THE TAXATION OF "BENEFITS" FROM AN OFFICE OR EMPLOYMENT

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The sustained era of prosperity in the United States since the termination of World War II has witnessed a substantial increase in the variety and quantum of benefits and advantages other than salaries and wages provided by employers for their personnel, both at the executive and other levels of employment.[1] Although there are few official statistics available on the cost of these benefits in Canada,[2] in view of the close relationship between the Canadian and American economies, it seems fair to assume that "fringe benefits", as they have come to be known, are fairly widespread in Canadian industry.[3] With regard to company executives, these benefits are probably the progeny of high tax rates, which make salary increases for highly paid help considerably less attractive than they would otherwise be, and a desire for

[1] "Figures compiled by the [National Industrial Conference Board] show that fringe benefits cost private industry a record $8,054,000,000 in 1952, compared with $7,677,000,000 in 1951. However, this increase of $377,000,000 from 1951 to 1952 was the smallest year-to-year gain since 1949. In 1951 the gain was $1,055,000,000 over 1950; in 1950 it was $1,497,000,000 over 1949. In 1952 employers contributed $3,436,000,000 for private pensions and welfare funds, compared with $3,125,000,000 in 1951; $2,101,000,000 for old-age and survivors insurance, compared with $1,966,000,000; $1,654,000,000 in taxes and contributions for unemployment insurance, compared with $1,757,000,000; and $863,000,000 for other benefits, compared with $829,000,000 in 1951." 53 *Labour Gazette* 1266.

"United States corporations disbursed $187,900,000,000 in wages and salaries in 1956, a gain of $13,500,000,000 over 1955, it was estimated by *The New York Times* . . . . Fringe benefits were estimated at $12,200,000,000, against $11,082,000,000 in 1955. The ratio of welfare benefits to wages and salaries was 6.5 per cent compared with 6.4 per cent in 1955. Of the total estimated $12,200,000,000 paid out for welfare benefits by private industry in 1956, the largest amount was $5,900,000,000 for pension and welfare funds." 57 *Labour Gazette* 271.

A canvass by the United States Chamber of Commerce of 940 companies on the cost of fringe benefits revealed that, in 1953, labour costs other than wages in the United States averaged $720 per employee, a rise of $76 in two years. "Payments for pensions were reported by 81 per cent of the companies, with costs averaging 4.7 per cent of payroll, while more than 97 per cent of the companies reported payments for employee insurance programs, with costs averaging 1.8 per cent. Fringe payments varied widely, ranging from less than five per cent to more than 55 per cent of payroll, with the average payment 19.2 per cent. Payments for fringe benefits made by 130 identical companies increased from 15.2 per cent of payroll in 1947 to 16.9 per cent in 1949, to 19.1 per cent in 1951 and to 20.2 per cent in 1953, the Chamber reported." 54 *Labour Gazette* 1606.

[2] Two valuable recent studies are *"Report No. 3: Survey of Fringe Benefits—Alberta 1957"; "Survey of Working Conditions and Benefits—Alberta, 1 May, 1958"*, prepared by the Alberta Bureau of Statistics and the Department of Industries and Labour; and *"Certain Fringe Benefits in Canadian Industry"*, Bulletin No. 17, issued in 1959 by the Department of Industrial Relations, Queen's University. Also informative is the Department of Labour's *"Working Conditions in Canada, 1958."*

[3] In the opinion of one writer, "Any survey of [fringe benefits] indicates that Canada is following and adopting ideas and procedures which originate and are in effect in the United States. So close is the similarity that it is possible to say with some degree of assurance that Canada will be thinking and adopting, five years from now, what is presently being done in the United States." J. S. Forsyth, "Fringe Benefits", (1954), 2 *Can. Tax Jo.* 83.

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security for the future of employees and their families.[4] Employers who are anxious to acquire or retain superior management personnel may offer a wide variety of inducements ranging from pensions, death benefits, life insurance, medical, surgical and hospital insurance and deferred compensation, to more immediate advantages such as country club fees and the use of company property. Although it may well have been true twenty years ago that "Compensation in kind will ordinarily be small and confined largely to people at the bottom of the income scale,"[5] the same can hardly be said today, when it is probably not uncommon for executives to enjoy the use of company cars, boats, airplanes, country estates and private dining-rooms.[6] Employees other than executives, also in quest of security and additional compensation, have enjoyed wage-extras in the form of pensions, group life and health insurance, free or subsidized meals and lodging, profit-sharing, paid holidays and annual vacations, commodity discounts and recreational facilities, such as free tennis courts and swimming pools,[7] some of which have been voluntarily granted by employers, and others tenaciously bargained for by labour unions.[8]

Until the post-war period, the taxability of fringe benefits did not bulk large in importance on the Canadian fiscal scene, perhaps for a variety of reasons: their relative insignificance, real or fancied; lower tax rates; and doubt as to the aptness of the language of the Income War Tax Act to reach some of these benefits. However, in view of the large proportions which fringe benefits have apparently assumed, the question of their liability to taxation under the very broadly worded section 5 (1) (a) of the Income Tax Act, which requires the inclusion in income of "the value of board, lodging and other

[4]It has been argued that, relative to other classes of workers, the executive is much worse off today than he used to be, as a result of the combined effect of high taxes and the increased cost of living. See L. E. Coward, "Tax Planning for the Executive," *Report, 1957 Conference, Canadian Tax Foundation*, p. 162, at p. 163.

[5]Henry C. Simons, *"Personal Income Taxation"*, p. 124 (1938).

[6]See the *Report of the Royal Commission on The Taxation of Profits and Income*, where it is stated. "Up to recent years benefits in kind by way of remuneration were mainly found as an addition to the smaller ranges of wage; represented advantages that were often trivial in value: and had little significance to the total yield of tax. The same considerations do not operate today: partly because so large a part of the wage-earning population has now ascended into the class of income tax payers, partly because the pressure of high rates of taxation on all classes has made the receipt of benefits in kind a possible attraction to every class of wage and salary earner." *Cmd.* 9474, pp. 68-69, para. 212.

[7]In the December, 1959 issue of *Fortune* magazine at p. 208, the building and grounds occupied by an American manufacturing company are advertised as including:

"—A magnificent swimming pool for employees, their families and the community—complete with poolside tables and chairs in rich decorator colors.

—An auditorium-gymnasium where employees can enjoy shuffleboard, volleyball and ping pong during off hours.

—Lagoons stocked with fish, where anglers can while away leisure hours. The lagoons, like the pool, are also part of an ingenious water supply system which gives [the company] an extremely favorable insurance rate.

—Light, pleasant production and office areas . . . . "

On the Canadian scene, it is reported in *The Financial Post* of July 4th, 1959, p. 1, that a British Columbia firm engaged in the business of handling and supplying marine hardware, sporting goods and boats included in its new plant a swimming pool to be used to demonstrate its various products—"but the pool is also for the relaxation of employees during the summer months."

[8]See, for example, 57 *Labour Gazette* 1348, where it is stated that, in labour-management negotiations, "Changes in non-wage items formed an important part of the settlements reached in the first half of 1957. Emphasis among the changes appears to be in the area of vacations and paid statutory holidays."

benefits of any kind whatsoever", is of first importance to employers and employees, and also to the tax authorities, who are interested not only in the potential revenue but also in obviating any inequality in the taxation of persons receiving the same income. A disparity in the tax treatment of an employee who receives all his compensation in cash and one who receives the same amount of compensation but partly in the form of fringe benefits is not defensible. It is not intended to consider here those fringe benefits that have been the subject of specific statutory treatment, such as stock options,[9] or benefits received in cash, such as Christmas bonuses or vacation and holiday pay, which would seem to be clearly taxable, but rather to discuss the scope and affect of section 5 (1) (a) in its application to non-cash benefits. Before proceeding with this inquiry, it may be helpful to consider briefly the history of the taxation of benefits in kind in the United Kingdom, the United States and Canada.

I *UNITED KINGDOM*

The principle applied in the United Kingdom since the turn of the century for determining the taxability of benefits received in a form other than cash was established by the House of Lords in the leading case of *Tennant* v. *Smith*.[10] In that case the appellant, a bank agent, was bound as part of his duty to occupy the bank house in order to care for the premises and to be on hand for the transaction of any special bank business after hours. He was not allowed to sublet the house or use it for other than bank business. In deciding whether the appellant was entitled to certain relief from taxation which was granted to persons whose total income was below a stipulated amount, the House of Lords held that the value of his residence had been improperly included as part of his income from an office or employment. As has been pointed out elsewhere,[11] the ground for the court's decision may have been that, since the free residence was not "beneficially received" by the appellant, its value did not constitute income to him. That is to say, just as a sum of money paid by a master to his servant to be expended by the servant on the master's behalf and for which the servant is accountable is not income to the servant, so too, the value of living accommodation occupied free of charge by a servant in the course of his duties and for the benefit of his master is not income to the servant, even though he may derive some advantage by not having to rent other quarters. However that may be, certain statements made by members of the court have since been interpreted as establishing a fundamental principle in the concept of income, namely, that only money or what is convertible into money, can constitute income. Lord Halsbury held that ". . . money's worth may be treated as money for the purpose of the Act in cases where the thing is capable of being turned into money from its own nature."[12] And later he said: ". . . the thing sought to be taxed is not income unless it can be turned into money."[13] In Lord Watson's opinion, the value

[9]See sec. 85A.
[10][1892] A.C. 150.
[11]See LaBrie, *"The Meaning of Income in the Law of Income Tax"*, p. 46.
[12]p. 156.
[13]p. 157.

of the free residence did not come within the category of 'profits' ". . . because that word, in its ordinary acceptation, appears to me to denote something acquired which the acquirer becomes possessed of and can dispose of to his advantage—in other words, money—or that which can be turned to pecuniary account."[14] Lord Macnaghten, whose judgment was concurred in by Lord Morris, held that ". . . a person is chargeable for income tax . . . not on what saves his pocket, but on what goes into his pocket."[15] It was held by Lord Field that ". . . the residence . . . which although rent free could not in any way be converted by him into money or money's worth, cannot be held to be either a gain, profit, perquisite, or emolument, within the meaning of the statutes."[16] And finally, Lord Hannen said: "That which could be converted into money might reasonably be regarded as money . . . ."[17] Several reasons were given by the Court for this conclusion. Some of their Lordships based their decision on the narrow ground that the language of Schedules D. and E., under which alone the appellant fell to be taxed, extended only to money payments or payments convertible into money, and was not apt to tax other benefits. As Lord Halsbury pointed out, none of the words in Schedule E., either "prequisites", "profits" or "emoluments" was properly applicable to tax the advantage enjoyed by the appellant ". . . inasmuch as by the rule in which those words are used or explained the word 'payable' as applied to them renders it to my mind quite impossible to suppose that the mere occupation of a house is reconcilable with the just application of that word."[18] On the other hand, ". . . if any words could be found in the statute which provided that besides paying income tax on income, people should pay for advantages or emoluments in its widest sense (such as I think the word 'emoluments' here has not, . . .)" the appellant would have been taxed accordingly.[19] And as regards Schedule D., ". . . the word 'emolument' occurring in the rules of Schedule D. means some more tangible benefit than a servant's residence in his master's house, or a meal or a suit of livery supplied by the master," said Lord Watson.[20]

Furthermore, a conclusion contrary to that reached by their Lordships would have involved the proposition that the taxability of free accommodation depended up the suitability of the premises to the taxpayer. This proposition was quite unacceptable to Lord Halsbury and Lord Hannen. "[I]n every case where such a question arose it would be necessary to examine the particular circumstances of each man's family. If he had a large family that could not be accommodated in the house, and he must hire a house elsewhere, one result would follow. If he was a bachelor, and the house was appropriate to his wants, then another result would follow. I cannot thing that the legislature ever contemplated such an examination or discrimination of persons subject

[14] p. 159.
[15] p. 164.
[16] p. 164.
[17] p. 165.
[18] pp. 155-156.
[19] p. 155.
[20] p. 161.

to taxation as such a system of assessment would imply", said Lord Halsbury.[21] Both Lord Watson and Lord Macnaghten remarked that, although the Act contained express directions for estimating and calculating the value of property for certain purposes, it contained no direction for estimating or bringing into account any benefit or advantage or enjoyment derived from free residence. "I entertain very serious doubt whether, according to the scheme of the Income Tax Acts, it was intended to assess in any shape mere residence, either in performance of duty to the actual occupant, or by license from him."[22]

Lord Macnaghten was not content to rest his judgment on any minute criticism of the language of the different schedules. "The real answer," he said, "is, that the thing which the Crown now seeks to charge is not income .... [The duty under Schedules D. and E.] is a tax on income in the proper sense of the word. It is a tax on what 'comes in'—on actual receipts .... No doubt if the appellant had to find lodgings for himself he might have to pay for them. His income goes further because he is relieved from that expense. But a person is chargeable for income tax under Schedule D., as well as under Schedule E., not on what saves his pocket, but on what goes into his pocket. And the benefit which the appellant derives from having a rent-free house provided for him by the bank, brings in nothing which can be reckoned up as a receipt or properly described as income."[23]

The application of the principle laid down in *Tennant* v. *Smith* may lead to results which must appear peculiar to anyone unfamiliar with the importance of form in tax matters, such as the taxpayer in *Machon* v. *McLoughlin*.[24] In that case the taxpayer was originally employed at a yearly salary in cash with the addition of board, lodging, washing and uniform. These benefits in kind were not included as part of his income. Subsequently the basis of his remuneration was changed, so that the allowances in kind were no longer granted and his remuneration was paid weekly on a cash basis subject to fixed deductions before payment for board, lodging and washing provided by the employer. The taxpayer contended that only the net amount received by him in cash was assessable to income tax. It was held by the Court of Appeal, affirming the judgment of Rowlatt, J., that the full amount was taxable. Warrington, L.J., remarked that the alteration in the method of payment effected a change in substance and not merely in form, there being a very substantial difference between the granting of allowances in kind and remuneration on a cash basis. A pertinent observation in this respect was made by the *Royal Commission on the Taxation of Profits and Income,* as follows:

> "No doubt an inconvertible benefit has not got a monetary value in exchange, but that does not seem to us to be the same thing as saying that it does not possess any value at all which should be taken into account in a computation of income. A man who receives

[21] p. 156.
[22] Per Lord Watson, at p. 159.
[23] pp. 163-164. On the authority of *Tennant* v. *Smith,* the following benefits conferred on persons holding an office or employment have been held not to constitute income: free maintenance (*Daly* v. *C.I.R.,* 18 T.C. 641); and a non-assignable option for the purchase of shares in the employer company (*Forbes's Executors* v. *C.I.R.,* 38 T.C. 12).
[24] 11 T. C. 83.

remuneration of £1,000 in cash may well be said to have an income of a greater assessable value than another man who gets £700 in cash and the benefit of assigned living accommodation, even if the value of the latter is fairly put at £300. But we cannot accept that the true relation of their two incomes for the purpose of taxing them is correctly expressed in the proportion of 10:7."[25]

Indeed, the principle that only money or benefits convertible into money may constitute income seems quite irreconcilable with a number of decisions in which it was held by English courts that the discharge of an employee's pecuniary obligation by his employer gave rise to a benefit in money's worth which formed part of the employee's income. For example, in *Hartland* v. *Diggines*,[26] the appellant's income tax was voluntarily paid each year by his employer. Viscount Cave, L.C. held: "It is true that the appellant did not receive cash in his hands, but he received money's worth year after year. This being so, I cannot resist the conclusion that the payment was in fact a part of his profits and emoluments as an officer of the company . . . ."[27] Although the taxpayer's pocket may have been saved an expense, it is not readily apparent what convertible benefit "came in."[28] In *Nicoll* v. *Austin*,[29] a company of which the taxpayer was a director entered into an agreement to pay him a salary and to defray certain expenses associated with the maintenance of his home: the cost of insurance and utilities, upkeep of the gardens and repair of the house. It was held that the sums so paid to others were part of his income, on the ground that they constituted money's worth. Finlay, J. cited as authority for his decision *Hartland* v. *Diggines* and *Weight* v. *Salmon*.[30] The latter case, it is submitted, was quite inappropriate as an authority for the solution of the issue before the Court and serves, perhaps, to illustrate the confusion of principles in this area of taxation. In *Weight* v. *Salmon*, certain employees were permitted to purchase shares in the employer company at a price considerably below the market value, in consideration for services rendered. It was held by the House of Lords that the difference between the market price and the amount paid for the shares constituted income in

[25] *Cmd.* 9474, p. 68, para. 211.

[26] [1926] A.C. 289.

[27] p. 292.

[28] See also *Michelham's Trustees* v. *C.I.R.*, 15 T.C. 737, where a testator bequeathed to his widow an annuity free of income tax. The Court of Appeal held that the sums paid out of the estate in discharge of her tax liability were taxable to her, being "equivalent to the immunity which she enjoyed from having [her annuity] protected from any inroad into it by the charge of Income Tax." (P. 749) There is nothing in the case to suggest that the widow could have received the income tax payments in cash or otherwise converted the "immunity" into money.

In *Old Colony Trust Co.* v. *Com'r.*, 279 U.S. 716 (1929), the Supreme Court of the United States was faced with an issue similar to that raised in *Hartland* v. *Diggines* and arrived at the same result as did the House of Lords, but by a different route, invoking the doctrine of indirect or constructive receipt. Chief Justice Taft, delivering the opinion of the Court, held that the amount of taxes paid by an employer upon an employee's income was income of the employee on the ground that "The discharge by a third person of an obligation to him is equivalent to receipt by the person taxed." (P. 729). By this reasoning no question of taxing an inconvertible benefit arises. A similar approach was taken by the Exchequer Court of Canada in *Salter* v. *M.N.R.*, [1946] Ex. C. R. 634, where Cameron, J. held: ". . . if the payment of income tax by the Company on the appellant's income was not part of his profits or gain it was in my opinion, a gratuity indirectly received by the appellant from his office or employment." (P. 649).

[29] 19 T.C. 531.

[30] 19 T.C. 174.

money's worth actually received by the employees in the form of shares which could have been disposed of at any time at their market value. In the *Nicoll* case, on the other hand, the employee was saved the expense of maintaining his home, but received nothing from his employer apart from his salarly. The inconsistency of the English decisions did not escape the attention of the Royal Commission, which remarked:

> ". . . a taxable benefit arises whenever an employer discharges a pecuniary liability of an employee that he has not incurred in the course of performing the duties of his employment. . . . This rule cuts across the distinction between convertible and inconvertible benefits, since the payment of a particular bill for a man gives him no option between personal enjoyment and realization. But any different rule would be contrary to common sense; and, presumably, the same difficulties of valuation do not occur as those that tend to defeat the assessment of the ordinary inconvertible benefit."[31]

There is nothing inherent in the concept of income to warrant the arbitrary limitation of the form of income to money or what is convertible into money. As the Royal Commission pointed out, in theory, all benefits in kind received in the course of employment as remuneration for services should be taxed, whether convertible into money—such as consumer goods, stocks or bonds— or inconvertible and capable of enjoyment only by the recipient—such as a domestic servant's board and lodging, an employee's free meals, a railwayman's free travel, a bank manager's living accommodation at the bank, or a teacher's free education for his children. To a limited extent, the United Kingdom Parliament has put this theory into practice, and thus *pro tanto* nullified the rule in *Tennant* v. *Smith,* by enacting special legislation in 1948 providing for the taxation of directors of trading companies and employees whose gross remuneration (salary plus expense payments and benefits in kind) amounts to £2,000 per year, in respect of benefits in kind, convertible or inconvertible, received as remuneration.[32] Excepted from charge are (a) accommodation, supplies and services used wholly for business purposes on the business premises, and (b) meals taken in canteens where meals are provided for the staff generally; and, in the case of an employee, but not a director, living accommodation provided on the employer's premises, if the employee is required to live there for the purpose of his duties. Although the Royal Commission recognized that the provision of non-taxable benefits in kind was capable of becoming an abuse of the tax system, it did not recommend a more comprehensive taxation of such benefits largely on the ground that ". . . the burden of administration would be so great that we do not regard an extension of the present law as justified unless the absolute loss of tax and the relative irregularities between different taxpayers are greater than we believe them to be . . . It is not possible to obtain any figures that really bear on the point."[33]

In summary, then, apart from the special legislation of 1948, inconvertible benefits are not treated as taxable income in the United Kingdom.

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[31] *Cmd.* 9474, p. 68, para. 210.

[32] Finance Act, 1948, 11-12, Geo. 6 (U.K.), c. 49, ss. 38-46. See now the Income Tax Act, 1952, 15-16, Geo. 6 & 1 Eliz. II (U.K.), c. 10, ss. 160-168.

[33] *Cmd.* 9474, p. 69, para. 215.

II *UNITED STATES*

Although the Supreme Court of the United States in the celebrated case of *Eisner* v. *Macomber*, described 'income' as "something of exchangeable value",[34] the convertibility or inconvertibility into money of non-cash benefits has not ranked as an important issue in the determination of their liability to taxation. The definition of "gross income" in section 22 (a) of the Internal Revenue Code of 1939[35] was cast in wide terms and was given a broad interpretation by the Supreme Court, which held that it embraced ". . . any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected."[36] Since it is beyond the scope of the present inquiry to delve very deep into the American law on the taxability of fringe benefits, we shall content ourselves with a brief discussion of one benefit that has given rise to a considerable amount of tax litigation, namely, free board and lodging supplied by employers to employees.

Prior to the enactment of the 1954 Internal Revenue Code, there was no statutory provision dealing with these benefits. The test for taxation, appearing first in administrative rulings of the Bureau of Internal Revenue as early as 1919[36a] and later accepted by the courts, beginning with *Jones* v. *United States*,[37] was that if benefits were received as compensation for services, their value was taxable as income; on the other hand, if they were provided for the "convenience of the employer", the employee incurred no tax liability in respect of them.[38] For example, in *Benaglia* v. *Com'r.*,[39] the taxpayer was employed by a corporation as manager of several of its hotels, at one of which he was furnished with free meals and lodging. The proper performance of his managerial duties required his constant presence in the hotel. It was held that ". . . the petitioner's residence at the hotel was not by way of compensation for his services, not for his personal convenience, comfort, or pleasure, but solely because he could not otherwise perform the services required of him", and hence, he was not taxable on the value of the meals and lodging. The court's interpretation of *Tennant* v. *Smith* is particularly interesting, in view of the construction that that case has received at the hands of English judges. "The advanage to [the bank employee]," said the court, "was merely an incident of the performance of his duty, but its character for tax purposes was controlled by the dominant fact that the occupation of the premises was imposed

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[34]"Here we have the essential matter: *not* a gain *accruing to* capital, not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in*, being *"derived,"* that is *received or drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal; —*that* is income derived from property." Per Pitney, J. 252 U.S. 189 at p. 207.

[35]Sec. 22 (a), the predecessor of sec. 61 (a) of the Internal Revenue Code of 1954, which replaced the 1939 Code, read in part as follows: " 'Gross income' includes gains, profits, and income, derived from salaries, wages, or compensation for personal service . . . of whatever kind and in whatever form paid . . . .".

[36]*Commissioner* v. *Smith*, 324 U.S. 177 at p. 181 (1945).

[36a]See O.D. 265, 1 C.B. 71 (1919).

[37]60 Ct. Cl. 552 (1925).

[38]For a discussion of the history of the "convenience of the employer" rule, see Kletzing, "Tax Treatment of Compensation In Kind", 37 *Cal. L. Rev.* 628 (1949).

[39]36 B.T.A. 838, (1937).

upon him for the convenience of the employer." Viewed in this light, the "convenience of the employer" doctrine assumes a remarkable resemblance to the concept of "beneficial receipt", discussed earlier.[40]

A difference of judicial opinion arose with respect to the taxability of the value of free meals and lodging furnished both as compensation for services and for the convenience of the employer. Some judges took the view that the convenience of the employer rule was merely one test used to determine whether the value of these benefits was compensation, and that it was unnecessary to apply the rule if it was evident from other circumstances that the meals or lodging represented compensation for services.[41] Other judges considered the convenience of the employer aspect as controlling and exempted from taxation the value of meals and lodging falling within this category regardless of their compensatory nature.[42] The problem appears to have been resolved by section 119 of the Internal Revenue Code, 1954, which excludes from gross income the value of meals and lodging, whether or not these benefits are furnished as additional compensation, provided that, in the case of meals, the meals are furnished on the business premises of the employer and also for the convenience of the employer; and, in the case of lodging, the employee is required to accept the lodging on the employer's business premises as a condition of his employment.[43]

III *CANADA—INCOME WAR TAX ACT*

There is only slight judicial authority that bears on the question of the taxability of benefits or advantages under the Income War Tax Act.[43a] In *Malkin* v. *M.N.R.* Maclean, J. commented by way of *obiter dicta* on section 3 (1) (e) of the Act, which included in the definition of income "personal and living expenses when such form part of the profit, gain or remuneration of the taxpayer." His Lordship said:

> "It seems quite clear that s. 3 (e) of the Act contemplates a situation where the taxpayer, for services rendered, receives as salary or remuneration (1) money, and (2) something in addition to the money by way of either (a) a living allowance in money, or (b) *the free use of premises for living purposes,* or (c) some other allowance or perquisite, all or any of which may as a matter of sense and right be considered as part of the gain, salary or remuneration of the taxpayer." (emphasis added).[44]

The mention of "the free use of premises for living purposes" bears out the opinion of one writer that the provision probably had the effect of overriding

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[40] *Supra,* p. 371. See also *Van Rosen* v. *Com'r.,* where the *Benaglia* case was commented on as follows: ". . . though there was an element of gain to the employee, in that he received subsistence and quarters which otherwise he would have had to supply for himself, he had nothing he could take, appropriate, use and expend according to his own dictates, but rather, the ends of the employer's business dominated and controlled, just as in the furnishing of a place to work and in the supplying of the tools and machinery with which to work. The fact that certain personal wants and needs of the employee were satisfied was plainly secondary and incidental to the employment." 17 T.C. 834 at p. 838 (1951).

[41] See *Doran* v. *Com'r.,* 21 T.C. 374 and *Romer* v. *Com'r.,* 28 T.C. 145.

[42] See *Diamond* v. *Sturr,* 221 F. 2d 264 (2d Cir., 1955).

[43] For further discussion of the taxation of fringe benefits in the United States see Landman, "The Taxability of Fringe Benefits," 33 *Taxes* 173 (1955); Guttentag, Leonard and Rodewald, "Federal Income Taxation of Fringe Benefits: A Specific Proposal," 6 *Nat. Tax. J.* 250 (1953); and Bittker, "The Individual As Wage Earner," 11 *N.Y.U. Tax Institute* 1147 (1953).

[43a] "An Act to authorize the Levying of a War Tax Upon Certain Incomes," R.S.C., 1927, c. 97, as amended.

[44] [1938] Ex. C. R. 225 at p. 231.

the principle that the value of free living quarters which the occupier was not free to let, and could not, therefore, be turned to pecuniary account, did not constitute income.[45] On the other hand, if it is true, as this statement suggests, that the section was intended to include in income only perquisites that were received as a reward for services, then it would seem to follow that the value of living quarters occupied by an employee in the course of carrying out his duties, or "for the convenience of the employer," as in *Tennant* v. *Smith*, would not have fallen to be taxed under section 3 (1) (e).

The same section of the Act received consideration by the Exchequer Court in *Salter* v. *M.N.R.*[46] The appellant was president of a company that decided in 1938 to provide annuities for certain of its employees. The company agreed to pay the premiums on an individual policy taken out for the appellant so long as he remained in its employ. The policy provided for a monthly payment to the appellant commencing in 1944 and to continue for his lifetime, with payments for 10 years guaranteed, his wife to be the beneficiary of the guaranteed payments in the event of his early death. If he left the service of the company prior to the due date of the first annuity payment, all benefits of the annuitant and the beneficiary were to terminate on the date that such service ended, and the insurer was bound only to pay to the annuitant in one sum an amount equal to the sum of all premiums then paid, or the cash surrender value of the policy, whichever should be the greater. Upon the termination of his services in 1942, the company assigned all its control and interest in the policy to the appellant who paid the last premium and instructed the insurance company to pay any further benefits in the annuity which might be available to him to his wife upon his death. The premiums paid by the company were considered by the taxing authorities to constitute additional income in the hands of the appellant, who argued that since he never received the payments, directly or indirectly, although at some future date he might receive benefit from them, they were not income. Cameron J. held that the sums were taxable. The premiums had been paid to or for the benefit of the taxpayer or his family, and hence were "personal and living expenses" forming part of the profit, gain or remuneration of the taxpayer, and constituting part of the gain, benefit or advantage accruing to the taxpayer under the annuity contract, within the meaning of sections 3 (1) (e) and 2 (r) (ii).[47]

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[45] Plaxton, *Canadian Income Tax Law*, 2nd ed., p. 63.

[46] [1946] Ex. C. R. 634.

[47] "Sec. 3 (1) For the purposes of this Act, 'income' means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment . . . and shall include . . . the annual profit or gain from any other source including

(e) personal and living expenses when such form part of the profit, gain or remuneration of the taxpayer or the payment of such constitutes part of the gain, benefit or advantage accruing to the taxpayer under any estate, trust, contract, arrangement or power of appointment, irrespective of when created."

"Sec. 2 (r) 'personal and living expenses' shall include inter alia:—

(ii) the expenses, premiums or other costs of any policy of insurance, annuity contract or other like contract if the proceeds of such policy or contract are payable to or for the benefit of the taxpayer or any person connected with him by blood relationship, marriage or adoption."

"The annuity contract," said the court, "was entirely for the benefit of the appellant, for although in certain particulars the appellant did not have absolute control as to options, loans and assignments, I cannot recall any provisions in the policy under which the Company could at any time receive any benefits thereunder without, at least, the voluntary approval and direction of the appellant."[48] The fact that the appellant had only limited control over the policy and could hardly have been in a position to convert it into cash was of no apparent importance in determining the taxability of the "benefit" conferred on him, which may fairly be described as a non-forfeitable right to receive in the future either monthly annuity payments or, in certain events, a lump sum payment. The *value* of the annual benefit to the appellant may well have been less than the full amount of the premiums, since certain of the rights purchased by his employer were withheld from him. However, in view of the definition of "personal and living expenses" as "the expenses, premiums or other costs of any . . . annuity contract," the inclusion in his income of the whole of the premiums would seem to have been warranted.[49]

A contrary result was reached by the Income Tax Appeal Board in *Fuller* v. *M.N.R.*[50] where the appellant was assessed under sections 2 (1) (r) (ii) and 3 (1) (e) in respect of annuity premiums paid on her behalf by her employer. Under the terms of the annuity contract, the appellant was entitled to receive fixed monthly payments for her lifetime, the first of such payments to be made when she reached the age of fifty-six. If she died before one hundred and twenty monthly payments had been made, her employer was entitled to receive from the insurer the balance of the one hundred and twenty payments. In the event of her death before the due date of the first payment, her employer again was entitled to receive the total premiums paid under the contract or its cash value, whichever should be the greater. The Income Tax Appeal Board, without referring to the *Salter* case, held that the premiums were not taxable to the appellant for two reasons. In the first place, it was very doubtful whether the proceeds of the policy could be said to be "payable to or for the benefit of the taxpayer or any person connected with him by blood relationship, marriage or adoption," within the meaning of section (2) (1) (r) (ii), since "it could be held at the very most that there is a possibility the proceeds will be payable to her."[51] And secondly, even if the premiums did constitute "personal and living expenses", they did not form part of the gain or remuneration of the taxpayer within the meaning of section 3 (1) (e), since, under certain circumstances, "the premium amounts paid by the employer would be refunded to him or the unpaid balance of the 120 monthly instalments guaranteed the appellant would also be paid to her employer."[52] The first ground for the decision is in keeping with the well-established principle that

[48]p. 647.

[49]The premiums were also held taxable as being "a gratuity indirectly received by the appellant from his employment with the company." (P. 647.) To the same effect is *In re Gillespie*, [1942] C.T.C. 249, aff'd. [1943] C.T.C. 127. See also n. 28, *supra*.

[50]51 D.T.C. 426; 5 Tax A.B.C. 220.

[51]p. 228.

[52]p. 229.

amounts to which a taxpayer is only contingently entitled do not form part of his income.[53] The appellant's conditional right to future payments is readily distinguishable from the non-forfeitable rights of the taxpayer in *Salter* v. *M.N.R.* The second reason for the Board's decision is open to question. There is nothing in the case to suggest that the premiums were paid as a testimonial to the appellant or for a consideration other than services. If the definition of "personal and living expenses" had been held to include contingent benefits, it is difficult to escape the conclusion that the payments, whose nature the Board expressly refrained from determining, were made as "remuneration",[53a] a word to which the courts have given a considerable breadth of meaning.[54]

Although it is difficult to spell out from this paucity of authorities the precise extent to which benefits and advantages were taxable under the Income War Tax Act, it is probably accurate to say that benefits, whether convertible into cash or not, received as remuneration for services and constituting "personal and living expenses" were taxable as income. Let us turn now to a consideration of the tax treatment of benefits under the present Income Tax Act.

IV *CANADA—INCOME TAX ACT*

It is not easy to conceive of a more inclusive definition of income from an office or employment than that contained in section 5 of the Income Tax Act,[55] the relevant part of which for our purposes reads as follows:

> "Sec. 5 (1) Income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year plus
>
> (a) the value of board, lodging and other benefits of any kind whatsoever (except the benefit he derives from his employer's contributions to or under a registered pension fund or plan, group life, sickness or accident insurance plan, medical services plan or supplementary unemployment benefit plan) received or enjoyed by him in the year in respect of, in the course of or by virtue of the office or employment; . . . ."

The Exchequer Court recently held that the purpose of paragraph (a) " . . . is to extend the meaning of 'income from an office or employment' beyond the normal concept of 'salary, wages and other remuneration, including gratuities' by including in that term the *value* of board, lodging and other benefits which an employee may receive or enjoy in the course of, or by virtue of, his office or employment."[56] It will be convenient to begin our discussion of this provision by examining decisions relating to both the liability to taxation of board and lodging and the problem of valuation of these benefits and other benefits generally.

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[53] See the tests laid down by Thorson, J. in *K.S.B. Robertson Ltd.* v. *M.N.R.*, [1944] C.T.C. 75 at p. 91, and *Edwards* v. *Roberts*, 19 T.C. 618, discussed below at p. 391.

[53a] "There can be little doubt that the contributions made by an employer to employees pensions, irrespective of how such contributions are made, are essentially a reward for services. It may be that the employer regards his contributions in a somewhat different light from the annual outlay for wages and salaries, but this does not alter the fact that the aggregate which the employee or his dependents receive from the employer is in the nature of a reward for services rendered, and as such should be considered as taxable income in the hands of the employee." *Report of the Royal Commission On the Taxation of Annuities and Family Corporations*, p. 36 (1945).

[54] See the discussion *infra*, p. 397.

[55] R.S.C., 1952, c. 148, as amended.

[56] *Williams* v. *M.N.R.*, [1955] Ex. C.R. 12 at p. 15.

(a) "... *the value of board, lodging*"

It is clear from *Williams* v. *M.N.R.*[57] that section 5 (l) (a) nullifies the principle established by *Tennant* v. *Smith,* that the value of board and living quarters supplied to an employee free of charge, and which cannot be turned to pecuniary account by the recipient, is not taxable as income. In the *Williams* case, the appellant resided with his family in Vancouver and was employed as a marine engineer on a steamship where he was supplied with meals and living accommodation without charge during his employment, as was required of every ship owner by the Canada Shipping Act. His contract of employment provided that the benefits were furnished "... in consideration of ... services to be duly performed." The appellant appealed from an assessment in respect of the value of these benefits, which the parties agreed to be $228.00, on the ground that, as his employer was required by law to provide them, the appellant had no option in the matter and that therefore their value should not be considered as part of his income. Cameron, J. held that the board and lodging were taxable under section 5 (1) (a). "The question," he said, "is not whether the employer supplied the benefits because of the requirements of the Canada Shipping Act or whether it did so by voluntary contract or otherwise—but whether the appellant did receive or enjoy them in 1952 in respect of, or in the course of, or by virtue of his employment, and my finding must be that he did."[58]

It is important to observe that it is the *value* of board and lodging and other benefits that is required by the statute to be brought into income. But far from providing any standard or direction for assigning a money value to benefits,[59] section 5 (1) (a) does not even specify *what value* is intended, whether fair market value, the value to the employee or the value to the employer or other person providing the benefit, that is, the cost.[60] Canadian courts have been afforded little opportunity to consider the problem of valuation of board and lodging, for in both of the cases in which the taxability of these benefits arose for judicial determination, the parties were able to agree on their value.[61]. However, there is support in other authorities for interpreting "value" to mean "value to the employee." In *Tennant* v. *Smith,*[62] Lord Watson remarked in the course of his reasons for judgment that "Even according to [the Crown's] argument the assessable value of a servant's

[57]*Supra,* n. 56.

[58]p. 15.

[59]It will be recalled that the absence of any machinery for valuation in the English statute was one of the factors that led Lord Watson and Lord Macnaghten in *Tennant* v. *Smith* to conclude that Parliament could not have intended to tax benefits not convertible into money, such as free lodging.

[60]Cf. section 26 (e) of the Australian Income Tax and Social Services Contribution Assessment Act, (1936-1953), which reads: "The assessable income of a taxpayer shall include —(e) *the value to the taxpayer* of all allowances, gratuities, compensations, benefits, bonuses and premiums allowed, given or granted to him in respect of, or for or in relation directly or indirectly to, any employment of or services rendered by him, whether so allowed, given or granted in money, goods, lands, meals, sustenance, the use of premises or quarters or otherwise." (Emphasis added).

[61]*Williams* v. *M.N.R.,* [1955] Ex. C.R. 12, and *No. 510* v. *M.N.R.,* 58 D.T.C. 289; 19 Tax A.B.C. 226.

[62][1892] A.C. 150.

residence, in premises which he does not occupy,[63] is not the price which other persons might be prepared to pay for the privilege, but the benefit which he personally derived from it, estimated in money."[64] In a South African case, *Income Tax Case No. 210,* the appellant was required by the conditions of his engagement of service to reside in an isolated locality having no amenities whatsoever from a social or residential point of view. The test for determing the occupational value of the premises in respect of which he was assessed was held by Dr. Manfred Nathan, K.C. to be the value of the premises to the employee and not their value to his employer. The learned judge said:

> "But it seems to us, when we have to consider the value of what is enjoyed by the appellant, that it must be the value from the point of view of the appellant. The appellant is the person who pays the tax, and he is paying in respect of what he receives, and what he receives is not what the company thinks it ought to get, but what is the value to him . . . . The actual owner of the house or the employer may put a fictitious value on the house. He may have regard to his ability to recoup himself for his expenditure, or the price the property may command in the market, but so far as the appellant is concerned, he is only interesetd in what is the value of the property which he enjoys, or the allowance connected with it."[65]

Further support for the "value to the employee" test is found in a case dealing with the valuation of shares. In *Ede* v. *Wilson,*[66] shares in a parent company were purchased at less than market value by employees of a subsidiary company, who gave a verbal undertaking not to sell such shares without the permission of the directors of the parent company so long as they remained in the employ of the subsidiary. It was held that the privilege of buying shares at an under-valuation had some worth, in respect of which the employees were assessable, but the case was remitted to the Commissioners for a valuation, in view of the restriction on the sale of the shares. In the course of his reasons and at the end of his judgment in reply to statements by counsel, Wrottesley, J. made the following observations with respect to valuation of the shares: "Thus, to a man not likely to need to sell them, they will doubtless hold their full value as on the stock exchange. To a man who has no other capital they may possibly have a lesser value; . . . [The value] may be very different in the hands of different persons . . . . to a well-to-do person with capital of his own already it may be worth the stock exchange value; to another man it may not."[67]

Having regard to these authorities, we may fairly conclude that the

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[63]His Lordship here is referring to "occupation" of premises for the purposes of Schedules A and B of the English Income Tax Act. "Schedule A, which assesses property according to its annual value, includes all lands, tenements, hereditaments, and heritages capable of actual occupation. Schedule B imposes an additional assessment in respect of occupancy, upon some of the lands and others comprehended in Schedule A, the occupation of which in itself constitutes a trade or business." Per Lord Watson at p. 158. The bank in *Tennant* v. *Smith* was held in *Russell* v. *Town and Country Bank,* to be the only occupier, being, as Lord Herschell said, ". . . in the same position as if that portion of their bank premises [occupied by the bank agent] were used in any other way in the strictest sense for the purposes of the bank, and the business of the bank." (1888), 13 App. Cas. 418 at p. 426.

[64]p. 158.

[65]6 S.A.T.C. 59 at p. 60.

[66]26 T.C. 381.

[67]p. 389. Some doubt as to the correctness of these remarks appears to have been entertained by Roxburgh, J. in *Abbott* v. *Philbin,* [1959] 2 All E.R. 270, at p. 273, where he said: "If that is good law . . . there may be some interesting and protracted valuations if they are conducted on the lines indicated by Wrottesley, J."

individual circumstances of each employee who is sought to be taxed in respect of free board and lodging would have to be examined with care. It would be important to consider, for example, whether the employee, required to live on the business premises, could live at home with his parents without charge; or whether the free accommodation was a duplication of already existing facilities, as in the *Williams* case, where the living quarters on the ship might well have been of negligible value to the taxpayer who was incurring the expense of maintaining another dwelling for his family and hence saved little expense, if any, as a result of the provision of the accommodation on the ship. Another factor to be taken into account would be the lack of free choice in the selection of the meals or living quarters, neither of which might be what the employee's personal tastes would have dictated. It is not unlikely that a ravenous eater, a dieting employee and a vegetarian would report different amounts as the value of equal portions of the same food supplied free of charge or at a reduced rate in the company cafeteria.[68]

The problem of determining the value of a benefit has been held by the Australian Taxation Board of Review to be a matter for the taxing authorities and the courts, and not for agreement between the taxpayer and his employer. In *Case C 49*,[69] the taxpayer was entitled by a contract in writing to receive as part of his remuneration as a hotel manager free board and lodging for himself and his dependants, upon which the contract placed a certain value. He appealed from an assessment for income tax in which these benefits were given a substantially higher value by the Commissioner. The Board held that "In cases of this kind it is not open to an employer and an employee to determine what is, for the purposes of an income tax assessment, the value to be placed upon board and lodging provided by the employer for the employee. Their assessment of that benefit to the employee might be far removed from its true value. It is for the Commissioner and, in the event of a review, for the Board, to determine that question."[70]

A troublesome question is presented where the living accommodation furnished to an employee is far more expensive than he would have chosen for himself. In these circumstances, it would be incumbent on the employee to marshall the facts to demonstrate the value of the premises to him, perhaps by pointing to the inexpensive quarters previously occupied. As a matter of principle, it should be completely irrelevant whether the premises occupied free of charge by an employee are owned or merely rented by his employer, for in either case, it is their value to the employee-occupant that is important.

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[68]The valuation problem is especially acute in the case of inconvertible benefits, such as free board and lodging. The value to an employee of a convertible benefit would seem to be its fair market value. For example, the value of the benefit received by an employee who buys shares in his employer company at an undervaluation is the difference between the price he pays for them and the amount he could get for them at the time of allotment: *Weight* v. *Salmon*, 19, T.C. 174. Cf. *No. 403* v. *M.N.R.*, 57 D.T.C. 120; 16 Tax A.B.C. 387.

[69]3 T.B.R.D. 269 (1952).

[70]p. 272. Among the factors taken into consideration by the Board in determining the correctness of the valuation were the cost of living during the year of income concerned and the tariff that guests paid at the hotel for food and quarters, which the taxpayer admitted were similar to the food and quarters received by him and his dependants.

A contrary view appears to have been taken in a recent Australian decision. In *Case 6*,[71] the taxpayer was the managing director of a large and prosperous company. For a short time after his appointment to that position, he occupied a modest dwelling for which he personally paid the rent. The directors of the company expressed the view that it was essential in the interests of the company that the taxpayer should maintain a standard of living and occupy a house on a par with others occupying similar positions, where he could return the hospitality of businessmen of corresponding status. He thereupon leased an appropriate residence for which the company paid £546 rent, in respect of which sum he was assessed for income tax. He argued that the house was in excess of his needs and that the value to him was not more than £156, the latter amount being, in his opinion, the amount of rent that would have been payable per annum for a house that would have been adequate for his private and domestic requirements. The Board held that ". . . the value to him of the benefit which he gains by having his rent paid by the company is the full amount so paid . . . . The taxpayer's representatives cited the case of a station manager who is permitted or required by his employers to live in their luxurious homestead, and the case of an hotel manager who may be given rent-free quarters in the hotel. These cases are easily distinguishable; the employers are not paying the employee's rent."[72] This result at first blush appears to be in keeping with a number of English decisions, discussed earlier,[73] in which the discharge of an employee's pecuniary obligations, such as income tax and the cost of maintenance of his own home, was held to give rise to a taxable benefit in money's worth or to constitute an indirect receipt of income. But in none of those cases were the payments made clearly for an employer business objective (other than having a contented staff) as in *Case 6*, where such objective was of paramount importance, any benefit enjoyed by the employee through the saving of expense being only incidental. Moreover, if the rationale of the decision was that an *employee's* pecuniary obligation was discharged, the result might have been different if the company, instead of the taxpayer, had entered into the leasehold agreement, in which case the rental payments would have been made in discharge of *its own* obligations. For form, it has been said, and truly, is most important in matters of taxation. However, that may be, the manifest disadvantage and gross unfairness to an employee of taxing him on the basis of the cost to his employer of a sumptuous dwelling which the employee may be required to occupy in order properly to entertain business clients militates strongly against the use of the cost of a benefit to an employer as the measure of its value to an employee, as was done in *Case 6*.[74]

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[71] 13 C.T.B.R. 32.

[72] p. 36.

[73] *Supra*, pp. 374-75.

[74] The English Income Tax Act, 1952, 15-16 Geo. 6 & 1 Eliz II, c. 10, directs in s. 161 that, in the limited circumstances where benefits are taxable, the measure of liability is to be the expense which the company or employer has been put to in providing the benefit in question. This method has, of course, the considerable advantage of obviating the very difficult problem of determining value according to the particular circumstances of each employee.

If it is true, as the weight of authority would indicate, that "value" in section 5 (1) (a) means "value to the employee", there is no necessary correlation between the cost of a benefit to an employer and its value to an employee, and in circumstances where the benefit is a deductible item, the value of the benefit reported by an employee and his employer as income and deduction respectively might differ widely. Such a situation arose in *Case 15*,[76] where the amount of £65 included in the assessable income as the value of board and lodging of an Australian farm hand was disputed on the ground that a deduction of only £39 was allowed to the employer for the cost of food provided by him for the taxpayer. The Board explained the apparent anomaly by pointing out that "The value of a meal is usually, and indeed necessarily, greater than the cost of the food as such, when the labour and expense of preparation and the value of the service are taken into account."[76]

(b) "*. . . other benefits of any kind whatsoever . . . received or enjoyed . . .*"

"[T]he concept of 'benefit' is essentially pragmatic and elastic, as it must be in order to handle 'all the protean arrangements which the wit of man can devise' as compensation."[77] The meaning attributable to this flexible concept in section 5 (1) (a) has been the subject of very little discussion by the courts. Mr. R. S. W. Fordham in *No. 126* v. *M.N.R.*, noted that "Neither of these words ['benefit or advantage'] is defined in the Act, but I am content to take the meaning given to each at pages 169 and 27, respectively, of the Shorter Oxford English Dictionary, as they are not words that are difficult to understand."[78] He held in *Reininger* v. *M.N.R.* that "A benefit, properly so called, usually indicates an advantage of some kind or another. In the Shorter Oxford English Dictionary, 3rd ed., at page 169, 'benefit' is stated to mean 'advantage, profit, good.' It is probably correct to say that if there is no advantage, there is no benefit."[79] It is probably equally correct to say, however, that not every advantage is a benefit within the meaning of section 5 (l) (a). The question remains, what kinds of benefits are taxable under that provision.

Since we are concerned with the meaning of a term in a taxing statute, and in view of the fact that the benefits contemplated by section 5 (1) (a) must be capable of being evaluated in money, to say that Parliament intended to tax only benefits of a pecuniary or economic nature, to the exclusion of aesthetic, moral or spiritual benefits is perhaps only to state the obvious. Moreover, certain other advantages would seem to fall outside the pale of taxation as being conditions of employment, which Parliament could hardly have intended to tax. Into this group would fall such items as air-conditioning, lighting, recorded music, washrooms, office space and attractive and spacious

[76]12 C.T.B.R. 108.

[76]p. 109.

[77]Eisenstein, "A Case of Deferred Compensation," 4 *Tax Law Rev.* 391 at p. 410.

[78]53 D.T.C. 419; 9 Tax A.B.C. 241 at pp. 246-47. At p. 169 of the dictionary referred to, "benefit" is defined to include: (a) 1. a thing well done; a good deed; 2. a kind deed; a favour, gift; 3. Advantage, profit, good. (c) pecuniary profit. At p. 27, "advantage" is defined to include: 1. benefit, increased well-being; 2. pecuniary profit, interest.

[79]58 D.T.C. 608; 20 Tax A.B.C. 242 at p. 246.

surroundings. But a precise line of demarcation between clearly taxable benefits conferred as compensation and non-taxable benefits that are part of the working conditions is not easily drawn. An employer interested in maintaining or increasing production may take steps to promote the health, efficiency and contentment of his employees by providing free medical check-ups or free recreational facilities such as swimming pools and tennis courts, which, on the one hand, may save the employees money and so constitute a benefit to them, and on the other hand, from the employer's viewpoint, are in the same category as better lighting and washrooms.

It is conceivable that minor benefits of little value might be excluded on the principle of *de minimis non curat lex.*[80] Such items as the value to an employee of the employer-sponsored summer picnic or the annual Christmas cake distributed to all staff members might fall into this category.

Judicial opinion as to the application of the *ejusdem generis* rule to section 5 (1) (a) as is stood prior to the 1956 amendment has not been unanimous. In *No. 247* v. *M.N.R.*, the argument that "other benefits" referred to benefits of the same nature as the preceding words, viz., board and lodging, met with failure. Mr. Fordham reasoned that ". . . the words 'other benefits', considered in relation to Section 5 (a) as a whole, are of general import and can include the right to purchase shares. The excepting words in brackets in para. (a), for instance, are far removed from anything akin to board and lodging."[81] The opposite view was entertained by Mr. W. S. Fisher in *Pazuk* v. *M.N.R.*, where he remarked: "Were it not for the decision of my colleague Mr. Fordham in *No. 247* v. *M.N.R.* . . . I might have arrived at the conclusion, from my own interpretation of the said phrase, that the *ejusdem generis* rule did apply and that 'other benefits' would have to be construed as benefits similar to 'board and lodging', and that this would be so in spite of the fact that after the word 'benefits' there is set forth an exception . . . ."[82] The addition of the words "of any kind whatsoever" to "other benefits" in 1956[83] would appear to have resolved the issue and left little scope for argument in favour of the application of the rule to the section as amended.

A rather fundamental limitation on the meaning of "benefits" has been suggested by one member of the Tax Appeal Board. In *Pazuk* v. *M.N.R.*, the appellant was assessed under section 5 (1) (a) as having received a benefit from his employer's contributions to a pension fund. Mr. Fisher, whose judgment was concurred in by Mr. Snyder, said:

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[80]In *Sutton* v. *C.I.R.*, 14 T.C. 662, an argument by counsel raised the question of whether a bequest of the right to have a free meal at the testator's establishment was income to the beneficiary. "Well, I think perhaps the answer to that is that that may be dealt with as the minimum with which the law does not concern itself," said Rowlatt, J. at p. 679.

[81]55 D.T.C. 192; 12 Tax A.B.C. 335 at p. 339. A similar argument with respect to the meaning of Sched. E of the English statute met with the same fate in *Cowan* v. *Seymour*, [1920)] 1 K.B. 500 at pp. 507-08.

[82]55 D.T.C. 428; 13 Tax A.B.C. 264 at pp. 269-70. Mr. Cecil Snyder, now Chairman of the Board, apparently shared Mr. Fordham's opinion for, without mention of the *ejusdem generis* rule, he held taxable certain benefits other than board and lodging. See, for example, *No. 350* v. *M.N.R.*, 56 D.T.C. 369; 15 Tax A.B.C. 330 (company automobile used by its president).

[83]S.C. 1956, c. 39, s. 1.

"It might be thought that by virtue of his employment with an employer who set up a group insurance plan to provide an ultimate annuity upon the retirement of each and every employee this taxpayer was being saved the expense of providing for his own retirement. It has long been settled tax law, however, that unless specific and clear provisions of the law make such items taxable income includes only that which comes into the pocket and not that which saves the pocket."[84]

While it may be true that "income" includes only that which comes into the pocket, there is nothing inherent in the elastic and pragmatic concept of "benefit" or in the language of section 5 (l) (a) to warrant the making of a distinction between benefits that come into the pocket and those that save the pocket. On the contrary, by requiring the inclusion in income of benefits merely "enjoyed" as well as those "received", Parliament would seem to have intended to reach benefits other than those having all the attributes of "income".

Having examined briefly some of the factors that may serve to define in broad outline the general scope of section 5 (1) (a), we turn now to a study of specific benefits whose taxability has been considered by the courts, especially the Tax Appeal Board.[85]

1. *Use by an employee of his employer's property.* In *No. 350* v. *M.N.R.*, the president and managing director of a company was taxed in respect of the value of the benefit received by him from the use, for his private purposes, of an automobile owned by the company.[86] In computing the value of the benefit, the court estimated the appellant's personal use of the car as a percentage of the total mileage and added to his income that percentage of the total cost of operation, including depreciation, gas, oil, washing and insurance. The same system was used in *Curtis* v. *M.N.R.*,[87] *Sherman* v. *M.N.R.*[88] and *No. 592* v. *M.N.R.*[89] This method is not in keeping with the principle discussed earlier, that valuation depends upon matters personal to the individual employee, although it does have the great virtue of simplicity, and in the case of one-man companies, where the major shareholder-officer has the choice of selecting the company car, knowing that it will also be used for personal purposes, the percentage of cost method is probably a satisfactory measure of the value of the benefit to him. On the other hand, it is not unlikely that a small sports car would be of less value to an employee with a large family

[84]55 D.T.C. 428; 13 Tax A.B.C. 264 at p. 273. He reiterated this view in *Norris* v. *M.N.R.*, 57 D.T.C. 301, 17 Tax A.B.C. 257 at p. 261, where the issue was similar.

[85]Whether a particular benefit has been received or enjoyed "in respect of, in the course of or by virtue of the office or employment" is discussed, *infra*, p. 393ff.

[86]56 D.T.C. 369; 15 Tax A.B.C. 330. The taxpayer was apparently assessed in his capacity as officer under section 5 (1) (a) and in his capacity as shareholder under section 8 (1), both of which sections require the inclusion in income of the value of "benefits." There is no reason to attribute a different meaning to the word as used in several sections of the Act. See Maxwell, The Interpretation of Statutes, 10th ed., p. 322: "It has been justly remarked that, when precision is required, no safer rule can be followed than always to call the same thing by the same name. It is, at all events, reasonable to presume that the same meaning is implied by the use of the same expression in every part of an Act. [Authorities cited.] But the presumption is not of much weight. The same word may be used in different senses in the same statute and even in the same section."

[87]57 D.T.C. 509; 18 Tax A.B.C. 90.

[88]56 D.T.C. 59; 14 Tax A.B.C. 279. The assessment was made under section 8 (1) (c).

[89]59 D.T.C. 82; 21 Tax A.B.C. 219. The assessment was apparently made under section 8 (1).

than to a bachelor interested only in a means of transportation for himself. And consider the unfairness of the percentage of cost method in the case of a junior executive whose needs would be satisfied by an automobile of modest price who is required by his employer to drive a large and expensive company car for the business purpose of maintaining prestige.[90] Although it is simple enough to state the principle of valuation involved, it is exceedingly difficult to say how a court should weigh these personal matters in assigning a money value to such benefits.

It is of interest to note that in each of the above cases, the assessor's valuation was reduced by the Board, by amounts ranging from seventeen per cent in the *Curtis* case (from $300 to $250) to almost fifty per cent in the *Sherman* case (from $350 to $185).[91]

2. *Benefits enjoyed by an employee's family.* There is judicial authority for the proposition that the value of benefits conferred by an employer on the family of an employee who is thereby saved from incurring expenses, is taxable to the employee. In *No. 510* v. *M.N.R.*,[92] amounts were added to the taxpayer's income in respect of room and board provided for himself and his wife by his employer. Although it is not clear from the decision, the benefit enjoyed by the wife could have been assessed to the taxpayer only as "other benefits", for meals consumed by her could hardly be considered as ". . . board . . . received or enjoyed by" her husband.[93] And in *No. 592* v. *M.N.R.*,[94] the percentage of the cost of operation of two company-owned cars and a cabin cruiser attributable to the use made of these vehicles by the appellant's wife was taxed to the appellant, the major shareholder, probably on the ground that he was saved the expense of having to provide her with other means of transportation.

3. *Purchases of shares by employees at an undervaluation.* The privilege of buying shares at a lower-than-market price, with no restriction as to the time and place of resale, was held in *Snell* v. *M.N.R.* to be "distinctly an advantage from the appellant's point of view . . . . Consequently, what the appellant derived can properly be regarded as embraced by the words 'and other benefits' as found in [section 5 (a)]."[95] The value of the advantage

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[90] Cf. *Case 6, supra* p. 384.

[91] In *No. 592* v. *M.N.R., supra,* n. 89, Mr. Fordham observed: "My experience in these matters—and I have heard many of them across the country—is that assessors, with their local knowledge of what transpires, are usually not far out in their calculations of the degree of use to which vehicles owned by a private company are put by controlling shareholders. Consequently, and except when the evidence adduced is very indicative, I am not often inclined to interfere much with their figures." P. 224. He reduced the assessor's value by twenty-five per cent, from $6,083.55 to $4,562.66. The judgment in the *Sherman* case was also given by Mr. Fordham.

[92] 58 D.T.C. 289; 19 Tax A.B.C. 226.

[93] See also *Case C49,* discussed *supra,* p. 383, where the Australian Taxation Board of Review held that the provision of free board and lodging for the taxpayer's daughters and step-son, for whose maintenance and support he accepted full responsibility, was an allowance or benefit granted to him in respect of his employment, and therefore part of his assessable income.

[94] *Supra,* n. 89.

[95] 57 D.T.C. 299; 17 Tax A.B.C. 186, at pp. 188-89. To the same effect is *No. 247* v. *M.N.R.,* 12 Tax A.B.C. 335. Even in the absence of a statutory provision as broad as sec. 5 (1) (a), the same result was reached by the English courts: see *Weight* v. *Salmon,* 19 T.C. 174 (H.L.).

was held to be the difference between the amount paid for the shares and their market value at the time of purchase.[96]

4: *Loans to employees.* An employee who is permitted to borrow money from his employer for his private purposes may clearly enjoy a benefit, within the ordiniary meaning of that word,[97] in at least two respects. First, he may be too doubtful a credit risk to obtain funds from a commercial lender, and second, if the loan is made free of interest, the saving of expense which he would ordinarily incur in borrowing money is a real advantage. The case of *Reininger* v. *M.N.R.*,[98] is instructive with regard to the first kind of benefit. A company of which the appellant was principal shareholder loaned money at 5% interest to his wife, who gave a demand note to the lender but no security. In determining the tax liability of the husband in respect of the loan, it was necessary for the court to decide whether the wife had received a "benefit" within the meaning of section 16 (1).[99] After discussing the meaning of "benefit" generally and quoting a dictionary definition,[100] Mr. Fordham concluded that she had. "It seems to me," he said, "to be more than doubtful that any bank, or other financial institution, would have lent money to the appellant's wife on such easy terms—or even at all, for that matter—and that, accordingly, what she derived from the company's action was a benefit within the meaning of Section 16 (1) . . . ."[101]

From the point of view of an employee, the free use of an employer's property, whether in the form of an automobile on the one hand, or money on the other, results in a benefit in the form of a saving of expenses. However, in *No. 359* v. *M.N.R.*,[102] it was held that a company did not confer a 'benefit', within the meaning of sections 5 (1) (a) and 8 (1) (c), on a shareholder by lending him $97,000 interest free. The Minister had valued the benefit at 4% of the amount of the loan outstanding. Mr. W. S. Fisher held: "Apart from specific legislation in a taxing statute, I know of no law which imposes an obligation upon a lender to demand the payment of interest in connection with a loan granted by the lender to a borrower, and if the lender does not require the payment of interest, the borrower is under no obligation to pay interest."[103] It is submitted that it is the absence of the obligation to pay interest for the use of the money, just as it is the absence of an obligation to pay rent for the use of a company car that results in a benefit to the employee in the form of a saving of expenses.

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[96]A restriction on the right of disposal of the shares is a factor to be considered in the valuation of the benefit: *Ede* v. *Wilson*, 26 T.C. 381, discussed *supra*, p. 382.

[97]"In general the language of a taxing statute is to be taken in its colloquial or popular sense. . . ." *Per* Rand, J. in *Thomson* v. *M.N.R.*, [1946] C.T.C. 51 at p. 65.

[98]58 D.T.C. 608; 20 Tax A.B.C. 242.

[99]"Section 16 (1) A payment or transfer of money, rights or things made pursuant to the direction of, or with the concurrence of, a taxpayer to some other person for the benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred on the other person shall be included in computing the taxpayer's income to the extent that it would be if the payment or transfer had been made to him."

[100]See *supra*, p. 385.

[101]p. 246.

[102]56 D.T.C. 475; 16 Tax A.B.C. 24.

[103]pp. 27-28.

More recently, the problem raised by interest-free loans was again considered by the Board in *Pillsbury Canada Limited* v. *M.N.R.*[104] The appellant company borrowed large sums of money from two companies which it controlled through stock ownership, the loans being evidenced by promissory notes bearing interest at 4½% per annum. When the principal amounts were repaid, each of the creditors elected to waive the interest owing, in respect of which sums the appellant was assessed as having had benefits conferred on it within the meaning of section 8 (1) (c). In giving judgment for the taxpayer, Mr. Fordham followed *No. 359* v. *M.N.R., supra,* and also applied the law of England, to the effect that "Where . . .—and this is the case now before the Board—the partial or total remission of a debt amounts to no more than a saving by the debtor, it is not *income* accruing to him." (emphasis added).[105] By this reasoning, the lenders might have forgiven the whole of the debt without thereby conferring a benefit on the borrower. To say that a saving is not *income,* apparently because nothing comes into the pocket,[106] is far from saying that a "saving" may not be a *benefit,* the value of which is made taxable by aptly worded legislation, such as sections 5 (1) (a) and 8 (1) (c), unless the word "benefits" is to be construed as including only benefits having all the attributes of income. This question has already been dealt with.[107]

5. *Payments made by an employer to discharge employees' pecuniary obligations.* As we observed in our discussion of the English Income Tax Acts and the Canadian Income War Tax Act, payments made by an employer to discharge an employee's pecuniary obligations, such as income tax and maintenance costs of a home, were held to constitute income to the employee. Such payments would be taxable under the Income Tax Act, it is submitted, either as having been constructively received by the employee or, on the basis of the following decisions under section 8 (1), as benefits under section 5 (1) (a). In *Herbascz* v. *M.N.R.,*[108] company funds used to pay a shareholder's income tax were held to be taxable to him as a benefit under section 8 (1). Similarly, in *Sabat* v. *M.N.R.,*[109] a company which made a payment in partial discharge of a shareholder's personal indebtedness was held to have conferred a taxable benefit on him under the same section.[110]

6. *Employers' contributions to insurance and pension funds.* An employee whose pecuniary obligation, such as income tax, is paid by his employer is taxable in respect of such payment in the year in which it is made, for the benefit to him is immediate. On the other hand, if an employee acquires only a contingent or conditional right to benefit at some time in the future from payments made by his employer, it has been held by English and Canadian

[104]58 D.T.C. 428; 19 Tax A.B.C. 431.

[105]p. 433.

[106]Lord Macnaghten's celebrated statement in *Tennant* v. *Smith* (". . . a person is chargeable for income tax under Schedule D, as well as under Schedule E, not on what saves his pocket, but on what goes into his pocket") was recently quoted with approval by Thurlow J. in *McCullagh Estate* v. *M.N.R.*, [1959] C.T.C. 308 at p. 312.

[107]*Supra,* p. 387.

[108]56 D.T.C. 34; 14 Tax A.B.C. 241.

[109]55 D.T.C. 321; 13 Tax A.B.C. 101.

[110]To the same effect is *No. 523* v. *M.N.R.,* 58 D.T.C. 379; 19 Tax A.B.C. 360.

courts that the employee is not taxable in the year the payments are made. In *Edwards* v. *Roberts*,[111] the taxpayer was employed by a company under a service agreement dated 1921 which provided, *inter alia*, that in addition to an annual salarly, he should have an interest in a "conditional fund," which was to be created by the company by the payment after the end of each financial year of a sum out of its profits to the trustees of the fund, to be invested by them in the purchase of the company's shares. He was not entitled to receive any part of the corpus of the fund set aside for his benefit until he had been in the service of the company for at least five years. His interest in the fund was to cease completely in the case of his being dismissed or assigning or creating a mortgage or charge on his salary or his interest in the fund. In the case of his death or the termination of his service owing to ill-health, the amount standing to his credit in the fund would be paid to him or his estate. In 1927 the taxpayer, with the company's consent, resigned from its service and received from the trustees the shares purchased from the payments made by the company between 1922 and 1927, in respect of the value of which he was assessed for income tax under Schedule E for the year of receipt. He contended that, nothwithstanding the liability to forfeiture of his interest in certain events, immediately a sum was paid by the company to the trustees of the fund he became invested with a beneficial interest in the payment which formed part of his emoluments for the year in which it was made and for no other year and that, accordingly, the amount of the assessment for the year 1927-28 should not exceed the amount paid into the fund during the year of assessment. It was held by the Court of Appeal that the taxpayer ". . . had only a conditional right, that is to say, a right as given to him conditionally upon the events mentioned in Clause 8 of the agreement being complied with, to receive the investments which might be made on his behalf at times and in the manner therein mentioned. If all those circumstances are taken into consideration . . . the benefits which he might conditionally become entitled to under the agreement are not in a true sense part of the salary in the wide sense chargeable under Schedule E of the Income Tax Act."[112]

In *Pazuk* v. *M.N.R.*,[113] the taxpayer was the chef at a hospital which entered into a contract with an insurance company to provide a pension plan for its employees. Contributions to the plan were made primarily by the employer. Under the policy, the insurance company agreed to pay to each employee to whom coverage extended a retirement annuity payable monthly during the lifetime of the employee after his retirement, or during 119 months, whichever period might be the longer term. An employee was to obtain a vested right to benefits provided by his employer's contributions to the extent of 25% after 5 years' service, 50% after 10 years's service, 75% after 15 years' service and 100% after 20 years' service. In the event of death before retirement, his estate would receive 100% of both his employer's

[111]19 T.C. 618.

[112]Per Maugham, L.J. at p. 641. Cf. *Fuller* v. *M.N.R.*, 5 Tax A.B.C. 220, discussed *supra*, p. 379.

[113]55 D.T.C. 428; 13 Tax A.B.C. 264.

and his own contributions, with interest. If an employee withdrew from service before retirement and apparently after 20 years' service, he would receive 94% of his own contributions and 95% of 94% of his employer's contributions, both with interest. The withdrawal allowance could be taken in the form of a paid up annuity or in cash, and in the latter case a further 5% was withheld. The appellant left the hospital in 1953, after 9 year's service, taking his allowance in cash, which consisted for the most part of 25% of his employer's contributions. For the years 1949 to 1951, the Minister added to the appellant's income the full amount contributed by the hospital to the fund in those years on the ground that they were income from an office or employment under section 5 (1) (a) and were not contributed to an approved superannuation fund or plan within the meaning of that paragraph. The Tax Appeal Board allowed the appeal on the ground that the appellant received nothing and enjoyed no benefit in the years under review from his employer's contributions. "Any benefit which he might receive in the future would be received either on his retirement at the normal retiring age; in the year in which he severed his connection with the employer before reaching the normal retirement age; or upon his death, in which latter case the benefit would go to his estate."[114]

There is another point of time at which the appellant might be considered to have received a benefit, namely, in 1949, the fifth year of his employment, when he acquired a vested right to 25% of his employer's contributions. So long as his rights under the plan were forfeitable, he could not be considered to have received any benefit until actual receipt of future payments.[115] On the other hand, there is merit in the argument that the indefeasible vesting in him of a right to 25% of his employer's contributions constituted the acquisition of a benefit that he did not have before and in respect of which he could be taxed under section 5 (1) (a), whether or not his non-forfeitable rights were assignable or commutable or had any loan value.[116] Consider the American case of *United States* v. *Drescher*,[117] where the taxpayer's employer purchased for $5,000 a single premium, non-assignable annuity contract, naming the taxpayer, who was then 46 years of age, as annuitant. Under the terms of the policy, payments were to begin at age 65, with 120 monthly payments guaranteed. Although the policy had no cash surrender, salable, or loan value, he was held taxable in respect of its value to him in the year the contract was purchased. Judge Swan, who delivered the majority opinion, said:

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[114] *Per* Mr. W. S. Fisher at p. 273. He also reasoned that the policy in question could very well have been considered as a "group insurance plan" within the meaning of the exception in section 5 (1) (a), and since the word "approved" applied only to "superannuation fund or plan" and not to "group insurance plan", the employer's contributions fell within the exception and were not taxable to the appellant.

[115] In *Norris* v. *M.N.R.*, 57 D.T.C. 301; 17 Tax A.B.C. 257, the rights of the appellant to receive benefits under the staff assurance scheme there in question were subject to forfeiture on a number of grounds until his retirement. The Tax Appeal Board held, following the *Pazuk* case, that the appellant was not taxable in respect of his employer's contributions to the scheme in the years they were made.

[116] There is nothing in the report of the case to indicate the extent of the appellant's rights under the policy to deal with his indefeasible interest in his employer's contributions.

[117] 179 F. 2d 863.

"It cannot be doubted that . . . the plaintiff received as compensation for prior services something of economic benefit which he had not previously had, namely, the obligation of the insurance company to pay money in the future to him or his designated beneficiaries on the terms stated in the policy . . . . The perplexing problem is how to measure the value of the annuitant's rights at the date he acquired them . . . . The prohibition against assignment does not prove complete absence of present value. The right to receive income payments . . . represented a present economic benefit to him. It may not have been worth to him the amount his employer paid for it: but it cannot be doubted that there is a figure, greater than zero although less than the premium cost, which it would have cost him to obtain identical rights."[118]

It is quite true that by the above reasoning, the appellant in the *Pazuk* case would have been taxed in 1949 when he acquired his "present economic benefit", and probably again in 1953, in respect of the same amount, when it was paid to him.[119] However, it is axiomatic that "if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be."[120]

7. *Reimbursement of the loss suffered by an employee on the sale of his home.* An amount paid by an employer to an employee as reimbursement of a capital loss suffered by him on the sale of his house was held in *Jennings* v. *Kinder; Hochstrasser* v. *Mayes,*[121] not to be taxable as a "profit from an office or employment" on the ground that the housing agreement pursuant to which it was paid was made for a consideration other than the employee's services. There is a suggestion in the judgment of Jenkins, L.J. that even if the employee had not given any consideration other than services for the payment, it might still have escaped taxation as not constituting a "profit". His Lordship said:

"The transaction may be described as a form of insurance. It cannot bestow any profit on the employee, but merely protects him against loss . . . . I find it difficult to rid myself of the inclination to think that if the house purchase transaction is looked at as a whole no profit arises from it to the employee, even in a case in which the guarantee becomes operative."[122]

While it may be true that the reimbursement of a loss does not give rise to a "profit" with the meaning of the English statute,[123] it would seem clearly to constitute a "benefit" to the recipient and hence fall to be taxed under section 5 (1) (a) of the Income Tax Act.

(c) *" . . . in respect of, in the course of or by virtue of the office or employment"*

Only the value of benefits received or enjoyed "in respect of, in the course of or by virtue of" an office or employment is required to be brought into

[118]The Court explained that the policy was worth less to the annuitant than the premium paid because the employer's retention of possession of the policy precluded him from exercising the privilege of accelerating the date of annuity payments. That privilege must have been taken into account in fixing the premium, and hence, deprivation of ability to exercise the privilege decreased the value of the policy to the annuitant below its cost to the employer.

[119]Section 6 (a) requires the inclusion in income of amounts received as "(iv) superannuation or pension benefits, (v) retiring allowances, or (vi) death benefit."

[120]*Per* Lord Cairns in *Partington* v. *A.-G.,* (1869) L. R. 4 E. & I. 100 at p. 122.

[121][1959] 1 Ch. 22. These cases are further discussed *infra,* pp. 397-98.

[122]pp. 50-51.

[123]"Now the profit upon which the income tax is charged is what is left after you have paid all the necessary expenses to earn that profit. Profit is a plain English word; that is what is charged with income tax." *Per* Lord Halsbury in *Ashton Gas Company* v. *A.-G.,* [1906] A.C. 10 at p. 12.

income by section 5 (1) (a). The courts have not yet come to grips with the problem of interpreting these phrases, and it is not clear whether they were intended by Parliament to have the same connotation, being simply alternative forms of expression, or whether each phrase was intended to have a separate meaning, and if so, what meaning. There seems to be little difference in meaning between "in respect of" and "by virtue of", and indeed, these terms have been used synonymously by English judges interpreting the English Income Tax Acts.[124] The expression "in the course of" appears to convey the idea of "during the continuance of" and, if this interpretation is accurate, is probably narrower in scope than either of the other phrases, for a benefit received after the termination of an office or employment[125] might be taxable as having been received or enjoyed "in respect or" or "by virtue of" but not likely "in the course of" the office or employment. In *Williams* v. *M.N.R.* the Court did not differentiate between these terms and held simply that ". . . the board and lodging which the appellant received or enjoyed was so received or enjoyed by him 'in respect of, in the course of or by virtue of' his employment."[126] Two reasons were given by Cameron, J. for this conclusion. First, "Had he not been employed by the company, he would not have been entitled to and would not have received or enjoyed the benefits of the board and lodging;"[127] and second, the agreement between the appellant and his employer contained a provision that the board and lodging were supplied ". . . in consideration of . . . services to be duly performed . . . ." In view of the paucity of authority on this subject, each of these reasons merits a detailed examination.

It is true that in the circumstances of the case, the appellant would not have received the board and lodging furnished by his employer in accordance with the provisions of the Canada Shipping Act if he had not been engaged as a member of the crew. However, the "but for the employment" test can hardly be regarded as a conclusive test in view of the Canadian and English decisions which have held that benefits that would not have been received by an employee but for his employment were not taxable.[128] In the leading

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[124]See *infra*, n. 128.

[125]See *Wing* v. *O'Connell* [1927] I.R. 84 and *Hofman* v. *Wadman*, 27 T.C. 192.

[126][1955] Ex. C.R. 12 at p. 14.

[127]p. 14.

[128]Notwithstanding the difference in wording between the relevant sections of the Canadian and English statutes, the striking similarity between the wording of s. 5 (1) (a) and the language used by some of the judges in construing the English acts affords some justification for seeking guidance in this area in the English authorities. Under the Income Tax Act, 1842, duty was charged by Rule 1 of Schedule E, ". . . for all Salaries, Fees, Wages, Perquisites or Profits whatsoever accruing *by reason of*" offices or employments. In deciding whether a payment fell within the words "accruing by reason of such office", Collins, M.R. held in *Herbert* v. *McQuade* [1902] 2 K.B. 631 at p. 649: ". . . the test is whether, from the standpoint of the person who receives it, it accrues to him *in virtue of* his office . . . ." Kellock, J. quoted this passage with approval in *Goldman* v. *M.N.R.* [1953] 1 S.C.R. 211, at p. 215, where he said: "In my view this reasoning is equally applicable to payments made to a person 'in connection with' an office or employment." In the case the Court was concerned with the meaning of s. 3 (4) of the Income War Tax Act, which provided: "Any payment made to any person *in connection with* any duty, office or employment . . . shall be salary of such person and taxable as income for the purposes of this Act." In *Cowan* v. *Seymour* [1920] 1 K.B.

Canadian case, *Goldman* v. *M.N.R.*, Rand J. said:

> "Contrasted with such a payment [a payment for services rendered] is a benefaction of an exceptional kind such as a testimonial or other personal tribute, the antecedent instigation of which has been an office or employment. There the essential elements of gift are present; and though it may be related to the fact of services, it is not as remuneration for them that the gift is attributed."[129]

Where an employee holding the office of managing director received from his employer the sum of £7,000 in consideration of his entering into a covenant not to engage in the same business as that carried on by his employer after the termination of his employment, the House of Lords held in *Beak* v. *Robson* that the sum was not taxable as a profit from his office. Lord Simon, who delivered the judgment of the court said:

> "It is quite true that, if he had not entered into the agreement to serve as a director and manager, he would not have received £7,000, but that is not the same thing as saying that the £7,000 is profit from his office of director so as to attract tax under Schedule E."[130]

In *Cowan* v. *Seymour* the appellant acted as secretary and liquidator of a company without remuneration. Upon completion of liquidation, a shareholders' resolution directed that part of the surplus funds should be paid to the appellant and the chairman. In holding that the sums did not accrue by reason of the offices, and so were not assessable, Younger, L.J. remarked: ". . . their office or offices as such . . . were relatively nothing. They may have been the causa sine qua non, but they were not the causa causans."[131] And more recently in *Hochstrasser* v. *Mayes; Jennings* v. *Kinder,*[132] an employee of a company received a payment from his employer in accordance with the terms of a housing agreement entered into by the company and the employee, which payment the Crown sought to tax. Jenkins, L.J. pointed out that although the employee was enabled to enter into the housing agreement "by virtue of the fact that he was an employee" of the company, any payment he might receive under the housing agreement would be received by him, not in his capacity as employee, but rather because being an employee of the company, he had entered into the housing agreement and had complied

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500 at p. 518, Younger, L.J. held that ". . . the particular payment here in question was not a profit which accrued to the appellant *in respect of* that office." Under the Income Tax Act, 1918, Rule 1 of Schedule E differed somewhat in wording from its predecessor, and charged a tax ". . . on every person having or exercising an office or employment of profit mentioned in this Schedule . . . in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom . . . ." These words and the corresponding expressions contained in the earlier statutes were held by Viscount Cave, L.C. in *Seymour* v. *Reed* [1927] A.C. 554 not to be materially different. And indeed, language similar to that used by the courts in construing the old legislation may be found in decisions based on the new wording. In *Corbett* v. *Duff* [1941] 1 K.B. 730, Lawrence, J. held that ". . . it is impossible to hold that any of the payments to the appellants were not paid *in respect of* . . . the appellants' employment . . . ." (p. 740). Finally, in *Moorehouse* v. *Dooland* [1955] 1 Ch. 284, Jenkins, L.J. echoed Collins, M.R. in *Herbert* v. *McQuade, supra,* when he said: "(i) the test of liability to tax on a voluntary payment made to the holder of an office or employment is whether, from the standpoint of the person who receives it, it accrues to him *by virtue of* his office or employment, or in other words by way of remuneration for his services." Pp. 303-04. (emphases added).

[129] [1953] 1 S.C.R. 211 at p. 214

[130] [1943] A.C. 352 at p. 355.

[131] [1920] 1 K.B. 500 at pp. 517-18. Almost identical language was used by Pearce, L.J. in *Hochstrasser* v. *Mayes; Jennings* v. *Kinder,* [1959] 1 Ch. 22 at p. 61 in determining the taxability of a benefit received by an employee.

[132] See n. 131.

with all its terms and conditions. Parker, L.J. was of a similar mind when he said: ". . . though the benefits are received by him while he is an employee and might not have been received but for his being an employee, yet in his hands the benefit is not a reward for services."[133] Hence, while it may be true that a benefit completely unconnected with the recipient's employment would not be taxable under section 5 (1) (a), it seems clear from these authorities that the converse proposition is not true, and that the fact that a benefit would not have been received but for the recipient's employment is not enough to require its inclusion in his income.

There can be little quarrel with Cameron, J.'s second reason for holding the value of the board and lodging in the *Williams* case taxable. A benefit conferred on an employee by his employer, pursuant to a contractual obligation, as remuneration for services rendered is one of the clearest examples of income,[134] and Parliament may fairly be presumed to have intended the words "in respect of, in the course of or by virtue of the office or employment" to include such an obvious income item. Even if the benefits had been conferred voluntarily, without any antecedent legal obligation, contractual or statutory, on the part of the employer, it seems likely that they would still have been taxable as remuneration for services, on the basis of the principles established by a considerable body of case law[135] for determining the liability to taxation of gratuitous payments to employees. These principles were recently restated by Jenkins, L.J. in *Moorehouse* v. *Dooland* in part as follows:

> "(i) The test of liability to tax on a voluntary payment made to the holder of an office or employment is whether, from the standpoint of the person who receives it, it accrues to him by virtue of his office or employment, or in other words by way of remuneration for his services. . . .
>
> "(iv) On the other hand, a voluntary payment may be made in circumstances which show that it is given by way of present or testimonial on grounds personal to the recipient, as, for example, a collection made for the particular individual who is at the time vicar of a given parish because he is in straitened circumstances, or a benefit held for a professional cricketer in recognition of his long and successful career in first-class cricket. In such cases the proper conclusion is likely to be that the voluntary payment is not a profit accruing to the recipient by virtue of his office or employment but a gift to him as an individual, paid and received by reason of his personal needs in the former example and by reason of his personal qualities or attainments in the latter example."[136]

Viscount Cave summarized the position in *Seymour* v. *Reed* when he said: "The question to be answered is . . . 'Is it in the end a personal gift or is it remuneration?' "[137] This dichotomy was held to be a part of Canadian tax

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[133]p. 55. His Lordship agreed with the other members of the court on the principles to be applied, but differed in the result of their application.

[134]In *Ryall* v. *Hoare*, Rowlatt, J. put the matter thus: ". . . where an emolument accrues by virtue of service rendered whether by way of action or permission, such emoluments are included in 'Profits or gains'," [1923] 2 K.B. 447 at p. 454. The rationale for this principle was expressed by Lawrence, J. in *Hobbs* v. *Hussey* as follows: ". . . the performance of services . . . are in their essence of a revenue nature since they are the fruit of the individual's capacity which may be regarded in a sense as his capital but are not the capital itself." [1942] 1 K.B. 491 at p. 496.

[135]For a close analysis of the relevant English and Canadian cases, see LaBrie, *The Meaning of Income In the Law of Income Tax*, (1953), pp. 196-205.

[136][1955] 1 Ch. 284 at pp. 303-04.

[137][1927] A.C. 554 at p. 559.

law by the Supreme Court of Canada in *Goldman* v. *M.N.R.*,[138] a case arising under the Income War Tax Act. There is nothing in the language of section 5 (1) (a) to suggest that Parliament intended to do away with this distinction.

It is of interest to observe that the courts have given a fairly wide scope to the concept of "remuneration for services" and have held it to include not only payments directly rewarding an employee for certain work but also benefits enjoyed by a taxpayer in his capacity as employee and as incidents of his employment, as, for example, benefits conferred as an inducement or incentive to take a more active interest in his employer's business or to apply himself energetically and give good service in the future. In *No. 126* v. M.N.R.,[139] shares were sold by a company to certain of its senior key officials "in order to strengthen their interest in its affairs and make them feel that they were part of the corporation." The difference between the price paid by the purchasers and the current market price of the shares was held taxable as a benefit under sections 5 (l) (a) and 8 (l) (c). And in *Ede* v. *Wilson,* certain officers of a company were permitted to buy shares at a price considerably below their market price, "partly for services well rendered in the past, and partly as a stimulus to similar conduct in the future." In his judgment holding the benefit assessable, Wrottesley, J. remarked that the gain was "clearly something which reached them in virture of their position as officers in the company . . . ."[140] In some cases it might be difficult for a court to decide whether a benefit was received by a taxpayer in his capacity as employee or in some other capacity. Consider the position of a son, employed by his father, who is provided with free board and lodging at home[141] and is permitted to use his father's car for personal purposes. The value of such benefits would be taxable or not, depending on whether they were considered to be in the nature of a reward for services rendered or to be rendered, or, on the other hand, a manifestation of parental generosity and affection.

From the discussion above, it would seem to follow that a benefit received by an employee from his employer, not as remuneration but for a consideration other than services, would not likely be taxable as having been received or enjoyed "in respect of, in the course of or by virtue of" his employment. The taxability of such a benefit under the English Income Tax Act was recently considered by the Court of Appeal in *Hochstrasser* v. *Mayes; Jennings* v. *Kinder.*[142] The respondent was employed by Imperial Chemical Industries Ltd., which owned numerous factories in different places and employed a very

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[138][1953] 1 S.C.R. 211. See the extract from the judgment of Rand, J., quoted *supra*, p. 395.

[139]53 D.T.C. 419; 9 Tax A.B.C. 241.

[140][1945] 1 All E.R. 367 at p. 368. In *Commissioner* v. *LoBue*, the Supreme Court of the United States held: "When assets are transferred by an employer to an employee to secure better services they are plainly compensation. It makes no difference that the compensation is paid in stock rather than in money . . . . [The taxpayer] received a very substantial economic and financial benefit from his employer prompted by the employer's desire to get better work from him. This is 'compensation for personal service' within the meaning of s. 22 (a)'." (1956), 351 U.S. 243 at p. 247.

[141] Cf. *No. 510* v. *M.N.R.*, 58 D.T.C. 289; 19 Tax A.B.C. 226.

[142][1959] 1 Ch. 22.

large number of staff, many of whom were obliged by their service agreements to be prepared to serve the employer wherever required. In order to facilitate the transfers of certain of its staff, the employer designed a scheme which provided that if on transfer the employee wished to sell or let his house, he was to give an option to the employer to purchase it at a fair valuation; if the option was refused, he was free to sell it, but in either case the employer guaranteed him against any capital loss, provided that the house had been maintained in good repair. In 1951, the respondent entered into an agreement with his employer pursuant to the housing scheme. On his transfer to another factory in 1954, he sold his house with the consent of the employer at a loss of £350, which sum it paid him as compensation for the loss. He was assessed under Schedule E to income tax on that sum. A majority of the Court of Appeal gave judgment for the respondent, holding that the housing agreement was a genuine bargain advantageous to both parties, under which a substantial consideration other than his services moved from the respondent for the benefits received, so that the agreement could be regarded as a collateral transaction. By its terms, he was obliged to comply with a number of conditions, such as, for example, keeping the house in good tenantable repair and offering it for sale to I.C.I. in the event of his desiring to sell or let it by reason of transfer. The latter obligation was described by Jenkins, L.J. as a "restriction of substance".[143] However, not every legal consideration would suffice to exempt a benefit obtained thereby from taxation. The consideration moving from the employee, said Pearce, L.J., ". . . must be more than a technical consideration. It must not be a mere cloak to conceal any additional benefit given to the employee as such. It must in my view be such as to entitle both the consideration and the benefit obtained thereby to rank as a collateral transaction. The alleged collateral transaction need not be weighed in exact scales in order to see who benefits most by it.[144]

Jenkins, L.J. summarized the principles relating to the taxation of profits from an office or employment under the English statute as follows:

> "I am content to accept [the] broad proposition [advanced on behalf of the Crown] that the profits of an office or employment include every sum in money or money's worth paid by an employer to an employee during his employment in his capacity as employee, and for no consideration moving from the employee other than the services which he renders. I would, however, qualify that broad proposition by saying that [it] is not to be taken as extending to 'testimonials' of the kind considered by the House of Lords in *Seymour* v. *Reed*, and also that there may be benefits casually bestowed by an employer on an employee such as birthday, Christmas, or wedding presents, or given on compassionate grounds referable to relationships, friendship, social custom, or motives of charity which, though made for no consideration in the legal sense, should not be treated as referable to services or as made to the employee in that capacity . . . .
>
> "I am also content to accept the converse proposition that a payment made by an employer to an employee for a consideration other than services is not a profit of the employment albeit made during the continuance of the employment."[145]

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[143] p. 48.

[144] p. 58. Cf *Losey* v. *M.N.R.* [1957] C.T.C. 146, where excessive consideration was paid by a company to its shareholder for a transfer of assets. The excess was held taxable as a benefit or advantage conferred on the shareholder by the company under sec. 8 (1) (c). In *No. 403* v. *M.N.R.*, 57 D.T.C. 120; 16 Tax A.B.C. 387, a company sold a house to its president and controlling shareholder at a substantial undervaluation. The amount by which the house was undervalued was held taxable as a benefit under the same section.

[145] p. 47.

Although this statement is useful in construing the Canadian legislation, it should be noted that section 5 (1) (a) is wider in scope than the English law, not only because it imposes a tax on the value of inconvertible benefits as well as receipts in money or money's worth, but probably also because it taxes benefits received or enjoyed "in the course of" an office or employment. A literal interpretation of this phrase would seem to require an employee to include in his income the value of benefits not partaking of the character of remuneration or received by him for his personal convenience or pleasure, but enjoyed only as an incident of the performance of the services required of him, as for example the free lodging[146] provided for the bank agent in *Tennant* v. *Smith*, a fireman's uniform, or the free entertainment enjoyed every night by a movie projectionist or a theatre usher. However, the precise scope of "in the course of" as well as "in respect of" and "by virtue of", as we pointed out at the beginning of this discussion, still awaits judicial definition.

CONCLUSION

The policy of taxing benefits, as embodied in section 5 (1) (a), gives rise to many difficult questions. Foremost among these is the enormous problem of how to value the wide variety of benefits that may be enjoyed in a form other than cash. The fairest method of measuring the value of a particular benefit necessitates a detailed consideration of the individual circumstances of the recipient, a course that involves a most onerous administrative burden. On the other hand, benefits in kind are of the most diverse nature and do not readily lend themselves to any consistent treatment by rigid rules. The Income Tax Act provides no guides to valuation in this area, and a conscientious employee may experience great difficulty in measuring the benefit he enjoys from intangible amenities such as employer-provided recreational facilities, parking space and special discounts on purchases and services. Perhaps the enactment of elaborate evaluation provisions is the answer. Or it may be desirable as an administrative expedient to adopt the principle embodied in the English legislation of 1948, namely, that the measure of taxable benefits is the expense which the employer has been put to in providing them. No easy solution presents itself.

But the existence of difficult problems does not warrant a change in policy, for, as a matter of principle, all benefits in cash or in kind attributable to an office or employment should rank as taxable income if unfairness in the distribution of the tax burden is to be avoided. An employer who furnishes free board and lodging to an employee is defraying non-deductible personal and living expenses which everyone must meet and which otherwise would have to be borne by the employee. If such benefits are not taxed, the recipient clearly enjoys an advantage over others who receive their compensation in

[146]It is of interest to note that in both the English and American statutes, the value of meals and lodging furnished by an employer for his employees is specifically exempted from taxation when these benefits are received by the employee in the course of carrying out his duties. See the Income Tax Act, 1952, 15-16 Geo. 6 & 1 Eliz. II, c. 10, s. 161, discussed *supra* at p. 375, and the Internal Revenue Code, 1954, s. 119, discussed *supra* at p. 377.

cash and pay for the benefits themselves.[147] It may be that, in Canada, officers and employees do report as income most of the benefits they receive and also assign reasonable values to them. But it is also possible that many benefits are not reported and constitute a major source of tax avoidance that should not go unremedied. Before a cure can be prescribed, the seriousness of the malady, if any exists, must first be ascertained. As we pointed out in our introductory remarks, there are few official statistics available on the use of fringe benefits in Canada. It would seem desirable as the first step in a reappraisal of the problems in this field and of the effectiveness of the existing statutory provisions and administrative machinery for the taxation of benefits that information be gathered—perhaps from information returns required of all employers—as to the extent to which fringe benefits are being made use of. From such information any serious abuse of the tax system could probably be detected and remedial steps taken.

[147]It has been argued, on the other hand, that section 5 (1) (a) ". . . is a most unjust provision, directed against our poorest citizens, and the whole subsection should be repealed. In any event, an exception should be made in favour of farmers. The amount collected from farm labourers is small, and the irritation to the farmer is great." Gordon, "The Taxation of Farmers," (1949), 27 *Can. Bar Rev.* 898 at p. 904.