

Case No. BR 8/68

Board of Review:

S. V. Gittins, Q.C., *Chairman*, J. L. Bray & F. G. Nigel, *Members*.

31st August 1968.

Depreciation—initial and annual allowances, industrial buildings and structures—question of whether certain flats were held as capital assets or as trading or circulating assets—Inland Revenue Ordinance, s. 34(1)—onus on taxpayer to prove the finding of Commissioner wrong on the facts—Inland Revenue Ordinance, s. 68(4).

The appellant company purchased 15 flats in a building during the two years ending 31st December 1965 and 31st December 1966 respectively. One flat was sold during 1966. The Commissioner found that the 15 flats were acquired for resale. The appellant claimed that the remaining 14 flats were held by it as capital assets and it was therefore entitled to allowances in respect of them under section 34(1) of the Inland Revenue Ordinance. On appeal.

Decision: Appeal disallowed.

Peter Chan for the appellant.

Chow King-choi for the Commissioner of Inland Revenue.

Cases referred to:—

1. Commissioner of Inland Revenue v. the Board of Review ex parte Herald International Ltd., (1964) H.K.L.R. 229.
2. The Rees Roturbo Development Syndicate, Ltd. v. Ducker, 13 T.C. 366.
3. Hannan and Farnsworth; "The Principles of Income Taxation", pp. 350-352.
4. Golden Horse Shoe (New) Ltd. v. Thurgood, 18 T.C. 280.
5. Granville Building Co. Ltd. v. Oxby, 35 T.C. 245.
6. James Hobson & Sons Ltd. v. Newall, 37 T.C. 609.
7. Punjab Co-operative Bank Ltd. v. Income Tax Commissioner, (1940) A.C. 1055.
8. Whimster v. C.I.R., 12 T.C. 813.
9. Commissioner of Taxes v. Melbourne Trust Ltd., (1914) A.C. 1001.

Reasons:

Annexed hereto as Appendix A (omitted from this reprint) is the Commissioner's Determination of the Appellant's objection against Corporation Profits Tax Assessment for 1967/68 Year of Assessment dated 13th May 1968 and which contains:—

- (a) Facts upon which the Determination was arrived at.
- (b) The Determination.
- (c) The Reasons therefor.

The Appellant's grounds of appeal dated 12th June 1968 is annexed hereto as Appendix B (omitted from this reprint).

The only fact found by the Commissioner which was disputed by the Appellant was the 10th fact set out in Appendix A. This stated that the Appellant had acquired in the 2 years ending 31st December 1965 and 31st December 1966, 15 flats in C. F. Building for resale.

The Appellant's case was that its remaining 14 flats in C. F. Building (one having been sold during 1966) were held by it as capital assets (and not as trading or circulating assets) and it was therefore entitled to Industrial Building Allowances under section 34(1) amounting to \$151,765.00.

Counsel for the Appellant produced a bundle of 4 letters exchanged between the Appellant's accountants on its behalf and the Inland Revenue Department. The letter from the Inland Revenue Department dated 12th March 1968 submitted a statement of facts to the said accountants for their comments. This statement was not demurred from nor commented upon and it is to be noted that the statement included fact (10) which was challenged at the hearing before the Board. The letter from the accountants dated 23rd March 1968 sets out the case for the Appellant as it was argued by its counsel who expressly relied on the points made in that letter.

The Commissioner's representative produced at the hearing the Balance Sheet of the Appellant as at 31st December 1966 and its Trading and Profit and Loss Account for the year ended 31st December 1966.

The issue for the Board to determine is whether the 14 flats in C. F. Building are capital assets (as contended by the Appellant) or trading or circulating assets (as determined by the Commissioner). Unless the said flats are found to be capital assets (contrary to the Commissioner's finding) the Appellant will not be entitled to the Initial and Annual allowances claimed.

An appeal on such a question is one of fact and the burden is on the taxpayer to adduce evidence before the Board in support of its contention or to satisfy the Board that the finding of the Commissioner was wrong on the facts before him.

If there is any dispute on the facts the Appellant must establish the facts upon which it relies. The Full Court of Hong Kong

in the case of the **Commissioner of Inland Revenue v. the Board of Review ex parte Herald International Ltd.**,¹ at p. 237 stated:—

“And the onus of proving that the assessment is excessive lies on the taxpayer appellant. If the facts are agreed, and only points of law are involved, no difficulty should arise. If certain facts are not agreed, the onus of introducing evidence before the Board in the first instance lies upon the taxpayer. If he gives no evidence, the Board should deal with the case on the material before it. The assessor is entitled to have his assessment confirmed unless it is satisfactorily challenged by the taxpayer and shown to be excessive. If the taxpayer has given prima facie evidence of disputed facts, the assessor will be entitled to introduce evidence in rebuttal; and the Board will then resolve any conflict of evidence in the ordinary way on the basis of the evidence before them—not on the basis of the evidence called by the Commissioner.”.

The Appellant, in addition to the arguments contained in the letter from its accountant dated 23rd March 1968 relied on the general terms of paragraphs (g), (r) and (s) of the objects clause of the Appellant's Memorandum of Association. It is not disputed the Appellant has power to lease its properties but no issue arises as to whether such leasing is *intra vires* or *ultra vires*. The issue is whether the properties leased are or are not capital assets. The Board considers that the objects clauses relied upon are neutral in the resolution of this issue.

In fact no evidence was led by the Appellant which served in anyway to refute the finding by the Commissioner, that—

- (a) the Appellant is a property dealing company (this finding has not even been challenged); and
- (b) the flats in C. F. Building were acquired for resale.

The Appellant also relied on the name of the Company being called an “Investment” Company, but this fact by itself cannot advance the Appellant's case to any appreciable extent, if at all. The Appellant's counsel stated that the Appellant purchased properties for the purpose of making a profit, that the Company sold much of its properties at prices which showed profits, and pending the availability of purchasers at profitable prices, let out its unsold properties. This statement of the Appellant's intentions came from its counsel, no officer of the company gave evidence on such lines or at all.

Even if evidence was led to prove such intention, the C. F. flats would not fall within the definition by Rowlatt, J. in **The Rees Roturbo Development Syndicate, Ltd. v. Ducker**,² of a

¹ (1964) H.K.L.R. 229.

² 13 T.C. 366 at p. 379.

“Capital Asset” viz. “an asset which represents fixed capital as opposed to circulating capital, that is to say, that this is an article which is possessed by the individual in question, not that he may turn it over and make a profit by the sale of it to his advantage, but that he may keep it and use it and make a profit by its use”. Statements of the law by Rowlatt, J. which included the above were referred to when the same case eventually went to the House of Lords and was not dissented from or overruled (1928 A. C. at 141).

Mr. Chow for the Commissioner referred the Board to other authorities:—

- (a) **Hannan and Farnsworth**³.
- (b) **Golden Horse Shoe (New) Ltd. v. Thurgood**⁴ where Romer, L. J. said—“The land with which a dealer in real estate carries on his business is part of his circulating capital”.
- (c) **Granville Building Co., Ltd. v. Oxby**⁵.
- (d) **James Hobson & Sons Ltd. v. Newall**⁶. In this case the Appellant’s objects in its Memorandum of Association included carrying on the business of building and acquiring real property for business purposes or for investment and resale. At p. 617 Harman, J. said that by its objects the company may carry on the trade of builders in two ways, one by acquiring land and building houses for sale and another by acquiring land and building houses for let. Those let were no less a part of the trading activities of the company than those built for sale. That no effort had been made to sell them immediately did not affect their being part of the company’s trading assets.
- (e) **Punjab Co-operative Bank Ltd. v. Income Tax Commissioner**⁷.
- (f) **Whimster v. C.I.R.**⁸.

In the light of the principles derived from the above authorities the question for the Board is whether there is sufficient

³ “The Principles of Income Taxation” at pp. 350-352.

⁴ 18 T.C. 280 at p. 300.

⁵ 35 T.C. 245.

⁶ 37 T.C. 609.

⁷ (1940) A.C. 1055.

⁸ 12 T.C. 813.

evidence before it (or the Commissioner) to warrant a conclusion that the C. F. Building flats are not capital assets.

In a case not cited to us, but which was referred to in several of the cases mentioned above, the Privy Council in **Commissioner of Taxes v. Melbourne Trust Ltd.**,⁹ said at p. 1010—"In the present case the whole object of the company was to hold and nurse the securities it held, and to sell them at a profit when convenient occasion presented itself" and held that the assets were trading assets.

Apart from the statement of the Appellant's counsel to this effect, there is the history of the Appellant's dealings with respect to Y. W. Building, see Facts (4) to (6) in Appendix A, and in Appendix D in the Appellant's Balance Sheet where the C. F. Building properties are put under "Stock of Flats" in "Current Assets" (as distinct from "Fixed Assets") and no evidence was led to attempt to establish that there had been any mistake or inadvertence in the preparation and presentation of the accounts.

On the evidence the Board is of the opinion that the Appellant's case falls within the **Commissioner of Taxes v. Melbourne Trust Ltd.** The Board is clearly of the opinion that the onus placed on the Appellant by section 68(4) of proving that the assessment appealed against is excessive or incorrect, as limited by the Appellant's Grounds of Appeal (Appendix B), has not been discharged.

The Appeal is therefore disallowed.

However, the Board has noted that the calculation of the tax payable on the assessable profits in the Commissioner's Determination (paragraph 2 of Appendix A) appears to be incorrect. There is no ground of appeal on this point and the Board considers that its function is to do no more than draw attention to it.

Further, the Board is unable to see how the Appellant, being purchasers of the C. F. Building flats and not having itself constructed the building, can qualify for the initial allowances it has claimed under s. 34(1). No argument was addressed to us on that point, and when it was raised by the Board, the Commissioner's representative stated that that point was not in issue, it having been conceded on the Commissioner's Determination.

⁹ (1914) A.C. 1001

The Commissioner's representative also made a supplementary submission that even if the Appellant was successful in its appeal, no initial allowance should be allowed for the flats purchased in the year ended 31st December 1965 because the expenditure therefor had not been incurred in the year of assessment which is the subject of the Appeal. Although this point does not fall to be determined by the Board because its decision is that the appeal is dismissed, we would be disposed to accede to this submission if it had been material because s. 34(1) requires the capital expenditure to be incurred in the year of assessment.

Case No. BR 15/71

Board of Review:

Chan Ying-hung, *Chairman*, J. MacKenzie, A. E. Chaney, & C. H. Wong, *Members*.

29th March 1972.

Salaries tax—income arising in or derived from the Colony from . . . any office or employment of profit—taxpayer employee of Hong Kong company—his emoluments, deposited in bank in U.S.A. by parent company of Hong Kong company, included in management fee charged to Hong Kong company—taxpayer primarily resident in Hong Kong, but carries out 40 per cent of his duties outside Hong Kong—question whether whole of his emoluments subject to Hong Kong salaries tax—Inland Revenue Ordinance, s. 8(1).

Board had jurisdiction to hear the appeal even though the notice of appeal was lodged out of time because it was sufficient if the notice complied with the spirit rather than the letter of section 66.

The appellant, primarily resident in Hong Kong, was the Technical Director of a Hong Kong Company which was the subsidiary of an American Company. His emoluments were paid by the American company to his account in a bank in the U.S.A. On a time distribution of the taxpayers functions, approximately 60 per cent of his functions were carried out in Hong Kong on account of the Hong Kong company whilst of the balance of his duties approximately 20 per cent was carried out outside Hong Kong on account of the parent American company 15 per cent on account of the Hong Kong company and 5 per cent on account of a separate enterprise. For the two years of assessment in question he was at first charged with salaries tax on the proportion of his stated annual income calculated on the basis of the number of days he spent in Hong Kong. Subsequently additional assessments were issued to charge the differences between the full annual emoluments received by the taxpayer for the two years and the amounts on which he was first assessed. The taxpayer appealed against the additional assessments.