

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D 3/81

Board of Review:

S. V. Gittins, *Chairman*; J. S. Brooker; W. Hume; K. W. Young, *Members*.

28 April 1981.

Lease of furnished premises – Crown lessee – use as Public Dance Hall – whether business transaction or adventure in nature of trade.

The Appellant was a Crown lessee and had formed a company with his wife to operate a Ballroom. The Appellant leased the premises to his company and when the company later ceased to exist its fixed assets such as furniture fixtures etc. was taken over by the taxpayer. The Appellant then leased out the premises together with fixtures and fittings to other persons for use as a ballroom. The Appellant was assessed for profits tax. The Commissioner considered that the furnished letting represented a trade or an adventure in the nature of a trade and upheld the assessments. The Appellant appealed.

Held:

- (i) “Business” as defined by s. 2(1) of the Inland Revenue Ordinance could include subletting by a Crown lessee if the circumstances surrounding the subletting are such as to justify such a finding.
- (ii) The Appellant leased premises, fixtures and fittings for operating a public dance hall together with the benefit of the licence so that the whole transaction constituted a business transaction or an adventure in the nature of a trade.

Appeal dismissed.

Wong Ho Sang for the Commissioner of Inland Revenue.
John Lee instructed by Howell & Co. for the Appellant.

Reasons:

1. The Taxpayer and his wife (Mrs. N) formed a company in 1968. Immediately after incorporation of the Company, a Business Registration Certificate No. 259061 was taken out by the Taxpayer in his capacity as the Company’s director, showing the nature of business as ‘Ballroom’. The Company rented the premises at Shop No. 1 and front portion

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of the first floor, 501-503 C D Road, Hong Kong (the Premises) from Malahon Investment Co. Ltd. for operating the ballroom. On 5 December 1968, Mrs. N was granted by the Commissioner for Television & Entertainment Licensing a licence to operate 'Ballroom' at the Premises. During the active life of the Company, the Taxpayer and Mrs. N were its directors.

2. On 6 April 1971, the Taxpayer and Mrs. N acquired the Premises from Malahon Investment Co. Ltd. at a consideration of \$1,100,000. From April 1971 the Company paid the Taxpayer and Mrs. N a monthly rent of \$4,000 for the use of the Premises.

3. The Company ceased the ballroom business on 31 December 1972. Its last balance sheet drawn up as at 31 March 1973 signed by the Taxpayer and Mrs. N as directors showed that the Company had the following fixed assets:-

Furniture	\$ 39,706.95
Fixtures	59,628.10
Air-conditionings Plant	52,855.35
Electrical Installation	21,708.60
Neon Sign Board	3,360.70
Curtains & Uniforms	6,887.00
Tools	<u>4,878.90</u>
Total	<u>\$189,025.60</u>

These fixed assets were taken over by the Taxpayer and Mrs. N at a total consideration of \$30,000.

4. On 1 January 1973 the Taxpayer and Mrs. N leased the Premises for three years to Messrs. A and B in partnership for operating a ballroom named Ballroom (Y L). According to the Taxpayer and Mrs. N the tenancy agreement has been mislaid. The Profits Tax Return for the year ended 31 March 1976 filed by Y L Ballroom showed that the Taxpayer and Mrs. N were partners thereof from 17 July 1975 to 31 March 1976. Y L's balance sheet as at 31 March 1976 indicates that as at the previous balance sheet date, Y L held furniture and fixtures totalling \$2,777 only. The lease was later extended verbally by mutual consent for another two years to 31 December 1977. Y L's analysis of accounts for the year ended 31 March 1976 prepared by Messrs. M. B. Lee & Company (Certified Public Accountants), reveals that the monthly rental for the Premises was \$24,000 inclusive of the furniture hired.

5. On 30 December 1977, a fresh lease was entered into by the Taxpayer and Mrs. N with Y L. Terms of the lease included the following provisions: -

- (a) The letting of the same premises with the use of fixtures fittings and furniture as specified in an annexed inventory for 1 year from 1 January 1978 to 31 December 1978 at the monthly rent of \$28,000 exclusive of rating.

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- (b) The tenant covenanted to keep the interior of the premises and the landlord's fixtures etc in good condition and to deliver up the same in like condition fair wear and tear excepted.
- (c) The tenant covenanted to use the premises only for the purpose of the tenant's lawful business of a dancing ballroom.

6. According to the records of Television and Entertainment Licensing Authority, Mrs. N held a licence for operating the 'Ballroom' at the Premises from 5 December 1968 to 27 February 1977, when the licence was transferred to the son of the Taxpayer and Mrs. N. There is no record at the Television and Entertainment Licensing Authority for a ballroom named 'Y L Ballroom'.

7. The Commissioner of Rating and Valuation advised the Commissioner of Inland Revenue that the rateable value of the Premises for the years of assessment 1973/74 to 1975/76 was \$60,000 and the assessable value for the years of assessment 1976/77 to 1977/78 was \$111,600.

8. The Assistant Commissioner of Inland Revenue gave notices under section 51(1) of the Inland Revenue Ordinance (the Ordinance) to the Taxpayer trading as Y L Ballroom (Lessor) requiring him to file Profits Tax Returns for the years of assessment 1972/73 to 1976/77. As the Taxpayer did not file the Profits Tax Returns within the time stipulated, the Assessor raised Estimated Assessments on the Taxpayer under Section 59(3) of the Ordinance on 6 October 1978 as follows:-

<i>Year of Assessment</i>	<i>Estimated Profits</i>	<i>Tax thereon</i>
1972/73	\$ 72,000	\$10,800
1973/74	288,000	43,200
1974/75	288,000	43,200
1975/76	288,000	43,200
1976/77	288,000	43,200

9. On 4 November 1978, the Taxpayer lodged a notice of objection against all the above Profits Tax Assessments on the grounds that he had never carried on a business known as Y L Ballroom (Lessor) and that the lease in question was purely a lease of the Premises and could not be read as a lease of business as a going concern. In order to validate the objection, the Taxpayer filed Profits Tax Returns for 1972/73 to 1976/77 on 25 November 1978, showing profits as NIL, adding that "no business in the name of Y L Ballroom (Lessor) has ever been carried on".

10. Through Messrs. M. B. Lee & Company, Certified Public Accountants, the precedent partner of Y L advised the Assessor, by way of a letter dated 8 September 1979, that Y L was operated under the ballroom licence initially held by Mrs. N and later by her son.

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11. The Commissioner of Inland Revenue in his Determination of the Taxpayer's objection conceded that –

- (a) As the Taxpayer held the premises as a Crown lessee, the mere letting of the premises would not amount to the carrying on of a business;
- (b) The Taxpayer did not carry on a business of leasing a ballroom as a going concern.

But the Commissioner considered that the furnished letting in the present case represented a trade or an adventure in the nature of trade carried on by the Taxpayer, that the profits derived therefrom had been properly assessed, and confirmed the estimated assessments set out in paragraph 8 above.

12. The Taxpayer appealed to the Board of Review relying on Section 14 of the Ordinance whereby profits tax is only chargeable on assessable profits from carrying on a trade or business, and on the definition of "Business" in Section 2(1) –

“‘Business’ includes ... the letting or subletting by any corporation to any person of any premises ... and the subletting by any other person of any premises ... held by him under a lease or tenancy *other than from the Crown.*”

13. For the Taxpayer it was also contended that there was no authority to support a finding that the letting of furnished premises amounted to a trade.

14. Although the Taxpayer was erroneously addressed by the Assessor as “Mr. N trading as Y L Ballroom (Lessor)” we hold that this does not invalidate the assessments because it is clear that the Taxpayer was being charged in respect of his income from the leasing of the premises with furniture etc to Y L, see section 63 of the Ordinance.

15. We hold that the correct interpretation of the word “business” in Section 2(1) in relation to this case is that while any subletting by a person who is not a crown lessee would automatically constitute a business; a subletting by a crown lessee would not automatically constitute a business. The subletting by a crown lessee could and would constitute the carrying on of a business if the circumstances surrounding the subletting are such as to justify such a finding.

16. The issue for determination on this appeal is whether the circumstances of the letting by the Taxpayer and Mrs. N to Y L are sufficient to constitute the carrying on of a business by the Taxpayer.

17. We find that the following facts are relevant: -

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- (a) For Y L to carry on the business of a ballroom it was essential for there to be a valid licence, Section 4 of the Miscellaneous Licences Ordinance, Cap. 114. The licence here was one issued to Mrs. N on 5 December 1968, annually renewed to her until it was transferred to her son on 27 February 1977. For the licence to be kept in force Mrs. N had to comply with the Regulations in Part VI relating to Public Dance Halls which included the keeping of a register and monthly returns of dancing partners and other persons employed, the maintenance of the premises to the satisfaction of the Director of Fire Services and of the Chairman of the Urban Council.

These services had to be carried out by Mrs. N on behalf of the Taxpayer for the benefit of Y L.

- (b) That a substantial sum was included in the rent for furniture fixtures etc must necessarily be inferred from the following facts: -
- (i) From Paragraph 7 above, the rateable value of the value of the premises for the years of assessment 1973/74, 1974/75 and 1975/76 was \$60,000 and the assessable value for the year of assessment 1976/77 was \$111,600 whereas the rent paid by Y L for each of these years was \$288,000. The excess is \$228,000 for each of the first 3 years and \$176,400 for the 4th year.
 - (ii) From paragraph 3 above, the Taxpayer and Mrs. N took over furniture fixtures etc with a book value of \$189,025 which were presumably hired to the Y L as part consideration for the rent paid. It would have been possible to refute this inference by the production of the inventory referred to in the lease dated 30 December 1977, but this inventory has not been produced.
 - (iii) Y L's Balance Sheet as at 31 March 1976 shows that the balance of its furniture and fixtures at cost as at 31 March 1975 was \$2,777 (para. 4 above). The conclusion is that Y L had to expend very little before beginning business.

18. On these findings we accept the submission made on behalf of the Commissioner and we find that what the Taxpayer did was to lease the premises, fixtures and fittings therein for operating a public dance hall together with the benefit of the licence for operating such thereat so that the whole transaction constituted a business transaction or an adventure in the nature of trade.

19. The appeal is dismissed and the assessments in the Commissioner's Determination are confirmed.