Minister of National Revenue (*Appellant*) *v.* **Zachariah Estate** (*Respondent*)

Walsh J.—Quebec, Sept. 24; Ottawa, Oct. 8, 1970.

Estate tax—Employee of International Civil Aviation Organization—Exemption of property acquired "for or incident to residence" in Canada—Investments from savings, whether exempt—Estate Tax Act 1958, c. 29, s. 35(2)(b).

Section 35(2)(*b*) of the *Estate Tax Act* exempts from tax property acquired by a person "for or incident to residence in Canada as an officer or servant of" certain international organizations. *Z*, a citizen of India, was employed from 1950 to 1965 as an internal auditor in Montreal by the International Civil Aviation Organization. He died in Montreal in 1965, and his estate was assessed to estate tax on savings bonds valued at $42,796, a savings account of $3,136 in a Montreal bank and 100 grams of gold valued at $124.38, but not in respect of other assets situate in Canada valued at $23,389, which included a second savings account of $3,424.17 in a Montreal bank. All of these assets were acquired by *Z* from savings out of his salary.

Held, affirming the assessment, the assessed assets were not acquired by *Z* "for or incident to residence in Canada as an officer or servant of" the International Civil Aviation Organization. A line must be drawn between property acquired by a diplomat in connection with his residence in Canada to enable him to maintain a proper standard of living here and property which he has acquired in the exercise of his discretion by investment of surplus funds.

APPEAL from Tax Appeal Board.

A. Garon, Q.C., and *G. J. Rip* for appellant.

B. Verchère for respondent.

WALSH J.—This action came on for hearing in the form of a special case involving a question of law, the decision of which will have the effect of settling the issue. The facts as set out in the special case are that the late Cunnumparathu Abraham Zachariah (hereinafter referred to as the "deceased") died in the Town of Mount Royal, Quebec, on July 17, 1965, having been employed from 1950 to 1965 as an internal auditor by the International Civil Aviation Organization in Montreal where he resided as his duties required. He was, however, a citizen of India and domiciled therein. Upon his death he left an estate having an aggregate net value of $83,794.30 which appears from the return filed by his widow dated November 5, 1965. Certain of the assets were taxed by the Minister as follows:

Class D	$14,000	Canada Savings Bonds 5% and accrued interest	$14,466.76
Class D	$ 2,000	Canada Savings Bonds 4½% and accrued interest	2,060.00
Class D	$11,000	Province of Quebec Savings Bonds 5¼% and accrued interest	11,144.38
Class D	$15,000	Province of Quebec Savings Bonds 5% and accrued interest	15,125.10
Class E		Savings Account No. 12909, Bank of Montreal, Montreal	3,136.91
Class E		100 Grams Gold Bar	124.38
			$46,057.53

The following assets with situs in Canada were not included among the taxed assets:

Class E	Savings Account, The Royal Bank of Canada, Montreal	$ 3,424.17
Class E	Clothing, jewellery and personal effects	200.00
Class E	Household furniture, furnishings and effects	1,000.00
Class E	Accrued leave, Registration Grant, indemnities, etc., from International Civil Aviation Organization	18,765.60
		$23,389.77

All of the taxed assets, except for accrued interest, were acquired with moneys accumulated as savings from deceased's income earned as an employee of the International Civil Aviation Organization in Montreal, which is an organization as defined for the purposes of the *Privileges and Immunities (United Nations) Act* within the meaning of section 35(2)(*b*) of the

Estate Tax Act. In the estate tax return, deceased's widow claimed that the estate was exempt since most of the assets comprising the estate were acquired by the deceased:

> ...for, or incidental to, residence in Canada as a Career Officer of International Civil Aviation Organization, he having been required by his duties at the time of his death as such officer to reside in Canada under the terms of section 35, subsection 2(2), clause (*b*) of the Estate Tax Act.

By notice of assessment dated May 17, 1966, a tax of $6,908.63, being 15% of $46,057.53, was levied and a notice of objection was filed and, in due course, the assessment appealed to the Tax Appeal Board, which allowed the appeal by decision dated March 3, 1969[1], from which decision the present appellant, the Minister of National Revenue, appealed on June 26, 1969.

The statement of issue and statutory provisions as set out in the special case read as follows:

> 12. When filing the Estate Tax return Respondent assumed that the taxed assets were property acquired by the deceased during his lifetime for or incident to residence in Canada as an officer or servant of an organization as defined for the purposes of Section 3 of the *Privileges and Immunities (United Nations) Act*, and that as a result, the taxed assets were deductible in computing the aggregate value of the property taxable on the deceased's death, within the meaning of section 35(2)(*b*) of the *Estate Tax Act*.
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> 13. In making the assessment on 29th January, 1965 the appellant assumed that the taxed assets were not property acquired for or incident to residence in Canada by the deceased and that section 35(2)(*b*) of the *Estate Tax Act* was thus inapplicable. As a result, appellant assessed estate tax on the basis of section 34 of the *Estate Tax Act*.
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> 14. The relevant provisions of the *Estate Tax Act* (Can.) 1958, are:
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> 34. (1) In the case of the death, at any time after the coming into force of this Act, of any person domiciled outside Canada at the time of his death, an estate tax shall be paid as hereinafter required upon the aggregate value of all taxable property (hereinafter in this Part referred to as the "property taxable on the death"), being property situated in Canada at the time of his death, the value of which would, if that person had been domiciled in Canada at the time of his death, be required by this Act to be included in computing the aggregate net value of the property passing on his death.
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> 35. (2) Notwithstanding subsection (1)—(which refers to debts and encumbrances and has no application here)—there may be deducted in computing the aggregate value of the property taxable on the death of any person
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> (*b*) the value of any property acquired by that person during his lifetime for or incident to residence in Canada as an officer or servant of an organization as defined for the purposes of section 3 of the *Privileges and Immunities (United Nations) Act*, whose duties required him to reside in Canada, if that person, at the time of his death, continued to be required by his duties as such officer or servant to reside in Canada.

[1] [1969] Tax A.B.C. 280.

The question to be decided by the court is

> Were the taxed assets acquired by the deceased during his lifetime for or incident to residence in Canada as an officer or servant of the International Civil Aviation Organization?

and it is agreed that if the court should answer this question in the affirmative, then the appeal shall be dismissed with costs, and if the answer should be in the negative, then the appeal shall be allowed with costs.

Basically, the issue resolves itself into how wide an interpretation should be given to the words "for or incident to residence in Canada". Respondent seeks a very broad interpretation which would include in the exemption all property acquired by the investment of savings from income earned in Canada, such savings being considered by respondent as "incident to residence in Canada". Appellant, on the other hand, seeks a narrower interpretation on the basis that the accumulation of savings or investments is not "incident to residence" in any given place and that the exempting provision of the statute has in mind merely property such as a house, household furnishings, a car, a current bank account commensurate with deceased's standard of living, and other such property which a diplomat living abroad would require as a consequence of living there.

Section 34 of the *Estate Tax Act* is the taxing section in question and section 35 grants an exemption with respect to the property covered by it. It is settled law that the exempting provisions of a taxing statute must be construed strictly. (See *Lumbers v. M.N.R.* [1943] C.T.C. at p. 290; *Shaeffer Pen Co. v. M.N.R.* [1953] C.T.C. at p. 348-9; *Clevite Development Ltd v. M.N.R.* [1961] C.T.C. at p. 151; *Wylie v. Montreal* [1885] 12 S.C.R. at p. 386; *Toronto General Trust Corp. of Ottawa v. M.N.R.* [1935] S.C.R. at p. 536.)

In support of its claim for a broad interpretation of the exempting provision in question, respondent introduced an extract from the Vienna Convention on Diplomatic Relations of April 18, 1961, which was ratified by order in council P.C. 1966-653 to take effect on June 25, 1966. Article 39(4) of this Convention reads as follows:

> 4. In the event of the death of a member of the mission not a national of or permanently resident in the receiving State or a member of his family, forming part of his household, the receiving State shall permit the withdrawal of movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission.

This provision appears to give a wider exemption than that provided in the *Estate Tax Act* but there are several reasons why it is inapplicable in the present case. In the first place, it was ratified by Canada only in 1966 to take effect on June 25 of that year and the deceased in the present case died on July 17, 1965, the notice of assessment being made on May 17, 1966. Secondly, a section similar to the present section 35(2)(*b*) of the *Estate Tax Act* (though using the word "incidental" instead of "incident to")

appeared in the *Estate Tax Act* when it was first assented to on September 6, 1958 and a substantially similar section appeared in its antecedent the *Dominion Succession Duty Act* and no change was made in the wording of the section as it reads at present following the ratification by order in council of the Vienna Convention in 1966. It is clear that the wording of this Convention could not override the wording of the statute which we are called upon to interpret. In the case entitled *In the Matter of a Reference as to the Powers of the Corporation of the City of Ottawa and the Corporation of the Village of Rockcliffe Park to Levy Rates on Foreign Legations and High Commissioners' Residences*[2], Duff C. J. quotes from the British case of *Mortensen v. Peters* ((1906) 8 F. (S. C.) 93 at p. 101) in which Lord Dunedin, then Lord President of the Court of Session in Scotland, said:

> It is a trite observation that there is no such thing as a standard of international law extraneous to the domestic law of a kingdom, to which appeal may be made. International law, so far as this Court is concerned, is the body of doctrine regarding the international rights and duties of states which has been adopted and made part of the law of Scotland.

In the case of *Chung Chi Cheung v. The King*[3], the judgment of Lord Atkin states at page 167:

> ...It must be always remembered that, so far at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.

While respondent's counsel did not attempt to contend that this Convention applied so as to override the wording of section 35(2)(*b*) of the *Estate Tax Act*, he argued that it indicated that if Canada had intended that this section should be interpreted restrictively it would not have ratified the Vienna Convention. This is a rather tenuous argument and I cannot find that the intention of Parliament when the *Estate Tax Act* was passed can in any way be interpreted by what may have been the intention of the executive government when the order in council ratifying the Vienna Convention was adopted many years later. It is not for the court to decide whether section 35(2)(*b*) of the *Estate Tax Act* should now be amended so as to enlarge the exemption in order to give effect to the wording of Article 39(4) of the Vienna Convention, but rather it is the existing wording of the *Estate Tax Act* which must be interpreted.

Also filed as an exhibit was an extract from the Headquarters Agreement between Canada and the International Civil Aviation Organization signed at Montreal on April 14, 1951, to take effect from May 1, 1951. Section

[2] [1943] S.C.R. 208.
[3] [1939] A.C. 160.

12(*j*) of this Agreement provides that representatives of member states, while exercising their functions, shall be granted such exemption from federal income tax as the Government of Canada accords to diplomatic envoys. This section has reference to section 62(1) of the *Income Tax Act* which reads, in part, as follows:

> 62. (1) No tax is payable under this Part upon the taxable income of a person for a period when that person was
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> (*a*) an officer or servant of the government of a country other than Canada whose duties require him to reside in Canada
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> (i) if, immediately before assuming such duties, he resided outside Canada,
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> (ii) if that country grants a similar privilege to an officer or servant of Canada of the same class,
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> (iii) if he was not, at any time in the period, engaged in a business or performing the duties of an office or employment in Canada other than his position with that government, and
>
> (iv) if he was not during the period a Canadian citizen;
>
> . . .

Section 18 of the Headquarters Agreement deals with death taxes and succession duties and reads as follows:

> The Government of Canada shall not levy death taxes or succession duties on or in respect of property acquired for or incidental to residence in Canada by deceased Representatives of Members who were not Canadian citizens at the date of death. The Government of Canada shall make no impediment to repatriation of such tax and duty-free property.

It will be noted that this uses the words "for or incidental to residence in Canada" which was the wording used in the *Dominion Succession Duty Act*[4] in effect at that date. Respondent's counsel argued that exemption from income tax and other direct taxes such as customs and excise duties on articles imported for the personal or family use of the diplomat, indicates a scheme justifying a broad interpretation of the *Estate Tax Act* even though section 35(2)(*b*) is an exempting section. I do not believe that we can get away from the fact, however, that it is the wording of that section that must be interpreted and it cannot be extended beyond whatever property is covered by the interpretation of the words "for or incident to".

Respondent's counsel based another argument on the fact that the interpretation contended for by appellant leaves a great deal of discretion to the assessor and that no regulations have been made under the Act to determine where to draw the line between taxed and exempted assets. For example, in the present case, there were two bank accounts, one being Account No. 12909 in the Bank of Montreal containing $3,136.91 which

[4] R.S.C. 1952, c. 89, s. 7(*j*).

was taxed and the other, being a Savings Account in the Royal Bank of Canada, Montreal, containing $3,424.17 which was not taxed. He suggested that if all deceased's savings had been kept in a single bank account instead of being used to purchase bonds, there would be no way for the Minister to determine what, if any, part of the account was to be taxed. Appellant's counsel contended that in such a hypothetical case, a nominal and reasonable amount of the account would have been considered as tax-free and the balance taxed, and he argued that the decision to include one bank account in taxed assets and not to include the other was merely a reasonable exercise of discretion, both accounts containing approximately the same amounts, and that deceased required only one account as "incident to residence in Canada". The judgment of the Tax Appeal Board referred to this problem of making an arbitrary partition of the amount of accumulated savings for which action there is no specific authority in the legislation. Although this undoubtedly presents a problem, there are many sections in both the *Income Tax Act* and the *Estate Tax Act* and other taxing statutes requiring a considerable exercise of discretion by the assessor, and I believe that the exercise of discretion is implicit in the wording of the exempting section which exempts only property "for or incident to residence in Canada" so that it is necessary for the assessor to classify deceased's property into that which properly comes within this description and that which does not. The discretion appears to have been reasonably exercised in the present case unless respondent's contention that all the property acquired in Canada as a result of the investment of deceased's savings from income earned in this country should be exempted is upheld.

We now come to the real nub of the matter which is the interpretation to be given to the words "for or incident to residence in Canada". Neither party attempted to attribute any particular significance to the word "for" in the context of this case, confining their arguments to the interpretation to be given to the words "incident to".

Appellant's counsel pointed out that when the *Estate Tax Act* was first adopted in 1958[5], section 35(2) read as follows:

> 35. (2) Notwithstanding subsection (1), there may be deducted in computing the aggregate value of the property taxable on the death of any person the value of any property acquired by that person during his lifetime for or *incidental to* residence in Canada as an officer or servant of the government of a country other than Canada whose duties required him to reside in Canada,
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> (*a*) if that person was a citizen or subject of that country at the time of the acquisition of such property, and continued, at the time of his death, to be required by his duties as such officer or servant to reside in Canada, and
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> (*b*) if that country grants substantially similar relief in respect of property acquired by an officer or servant of the Government of Canada.

[5] S. of C. 1958, c. 29.

The words "incidental to" had also been used in the *Dominion Succession Duty Act* (*supra*). In 1962, the *Estate Tax Act* was amended[6] by repealing subsection (2) of section 35 and replacing it by the following:

> 35. (2) Notwithstanding subsection (1), there may be deducted in computing the aggregate value of the property taxable on the death of any person
>
> (*a*) the value of any property acquired by that person during his lifetime for or *incident to* residence in Canada as an officer or servant of the government of a country other than Canada, whose duties required him to reside in Canada,
>
> (i) if that person was a citizen or subject of that country at the time of the acquisition of such property, and continued, at the time of his death, to be required by his duties as such officer or servant to reside in Canada, and
>
> (ii) if that country grants substantially similar relief in respect of property acquired by an officer or servant of the Government of Canada; and
>
> (*b*) the value of any property acquired by that person during his lifetime for or incident to residence in Canada as an officer or servant of an organization as defined for the purposes of section 3 of the *Privileges and Immunities* (*United Nations*) *Act*, whose duties required him to reside in Canada, if that person, at the time of his death, continued to be required by his duties as such officer or servant to reside in Canada.

It was this amending statute which extended the exemption to officers or servants of organizations defined for the purposes of section 3 of the *Privileges and Immunities* (*United Nations*) *Act* in which category deceased was included. It was also in this amending statute that the words "incident to" replaced the words "incidental to" for the first time, and appellant's counsel attributes great significance to this. It is of considerable interest to note, however, that in the French version, both of the original Act and of the amending Act, the word "accessoirement" is used, apparently interchangeably as a translation of either "incidental to" or of "incident to". Appellant's counsel contends that the words "incident to" have a much more restrictive meaning than the words "incidental to" and that the change was made deliberately in view of the fact that the words "incidental to" might be deemed to have too wide a meaning. It must be noted, however, that this was not the only change made in this section of the Act at that time so that it cannot be stated that the amendment was made for the express purpose of changing these words. However, it would be wrong to assume that the change was made by the draftsman without some specific purpose in view. On his part, respondent's counsel argued that the French term "accessoirement" is wider in meaning than either "incident to" or "incidental to".

In support of their respective contentions, both parties refer to the definitions given in a number of standard and legal dictionaries. Respondent refers to the following definitions:

The Shorter Oxford English Dictionary

incident: liable to befall or occur to; likely to happen; hence naturally attaching. Relating or pertinent to.

[6] S. of C. 1962-63, c. 5, s. 5.

Funk and Wagnall Standard College Dictionary

incident: something that is characteristically or legally dependent upon or connected with another thing.

Bouvier's Law Dictionary

incident: this term is used both substantively and adjectively of a thing which, either usually or naturally and inseparably depends upon, appertains to, or follows another that is more worthy.

Jowitt's Dictionary of English Law

incident: a thing appertaining to or following another.

Webster's Third New International Dictionary

incident: occurring or likely to occur esp. as a minor consequence or accompaniment; associated with or naturally related or attaching; dependent on or appertaining to another thing; directly and immediately relating to or involved in something else though not an essential part of it.

Larousse Universel

accessoire: qui accompagne une chose principale; qui n'a qu'une importance secondaire.

accessoirement: d'une manière accessoire.

Appellant's counsel, for his part, refers to definitions in the following publications:

Standard Dictionary of the English Language

incident: anything that takes place as part of an action or in connection with an event; something characteristically, naturally, or legally depending upon, connected with, or contained in another thing as its principal; likely to befall, naturally or usually appertaining or attending.

incidental: happening without regularity or design; casual; something that is incidental, contingent, or fortuitous; a subordinate or minor occurrence, circumstance, or result.

Stroud's Judicial Dictionary of Words and Phrases

incident: incidental. A thing is "incident" to another when it appertains to, or follows on, that other which is more worthy, or principal.

Webster's Third New International Dictionary of the English Language (quoting different meanings than those referred to by respondent)

incident: something dependent upon, appertaining or subordinate to, or accompanying something else of greater or principal importance; something arising or resulting from something else of greater or principal importance.

incidental: subordinate, nonessential, or attendant in position or significance; occurring merely by chance or without intention or calculation; occurring as a minor concomitant.

Shorter Oxford English Dictionary (quoting different meanings than those referred to by respondent)

incident: an event of accessory or subordinate character; an accessory circumstance.

incidental: occurring or liable to occur in fortuitous or subordinate conjunction with something else. An incidental circumstance.

Nouveau Larousse Illustré

accessoire: qui se rapporte à une chose principale, qui s'y rattache, s'y unit, sans être essentiel à cette chose.

accessoire-
ment: d'une manière accessoire.

Dictionnaire Alphabétique et Analogique

accessoire: qui s'ajoute comme un accompagnement, une suite ou une dépendance, à la chose principale.

One of the most significant definitions is found in *Brown's New Law Dictionary* where, in referring to "incident", he says:

> This phrase is properly used to denote anything which is inseparably belonging to, connected with, or inherent in, another thing which is called the principal.

Fowler's Dictionary of Modern English Usage, in referring to the words "incident" and "incidental" says:

> . . .; while *incidental* is applied to side occurrences with stress on their independence of the main action, *incident* implies that, though not essential to it, they not merely happen to arise in connexion with it but may be expected to do so.

In examining these definitions, it appears fair to say that "incident to" is a more restrictive term than "incidental to" or than "accessoirement" (though, again, it must be pointed out that the term "accessoirement" is still used in the French version of the present text of the law).

While it would perhaps be going too far to hold that the property must be acquired as a necessary consequence of residence in Canada in order to benefit from the exemption, certainly these last two definitions would lead to a somewhat restrictive interpretation of the words "incident to residence". The definition from *Brown's New Law Dictionary* would require the investments to be "inseparably belonging to, connected with, or inherent in" deceased's residence, while the definition from *Fowler's Dictionary of Modern English Usage* would require that the investments should "not merely happen to arise in connexion with it but may be expected to do so". The decision of the Tax Appeal Board states: (at page 11 of the Documents, Exhibit R-1)

> . . . The savings were a logical outcome of residence in Canada as an officer or servant of an international organization, and were in no sense uncertain or fortuitous in their connection with such residence.

I find myself unable to agree with this statement. The savings no doubt arose as a result of deceased's residence in Canada and were acquired from income earned there but I do not agree that they were not "uncertain or fortuitous in their connection with such residence". One diplomat residing in Canada might acquire property only to the extent necessary to maintain a standard of living here appropriate to his position and station, and spend the rest of his income, or invest it in his own country or elsewhere abroad, while another, such as the present deceased, might live in a more frugal

manner and save his money and show his confidence in the country in which he is residing by investing it here. While he should be commended for this, it appears to me that the accumulation of savings and investments is a matter of individual choice and habits and not "incident to" residence in any particular place. To give a different interpretation to the exempting provision would be equivalent to exempting all property acquired from the saving and investment of income earned in Canada, in which event the only property not exempted would perhaps be inherited property or property owned by the diplomat prior to taking up residence in Canada and not brought into Canada in connection with such residence. This is not what the statute states and I do not believe it can be so interpreted. While I believe that a generous interpretation should be given to the exempting provision, a line must be drawn between property acquired for use by a diplomat in connection with his residence in Canada to enable him to maintain an appropriate standard of living here, and property which he has acquired by way of investment in the exercise of his free discretion to make such investment of surplus funds.

The question is therefore answered in the negative and the appeal is allowed. As this seems to be the first case of its kind interpreting section 35(2)(*b*) of the *Estate Tax Act* and respondent was successful before the Tax Appeal Board, I would have been inclined to relieve respondent from the burden of paying the costs of this appeal. However, paragraph 17 of the special case presented by the parties clearly states that if the court should answer the question in paragraph 15 in the negative, which I have done, then the appeal shall be allowed with costs and I do not believe that I should alter this agreement. At the hearing, it was stated by counsel for both parties that they had agreed that the costs, whatever the event of the cause, should be fixed at $600 and they are accordingly fixed at that figure.