser* (n 19).
[25] *Shilton* (n 20).
[26] *Ramsahoye v Linden Mining Enterprise Ltd* (Guyana CA, 2 March 2004).

at US$4,330 per month'[27] as loss of earnings damages for the duration of his contractual period until he would have attained the age of 65, that period being 41 months.

[87] From the foregoing, it is clear that the damages awarded for loss of earnings was calculated with reference to his salary in his previous employment. It is equally clear from those facts that, per contra, the circumstances that brought about his entitlement to the damages award was not any services given by him or to be given by him but was his wrongful dismissal by Linmine. Thus, the taxpayer's former employment was not the proximate cause, the *causa causans*, of the damages award. That cause was instead Linmine's breach of the employment contract with the taxpayer. The inevitable conclusion must therefore be that the damages awarded to the taxpayer was paid to him in respect of his personal situation as a victim of wrongful dismissal. Accordingly, the loss of earnings damages could not be 'from' his employment as contemplated by s 5(b) of the Act.

Conclusion on whether Commissioner had authority to tax the damages as employment income.

[88] The upshot of the foregoing is that the Commissioner had no authority to impose any tax on the damages received by the taxpayer for loss of earnings pursuant to s 5(b) of the Act. The Court of Appeal was correct in classifying that award as compensation for purposes of that subsection. However, it was also an essential requirement for chargeability under that subsection that the compensation was 'from' the taxpayer's employment. The employment was not the proximate cause of the damages award and was therefore not 'from' the employment.

(b) Whether the taxpayer can enforce the return of the sum of G$45,132,975 deducted and retained by the Revenue?

[27] ibid.

[89] The sum of G$45,132,975 deducted and retained by the respondent consisted of PAYE deductions for the period 1990-98 and tax payable on the damages award. In respect of the PAYE deductions, the Court of Appeal held at [30]-[31]:

> [30] We agree with the Hearing Judge that there was a breach of the processes provided in secs 72, 78, 82 (dealing with appeal to the Review Board), 86 (dealing with the right of appeal to a judge or to the Full Court), and in the manner under secs 93 and 102 and that these actions resulted in a breach of natural justice to the detriment of the respondent.
>
> [31] …The Commissioner therefore acted unlawfully when he instructed the deduction of the taxes and seemed to disregard the avenues available to the respondent in the event of a dispute. In this regard we uphold the Trial Judge's findings and his quashing of the assessment by the Commissioner.

It is therefore not in the terrain of doubt that the Court of Appeal, agreeing with the trial judge, held the PAYE assessment by the Commissioner breached the principles of natural justice so that the deduction was unlawful. The Court of Appeal and High Court quashed the assessment. I agree with those decisions.

[90] As regards the Commissioner's claim to tax the damages awarded, as has been seen, the Court of Appeal held that the Commissioner had no authority to tax the pension portion of that award. I am in agreement with that finding of the Court of Appeal but would go further and hold that the portion of the award which fell under the loss of earnings head was also not exigible to employment income tax. This means that the Commissioner had no authority to assess the taxpayer to any income tax on any part of the damages award made to him for his wrongful dismissal by Linmine. The Commissioner therefore unlawfully demanded that Linmine deduct and pay over to it the sum of $45,132,975. That sum was paid over to the respondent but has been lodged with the Registrar of the Supreme Court to be deposited in an interest-bearing account with a commercial bank pursuant to an order of Chang J in an application for a stay of execution by the Revenue. The question for this Court now is whether the taxpayer is entitled to restitution of that sum plus interest.

[91] Counsel for the taxpayer has argued in his written submissions that the House of Lords decision in *Woolwich Equitable Building Society v Inland Revenue Commissioners*[28] is authority supporting the taxpayer's claim for restitution of the sum of G$45,132,975 plus interest. *Woolwich* concerned the payment of tax by the Building Society which was subsequently held not to have been due as a result of the invalidity of the law under which the tax had been assessed. The Inland Revenue repaid the tax but disputed their liability to pay interest on the money during the time which they had held it. The House of Lords held that the Building Society was entitled to the interest as a matter of common law and that statutory provisions on overpaid tax were inapplicable.

[92] I agree with counsel that the import of the revolutionary decision in *Woolwich* is that there is now in the common law a *prima facie* right to restitution of money paid to a public authority under an unlawful demand. This decision has not yet been applied in Guyana and in approaching whether it should be treated as so applicable it is extremely useful to recall the joint judgment of de la Bastide PCCJ and Saunders JCCJ in *A-G v Joseph* [29] where they identified the mandate of this Court at [18] as follows:

> The main purpose in establishing this court is to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts are best equipped to pursue. In the promotion of such a jurisprudence, we shall naturally consider very carefully and respectfully the opinions of the final courts of other Commonwealth countries and, particularly, the judgments of the JCPC which determine the law for those Caribbean States that accept the Judicial Committee as their final appellate court.

To this may be added that, in developing a Caribbean jurisprudence, this Court must do so while adopting a disciplined approach to the doctrine of judicial precedent as well as an approach which actively seeks to promote, as far as possible, coherence in the law developed by this Court and the law in those common law Caribbean Community states that have not as yet acceded to the appellate jurisdiction of this Court.

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[28] [1993] AC 70.
[29] [2006] CCJ 3 (AJ) (BB) at [18].

[93] Fully cognisant of the mandate of this Court, I am of the view that *Woolwich*[30] should be held to apply in Guyana. In my view, this should be so for two good reasons.

[94] The first is that, even when there was much equivocation by English courts as to whether the doctrine of unjust enrichment was part of English law, Bollers CJ (Ag) and Crane JA (Cummings JA dissenting) in the Court of Appeal of Guyana's pathbreaking case of *Persaud v Plantation Versailles and Schoon Ord Ltd*[31] held that they were part of the law in Guyana. Bollers C (Ag) in expressing the view that the doctrine applied in Guyana said at 118:

> It is clear that controversy exists amongst the judges in England as to whether the principle of unjust benefit or unjust enrichment exists in the English law or not, and whether this principle which was derived from the genius of LORD MANSFIELD, as set forth by him in the case of *Moses v Macferlan* ((1760), 2 Burr 1005, 1 Wm Bl 219, 97 ER 676, 35 Digest (Repl) 167, 536), should find its place in English jurisprudence. But whether this is so or not, as I said on another occasion, as this country has now achieved the status of complete independence, we judges will no longer consider ourselves hidebound by English decisions, but with mature judgment in appropriate cases will strike out on our own and mould the common law to suit the needs of our ever-changing society.

[95] To the foregoing, Crane JA added at 130-131:

> Underlying the law of restitution is the conception that no one should unjustly enrich himself at the expense of his neighbour. As I see it, I must march with those in the vanguard of progress and try to develop the law by means of the application of equitable remedies in the dualism of common law and equity which is sanctioned by and built into our legal system-see s 3 (B) of the Civil Law of Guyana Ord, Cap 2 [G], which provides as follows:
> (B) The common law of the Colony shall be the common law of England as at the date aforesaid including therewith the doctrines of equity as then administered or at any time hereafter administered by courts of justice in England, and the Supreme Court shall administer the doctrines of equity in the same manner as the High Court of Justice in England administers them at the date aforesaid or at any time hereafter.

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[30] *Woolwich* (n 28).
[31] (1970) 17 WIR 107 (GY CA).

In my view, what is clearly meant by the above provision is that the Supreme Court (now the High Court) was as from the year 1917, being authorised to administer and apply locally, equitable doctrines side by side with the common law in much the same way as the English Judicature Acts of 1873-75 sanctioned it in England. Such doctrines of equity as were in existence in 1917, or at any time in the future, were henceforth to be administered in Guyana along with English common law as our legal system.

[96] In my judgment, the *Woolwich*[32] principle is effectively an extrapolation of the *Plantation Versailles*[33] doctrine. As such, it would be a repudiation of the genius of the *Plantation Versailles* decision to hold otherwise than that *Woolwich* applies in Guyana.

[97] The second is based on the constitutional principle of no taxation without Parliament. In the Guyana Court of Appeal decision of *IRC v Lilleyman*[34], this principle was recognised as one of the most fundamental principles of taxation enshrined in the Guyana Constitutional document. Indeed, there is a flood of Caribbean authority supporting the principle that taxes cannot be levied without the authority of Parliament.[35] In my opinion, a corollary of this principle is that the Revenue is entitled to demand and retain only such taxes as are legislated by Parliament. Full effect can only be given to that principle if the return of taxes exacted unlawfully can be enforced as a matter of right. *Woolwich*[36] is also applicable for this reason.

[98] All that said, to invoke *Woolwich* in this case, the taxpayer must prove the standard requirements of unjust enrichment. These are established by answering the following questions: (i) Was the defendant enriched? (ii) Was it at the expense of the claimant? (iii) Was it unjust? (iv) Does the defendant have a defence?

[99] The first two requirements and the fourth are easily made out in this case. In this regard, it is not in dispute that the Revenue demanded that Linmine deduct and pay over to it

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[32] *Woolwich* (n 28).
[33] See (n 31).
[34] (1964) 7 WIR 496 (BCCA).
[35] See, eg, *Bata Shoe Co (Guyana) Ltd v Commissioner of Inland Revenue* (1976) 24 WIR 172 (GY CA); *Mootoo v A-G of Trinidad and Tobago* (1979) 30 WIR 411 (TT PC); A-*G of Antigua and Barbuda v Goodwin* (1999) 60 WIR 249 (AG CA).
[36] *Woolwich* (n 28).

the sum of G$45,132,975 from the damages awarded to the taxpayer and that the Revenue received that sum. It is undoubtedly the law that where, as here, the revenue has received money from the taxpayer, the revenue is to be regarded in law as enriched by the money because receipt of money is always regarded as an enrichment. In this regard, Goff J in *BP Exploration Co (Libya) Ltd v Hunt (No 2)*[37] at 799 said: 'Money has the peculiar character of a universal medium of exchange. By its receipt, the recipient is inevitably benefited…'[38] It is to be emphasised here in the context of the case before this Court that the question is not whether the Revenue retained the money but whether he received it from the taxpayer.

[100] It follows therefore from the foregoing that the Revenue was enriched at the expense of the taxpayer. The sole defence raised by the Revenue is that it was acting pursuant to powers under the Act. However, this Court has rejected that defence. So that the Revenue has no defence. Consequently, the only requirement which remains is that the Revenue's enrichment was unjust.

[101] What is the unjust factor that will allow restitution to be granted? Prior to *Woolwich*[39], two unjust factors upon which a party might seek to rely to establish a claim for restitution were duress and mistake. *Woolwich* has changed this law by holding that an unlawful demand for a payment of tax which was not due is an unjust factor capable of making out unjust enrichment and enabling a claimant to obtain restitution of the money paid and interest.

[102] In this case, it has been determined that the demand by the Revenue that Linmine deduct and pay over to it the sum of G$45,132,975 was unlawful. The other requirements of restitution being satisfied, this unjust factor is sufficient to allow restitution of that sum plus interest to be granted to the taxpayer.

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[37] [1979] 1 WLR 783.
[38] ibid at 799. See also more generally, *Peel v Canada* (1992) 98 DLR (4th) 140.
[39] *Woolwich* (n 28).

Disposal

[103] For the foregoing reasons, I would allow the appeal, and grant the orders sought by the taxpayer. I would also order the Revenue to pay the costs of the taxpayer in the sum of US$32,383.39 or its Guyanese equivalent.

Orders of the Court

[104] Accordingly, the Court made the following Orders-

a. The appeal is allowed.
b. The purported assessment of income tax, in the sum of G$45,132,975.00, having been quashed, the respondent is not entitled to deduct or to retain the said sum.
c. The respondent shall forthwith pay to the appellant the sum of G$45,132,975.00 together with the interest earned which sum was lodged with the Registrar of the Supreme Court of Guyana pursuant to the order of the Hon. Mr. Justice I Chang dated 12 September 2005 and entered 19 September 2005.
d. The respondent shall pay to the appellant the sum of US$32,383.39 or its Guyanese equivalent, representing the Costs of the Appeal.
e. There shall be liberty to apply.

/s/ A Saunders

The Hon Mr Justice A Saunders, President

/s/ J Wit	**/s/ W Anderson**
The Hon Mr Justice J Wit	**The Hon Mr Justice W Anderson**
/s/ D Barrow	**/s/ A Burgess**
The Hon Mr Justice D Barrow	**The Hon Mr Justice A Burgess**