CORPORATION TAX - deductions - payment made for surrender of onerous lease - whether lease was a capital asset - whether expenditure was of a capital or revenue nature - appeal dismissed - ICTA 1988 Ss 18 and 74

THE SPECIAL COMMISSIONERS

BULLRUN INC

- and -

(H M INSPECTOR OF TAXES) Respondent

SPECIAL COMMISSIONER : DR A N BRICEChairman's name: use right arrow to move to starting point after this box

Sitting in London on 9 May 2000

Mr P R Allen and Mr B A C Hull of Messrs Slater, Chapman & Cooke, Chartered Accountants, for the Appellants

Mr Barry Williams, Regional Advocacy Adviser to the Inland Revenue, for the Respondent

ANONYMISED DECISION

The appeal

1. Bullrun Inc (the Appellant) appeals against a determination of the Respondent dated 17 July 1995 refusing a claim made on behalf of the Appellant on 16 September 1994 that a payment of £550,000.00 made on the surrender of an onerous lease be carried back against previous profits.

The legislation

2. Section 18(1)(a)(iii) of the Income and Corporation Tax Act 1988 (the 1988 Act) provides that tax shall be charged under Schedule D in respect of the annual profits or gains arising to any person from any trade, profession or vocation.

3. The relevant parts of section 74 of the 1988 Act provide:

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"(1) Subject to the provisions of the Tax Acts, in computing the amount of the profits or gains to be charged under

Case I or Case II of Schedule D, no sum shall be deducted in respect of- ...

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(f) any capital withdrawn from, or any sum employed or intended to be employed as capital in, the trade, profession or vocation, ..."

The issues

4. The Appellant paid the sum of £550,000 in one year in order to surrender a lease which was originally granted for ten years and which, at the date of the surrender, still had five and a half years to run. The Inland Revenue argued that the lease was a capital asset; that the payment was of a capital nature; and that the payment could not therefore be deducted in computing the profits of the Appellant for tax purposes. The Appellant argued that the lease was not a capital asset; that accordingly the expenditure was of a revenue nature; and that the sum of £550,000 could be deducted in computing its profits.

5. Accordingly the issue for determination in the appeal was whether the lease was a capital asset.

6. In reaching a decision on this issue I was greatly assisted by the way in which the evidence and the arguments were presented by both parties.

The evidence

7. Three agreed bundles of documents were produced. Bundle 1 contained the lease and other documents; bundle 2 contained copies of correspondence; and bundle 3 contained accounts and computations. Oral evidence was given on behalf of the Appellant by a director of the Appellant.

The facts

8. From the evidence before me I find the following facts.

9. The Appellant was incorporated in 1986 in the United States of America and is owned by a partnership of designers. Since its incorporation the Appellant has had an established place of business in the United Kingdom in London. Initially eleven people from the United States worked for the Appellant at Wellington House, London. The business expanded year by year and later the Appellant moved to premises on part of the ninth floor of Cornwall House London. Subsequently this proved insufficient for the Appellant's needs.

10. Accordingly, on 7 January 1988 the Appellant was

granted a lease (the Lease) by an unrelated property investment company (the landlord) of part of the second floor of Cornwall House. The Lease was for the term of ten years from 25 December 1987 for a rent of £550,000.00 each year until 24 December 1992 after which the rent could be reviewed upwards. At Cornwall House there was no exterior indication of the Appellant's occupation of the ninth floor but the Appellant's name appeared on the directory of occupants in the lobby of the building. The Appellant also rented other premises. For example, at the same time as the Lease was granted the Appellant also acquired a lease of nearby premises on the third floor of a nearby building where the administration of the Appellant was carried out. By 1990 there were 45 people from the United States and 200 from the United Kingdom working for the Appellant in the United Kingdom. However, profits reduced substantially in 1991 when the number of employees was halved.

11. In January 1992 the Appellant and its estate agents discussed the possibility of surrendering the Lease to the landlord. By that time the rent payable under the Lease exceeded the market rent and the Lease had, accordingly, become a liability. It was, therefore, appreciated that a contribution might have to be paid to the landlord for the surrender. On 7 April 1992 the Appellant's estate agents indicated that the landlord would take a surrender of the Lease on the basis that from 24 June 1992 to 24 December 1997 the Appellant would pay the sum of £100,000 each year. By 23 April 1992 the price for the surrender had risen to a single sum of £550,000 payable by instalments.

12. On 23 June 1992 the Appellant and the landlord entered into an Agreement (the Surrender) under which the landlord agreed to accept a surrender of the Lease from the Appellant and the Appellant agreed to pay the landlord the sum of £550,000.00 plus value added tax as consideration for accepting the surrender. The surrender was conditional upon a number of events all of which occurred.

13. Also on 23 June 1992 the Appellant entered into a Deed of Covenant with the landlord under which the Appellant agreed to pay the sum of £550,000.00 due under the surrender by quarterly payments of £25,000.00 each.

14. In the Appellant's profit and loss account for the year ending on 30 September 1992 the full amount of the payment for the surrender was charged as an exceptional item. In the Appellant's balance sheet for the same period the amount of £100,000.00 was included in "Creditors: amounts falling due within one year" and £400,000.00 was included in "Creditors: amounts falling due after more than one year". The amount of £50,000.00 had already been paid in two instalments by 30 September 1992.

15 Between 1988 and 1992 the rent paid under the Lease was on average a little less than one half of the total rents paid by the Appellant. Between 1986 and 1992 total rent payments were in the region of 10% of total operating expenses. I accept the evidence of the witness that the Appellant did not regard the Lease or any leases as investments; they were regarded as spaces in which the employees of the Appellant performed their professional activities. Any building would do as long as it had an open plan configuration, was well fitted out and had good technology connections.

The areas of agreement

16. The parties agreed:

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(1) that the accountancy treatment adopted by the Appellant was the only treatment possible which was consistent with SSAP 2 - "Disclosure of Accounting Policies" which requires provision to be made for all known liabilities;

(2) that the accountancy treatment was not determinative of the issue in the appeal but was one factor to be taken into account;

(3) that the time at which the test (as to whether the expenditure was of a capital or a revenue nature) had to be applied was June 1992;

(4) that, if the payment were deductible, then it was all deductible in the year ending on 30 September 1992 and not when the payments were made under the Deed of Covenant; and

(5) that the question as to whether a payment was of a capital or a revenue nature was a question of law.

17. The Appellant accepted that, if the lease were a capital asset, then the payment to surrender it was of a capital nature and so not deductible.

18. The Inland Revenue accepted that the payment was made wholly and exclusively for the purposes of the trade or profession of the Appellant within the meaning of section 74(1)(a) of the 1988 Act.

The arguments for the Appellant

19. For the Appellant Mr Hull argued that the Lease was not a capital asset and so the payment for the surrender was of a revenue nature and therefore deductible.

20 First, he argued that the lease was no more than an agreement or contract and urged that it be considered in the same way as a commercial agreement and not with all the legal connotations of a lease. The Oxford English Dictionary defined a lease as "a contract between the parties by which the one conveyed lands or tenements to the other for life, for a term of years, or at will, usually in consideration of rent or other periodical compensation". A contract was defined as "an agreement between two or more parties". It followed that a lease was an agreement. He cited Strick v Regent Oil Co Ltd (1965) 43 TC 1 at page 30A as authority for the view that the weight which must be given to particular circumstances in a particular case must depend rather on common sense than on the strict application of any single legal principle.

21. Next, Mr Hull went on to argue that the facts of this case distinguished it from many of its predecessors. The Appellant considered its various occupations of premises as incidental to its business of the trade of architects and engineers. The Lease was not "the whole structure of the Appellant's profit-making apparatus" as had been the case in Van Den Berghs Limited v Clark (1934) 19 TC 390 and he referred to the words of Lord MacMillan at page 431. The surrender of the Lease merely "effected a change in the Appellant's business organisation leaving its fixed capital untouched" which had been the reason for the finding that the expenditure in Commissioners of Inland Revenue v Carron Company (1968) 45 TC 18 at 68E was of a revenue nature. Any premises of sufficient quality would do for the Appellant's trade and that distinguished this case from Tucker v Granada Motorway Services Limited (1979) 53 TC 92 where the business of selling petrol had to be conducted from a service station. He adopted the words in the dissenting judgment of Lord Salmon at page 109F where he said that he did not understand how a lease which had been acquired at a rack rent and without a premium could be a capital asset of the lessee. He also distinguished the decision in Mallett v The Staveley Coal and Iron Company Limited (1928) 13 TC 772 where the mining leases were essential to the taxpayer's trade of mining coal and were "the whole structure of its profit-making apparatus". That was also the distinguishing feature in Anglo-Persian Oil Company v Dale (1931) 16 TC 253 where payments made to cancel onerous contracts were held to be of a revenue nature; at pages 271 and 272 Lawrence LJ had regarded the commercial agreements as circulating and not fixed capital. Finally, he relied upon the words of Millett LJ in Vodafone Cellular & Others v Shaw (1997) 69 TC 376 at page 433E where he said that where a lump sum payment made in order to commute or extinguish a contractual obligation to make recurring revenue payments was prima facie a revenue payment. He also relied upon the words at page 434G where Millett LJ said that it was only when a contract was one where the cancellation would effectively destroy or cripple the whole structure of the taxpayer's profit-making apparatus that it

fell to be treated exceptionally as a capital asset. Mr Hull argued that by 1992 the Lease was not an asset but had become a liability.

22 Mr Hull distinguished Atherton v British Insulated and Helsby Cables Limited (1925) 10 TC 155 as that case concerned a once and for all payment for future pensions which was not the case in the present appeal. He also distinguished Commissioner of Inland Revenue v Wattie and another [1998] STC 1160 where a sum of money paid to the taxpayer as an inducement to enter into a lease was held to be of a capital nature on the ground that that lease had a substantial period to run.

23 The following authorities were also referred to in the arguments for the Appellant:

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Usher's Wiltshire Brewery Limited v Bruce (1914) 6 TC 399

Hancock v General Reversionary and Investment Company Limited (1918) 7 TC 358

Glenboig Union Fireclay Company Limited v The Commissioners of Inland Revenue (1922) 12 TC 427

Pickford v Quirke (1927) 13 TC 251

Hyett v Leonard (1940) 13 TC 346

Morgan Crucible Company Limited v The Commissioners of Inland Revenue (1932) 17 TC 311

The Commissioners of Inland Revenue v The Falkirk Iron Company Limited (1933) 17 TC 625

Hinton v Maden & Ireland Limited (1959) 38 TC 391

Dain v Auto Speedways Limited (1959) 38 TC 525

The Commissioners of Inland Revenue v H J Rorke Limited (1960) 39 TC 1894

Leach v Pogson (1962) 40 TC 858

Lawson v Johnson Matthey Plc (1992) 63 TC 390

Threlfall v Jones (1993) 66 TC 77

Johnston v Britannia Airways Limited (1994) 67 TC 99

Herbert Smith v Honour [1999] STC 173

Croydon Hotel & Leisure Company Limited v Bowen [1996] STC (SCD) 466

Caledonian Paper plc v Inland Revenue Commissioners [1998] STC (SCD) 129

Southern Counties Agricultural Trading Society Limited v Blackler [1999] STC (SCD) 200

The arguments for the Inland Revenue

24. For the Inland Revenue Mr Williams argued that the Lease was a capital asset and thus the payment for its surrender was of a capital nature. The Lease constituted an interest in property which was not stock-in-trade. Even though the Lease was a rack rent lease, and had no balance sheet value, it was an identifiable asset following RTZ Oil & Gas Limited v Elliss (1987) 61 TC 132. Mr Williams cited Rolfe v Wimpey Waste Management Limited (1989) 62 TC 399 as authority for the view that depreciation of wasting capital assets, such as short leases from which businesses were carried on, were not deductions from revenue; at page 445F Dillon L J had said that a five year lease was a capital asset. Mr Williams also relied upon Cowcher v Richard Mills and Company Limited (1927) 13 TC 216 as authority for the view that payments for the surrender of a lease were generally of a capital nature. In Mallett Lord Hanworth had said that a payment to get rid of an onerous lease was of a capital nature; a single payment was only of a revenue nature if it extinguished an annual business expense. In Vodafone Millett L J at page 433I had stated that a payment made to modify or dispose of a capital asset was a capital payment and at page 434D had said that a lease with no balance sheet value was still a capital asset. The correct test was that set out in Strick. He relied upon E.C.C. Quarries Ltd v Watkis (1975) 51 TC 153 as authority for the view that a lease was a legal asset which, if it was not trading stock, was a capital item. The surrender payment produced an enduring benefit in that it released the Appellant from an onerous lease for premises which were no longer required.

Reasons for Decision

25. In considering the arguments of the parties I start with the legislation. Section 18 of the 1988 Act provides that tax shall be charged in respect of the annual profits or gains arising from a trade. In order to ascertain the annual profits of the trade one has to set against the receipts of the trade the expenditure necessary to earn them. That exercise will normally exclude the deduction of expenditure relating to capital transactions because such expenses would not be incurred in earning profits but in acquiring capital assets. The authorities cited by the parties are decisions by the courts as to whether expenditure is of a capital or revenue nature for tax purposes. Certain

principles have been developed to assist in such a decision but the principles do not stand alone; they always have to be considered within the context of section 18.

26. With that background in mind I turn to consider the authorities cited by the parties.

27. The earliest authority cited was Atherton (1925) which concerned the deductibility of a lump sum paid to establish the nucleus of a pension fund for employees of the company. At page 192 Viscount Cave L.C. established the following principle:

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"But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of the trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

28. Applying that principle to the Lease when it was acquired, as no premium was paid there was no "once and for all" expenditure. Nevertheless, at that time the Appellant did enter into an obligation to pay the rent for the term of ten years and, in return, received the right to occupy the premises for that period of time. That was an advantage for the enduring benefit of the trade.

29. The next authority in point of time was Cowcher (1927). There a fishmonger had several shops one of which was not profitable. The lease of that shop was a rack rent lease for fourteen years and it expired in 1923. In 1916 the lease was surrendered in consideration of the sum of £1.812.10s.0 to be paid by instalments of £250 each year. The instalments were paid regularly until 1921 when the lessor accepted a payment of £600 in satisfaction of all further liability. The issue was whether the sum of £600 was deductible. Rowlatt J asked whether the payment was an expense of the business carried on by the taxpayer and held that it was not because the taxpayer was not carrying on business at the premises the subject of the surrendered lease. At page 221 he said:

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"Of course ... any prudent directors would provide for that sum [the surrender payment]. They would not allow it to come out of capital account so far as their capital was concerned, but so far as the business which is the subject matter of tax is concerned the present payment has nothing to do with it. ... It is not laid out for the purposes of the business. If you have to call it anything you have to call it capital, except that the directors would never allow it

to fall on capital at all. It is not an expense in earning money in the business that is carried on. Neither the instalment, nor the commutation of the instalment was."

30. Thus Cowcher illustrates the principle that the question is whether the payment is an expense in earning money in the business that is carried on and the issue as to whether it is treated as a capital or a revenue payment in the accounts is not decisive.

31. Mallett (1928) concerned payments made to surrender two mining leases. One was for 63 years from 1882 and the other was for 21 years from 1919. Each reserved a minimum rent and mining royalties. In 1923 each lease was surrendered in return for a payment made to the lessor and the issue was whether those payments were deductible in computing profits. The Court of Appeal decided that they were not. At page 787 Lawrence L J said;

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"It must be borne in mind that [the company's] trade does not consist of acquiring mining leases and selling those leases. The company's business is that of colliery proprietors, and its trade consists of the winning and selling of coal. For the purposes of carrying on that trade it has acquired numerous leases, including the two leases in question in this case. Those two leases, to my mind, clearly constitute a part of the fixed capital assets of the Company, and none the less so because they were acquired without the payment of any cash premium."

32. And later at page 788:

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"Whatever may be the accurate description of the payment, it seems to me that it is a payment made in respect of the Company's fixed capital and not a payment made for the purposes of its trade of winning and selling coal so as to form a proper debit item against the incomings of that trade."

33. If those principles were applied to the facts of the present appeal the conclusion would be that the Appellant's business is that of designers and not the buying and selling of leases. For the purposes of its trade the Appellant acquired a number of leases, including the Lease, which are capital assets even though no premium was paid. The surrender payment was not a payment made for the purposes of the provision of design services and so does not count as a proper debit item against the incomings of the Appellant's trade.

34. Anglo-Persian (1931) did not concern payments to surrender leases but payments to cancel agency contracts.

The taxpayer had appointed agents to act for it for a period of years in return for commission payments. Later the agreements were cancelled upon the taxpayer making a lump sum payment to the agents. That sum was held to be deductible. Lawrence L.J. gave the reasons at page 269 as follows:

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"It is not open to doubt that under ordinary circumstances where a trader, in order to effect a saving in his working expenses, dispenses with the services of a particular agent or servant, and makes a payment for the cancellation of the agency or service agreement, such a payment is properly chargeable to revenue; it does not involve any addition to or withdrawal from fixed capital; it is purely a working expense."

35. At page 272 he distinguished the decision in Mallett and said:

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"The Company's oil concessions in Persia are part of the Company's fixed capital, and if a sum were paid for the cancellation of such a concession on the ground that it was onerous that would, no doubt, be a capital expenditure within the principles of the decision in Mallett. ... The contract to employ an agent to manage the Company's business in Persia, however, in no sense forms part of the fixed capital of the Company, but is a contract relating entirely to the working of the Company's business, the method of managing which may be changed from time to time. Neither the contract itself, nor a payment to cancel it, would, in my opinion, find any place in the capital accounts of the Company."

36. Thus the distinction is now drawn between a lease (which is a capital asset even though no premium was paid to acquire it) and a "contract relating to the taxpayer's business" which is not a capital asset.

37. Van den Berghs (1934) concerned a lump sum payment received in consideration of the taxpayer company consenting to certain profit-pooling arrangements being terminated thirteen years in advance. This was not a payment for the early termination of a lease and at first sight it might be thought that Anglo-Persian would apply and not Mallett. However, the House of Lords held that the cancelled agreements related to the whole structure of the company's profit-making apparatus and regulated the company's activities. That was a capital asset of the company and so the receipt was a capital receipt. At page 431 Lord MacMillan said:

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"The three agreements which the Appellants consented to cancel were not ordinary commercial contracts made in the course of carrying on their trade; they were not contracts for the disposal of their products or for the engagement of agents or other employees necessary for the conduct of their business; nor were they merely agreements as to how their trading profits when earned should be distributed as between the contracting parties. On the contrary, the cancelled agreements related to the whole structure of the Appellants' profit-making apparatus. They regulated the Appellants' activities, defined what they might and what they might not do, and affected the whole conduct of their business. I have difficulty in seeing how money laid out to secure, or money received for the cancellation of a trader's activities can be regarded as an income disbursement or an income receipt."

38 Thus the same distinction is drawn between a capital asset (which includes a lease even though no premium was paid to acquire it and which also now includes a contract relating to the whole structure of a taxpayer's profit-making apparatus) on the one hand and a "contract relating to the taxpayer's business" which is not a capital asset on the other hand. Mr Hull argued that because the Lease in the present appeal did not relate to the whole structure of the Appellant's profit-making apparatus it was not a capital asset. However, that is not what Van den Berghs says. Van den Berghs does not disturb the finding in Mallett that leases are capital assets. However, it distinguishes other commercial contracts into those which affect the whole structure of the profit-making apparatus on the one hand, which are capital assets, and others which relate to part of the taxpayer's business on the other, which are not.

39. In Strick (1965) the House of Lords held that lump sum payments by an oil company to retailers for exclusivity arrangements were of a capital nature because they took the form of a lease by the retailer of his premises to the oil company for a payment and a nominal rent with a lease back by the oil company to the retailer also at a nominal rent. The four leases the subject of the appeal were for 21, 21, 10 and 5 years respectively. The decision was based on the fact that premiums paid for leases were always regarded as of a capital nature and that the payments were made as the price of acquiring interests in land. At page 31 Lord Reid saw no distinction between a lease at rent and a premium and a lease at a rack rent and said:

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"It was argued that a rent and a premium paid under a lease are paid for different things - that the premium is paid for the right but that the rent is paid for the use of the subjects during the year. I must confess that I have been

unable to understand that argument. Payment of a premium gives just as much right to use the subjects as payment of a rent, and an obligation to pay rent gives just as much right to the whole term of years as payment of a premium. A lessee who only pays rent has the same right to assign the rest of the term - perhaps for a large capital sum if values have gone up - as has the lessee who has paid a premium."

40. It seems to me that that extract is the key to the decision in this appeal. If values in London had gone up before the rent review was due the Appellant may have been able to assign the Lease for a capital sum. It would be difficult to argue that the receipt of such a sum was not a capital receipt. Conversely, as in this case a payment has had to be made it follows that it is also of a capital nature.

41. E.C.C. Quarries (1975) concerned a payment made for unsuccessful planning applications to extract sand and gravel from land of which it owned the freehold. Brightman J found that this was a capital payment and gave the reason at page 171D as:

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"On consideration of the authorities it seems to me that in the case which I have to decide the company expended money for the purpose of securing a permanent alteration to the nature of the land it owned or occupied; that is a change from land confined to its existing use and of little or no value to the company for the purposes of its trade to land capable of being turned to account pursuant to the company's trading activities."

42 Although this authority is not of direct help, it confirms the view that interests in land are capital assets and that payments made to enhance them are capital payments.

43. In Tucker (1979) a payment made in 1974 to amend an onerous lease granted in 1964 for 50 years was held to be of a capital nature even though the lease was non-assignable and had no balance sheet value. At page 107B Lord Wilberforce said:

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"I think that the key to the present case is to be found in those cases which have sought to identify an asset. In them it seems reasonably logical to start with the assumption that money spent on the acquisition of the asset should be regarded as capital expenditure. Extensions from this are, first, to regard money spent on getting rid of a disadvantageous asset as capital expenditure and, secondly to regard money spent on improving the asset, or making it more advantageous, as capital expenditure."

44. And at page 108E Lord Wilberforce referred to the distinction between payments to get rid of onerous leases and payments to get rid of commercial contracts. He referred to Anglo-Persian and said:

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"The payment there was in order to free the company from a long-term agency agreement which had become onerous to the company. Now there may not be much commercial difference between a payment of this kind and a payment to get rid of an onerous lease. But since the courts have accepted and worked the "identifiable asset" test the decision was no doubt right in law. The test may be to some extent arbitrary, but it provides a means which the courts can understand for distinguishing capital and income expenditure and I think that we would be wise to maintain it."

45. And later at page 108G:

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"It is true that the lease was non-assignable, so it had no balance sheet value before or after the modification. But it was none the less an asset and a valuable one for the Appellant Company's trade, and, if an asset, was a capital asset."

46. So once again the concept of a lease as a capital asset is confirmed and the distinction between leases and commercial contracts maintained. Leases to be treated as capital assets include non-assignable leases which have no balance sheet value. Applying those principles to the facts of the present appeal the Lease was assignable but was for a shorter term than the lease in Tucker.

47. Tucker is also of interest because Lord Wilberforce seemed to find it hard to justify the distinction between the treatment of a payment to amend an onerous lease on the one hand and a payment to amend or get rid of an onerous commercial contract on the other; he finds the distinction "to some extent arbitrary". Nevertheless he maintains it and applies it. Like Lord Wilberforce I also can see arguments for aligning the two treatments so that a payment to get rid of an onerous lease, which is, say, a short lease at a rack rent and one of a number owned by the taxpayer, is treated in the same way as the payment to get rid of an onerous commercial contract which is not the whole structure of the taxpayer's profit-making apparatus. However, it is not for this tribunal to depart from the principles established and applied by the House of Lords.

48. RTZ Oil (1987) is not of direct interest in this appeal because it concerned the deductibility of a provision for future expenditure on reconverting oil rigs, capping oil wells

and dismantling a gathering system at the end of a licence to exploit an oil field. However, at page 172E Vinelott J reinforced the view that a lease is a capital asset when he said:

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"The contract of hire is clearly a capital asset just as a lease of land on which a trader conducts his business is a capital asset."

49. In Wimpey Waste Management (1989) the taxpayer put forward an argument similar to that in the present appeal. The taxpayer company acquired landfill sites and in its accounts included them all as current assets on the basis that the expenditure was not the cost of acquiring land but of acquiring "consumable tipping space" for its waste disposal operations. Some of the sites were freehold; some leasehold; and some held on licence. The Court of Appeal was not persuaded by that argument and held that expenditure to acquire an interest in land was prima facie capital expenditure and the sites were used for sufficiently long periods to qualify as capital assets. At page 445C Dillon L.J. said:

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"... I for my part do not find anything in common between the taxpayer's landfill sites and the trading stock of a builder. The builder works on the land which is his trading stock, building a house, and disposes of the land and house to his customer, the purchaser. The taxpayer collects the waste of his customer and deposits that in the landfill site or on the landfill site, but does not dispose of the landfill site or any interest in the landfill site to the customer. The landfill site is essentially the place where the taxpayer carries on its business ...".

50. Pausing there, in this appeal the Appellant used the premises the subject of the Lease as space in which its employees carried on their work but did not dispose of the Lease or any lease to its customers. The Lease was of premises where the Appellant carried on its business.

51. At page 445E Dillon L.J continued:

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"Beyond that, however, it seems to me that Mr Scrutton's approach, besides making a false distinction between airspace and the land, either ignores the established tax rule as to not allowing charges against revenue for depreciation of wasting capital assets, such as short leases from which or in which a business is carried on, or it is defining, as circulating capital or current assets, all assets which are wasting assets and will then need replacement;

for instance, all short leases from which businesses are carried on. But that would be wholly contrary to the approach in Strick. There the leases which were obtained were in some cases five year leases but they were nevertheless held to be capital assets."

52. Thus the Court of Appeal confirmed that a short lease of even five years, of premises from which or in which a business was carried on, was a capital asset.

53. Vodafone (1997) is of interest because it confirmed the view that a payment to get rid of an onerous commercial agreement which was not the whole structure of the taxpayer's profit-making apparatus was of a revenue and not a capital nature. It did not disturb the rule that payments made to get rid of leases, and of commercial contracts which do relate to the whole structure of a taxpayer's profit-making apparatus, were of a capital nature.

54. Finally, in Wattie (1998) a firm of accountants were paid a lump sum as an inducement to enter into an onerous lease for twelve years at a rent above market rent. The Privy Council held that the inducement payment was of a capital nature and, at page 1170d Lord Nolan referred to the twelve year lease as "for a substantial period". It is difficult to distinguish the twelve year lease in Wattie from the ten year lease in this appeal.

55. Thus the principles established by the authorities may be summarised as follows:

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(1) that a payment to surrender a rack rent lease for fourteen years which is only one of many leases used by the taxpayer is of a capital nature (Cowcher);

(2) that leases for twenty-one years and sixteen years are capital assets even though they are acquired without the payment of any premium (Mallett);

(3) that a twelve year lease is a capital asset (Wattie);

(4) that leases for twenty-one, ten and five years are capital assets (Strick);

(5) that a short lease for five years, of premises from which or in which a business is carried on, is a capital asset (Wimpey Waste Management);

(6) that there is no difference in treatment between a lease at a rack rent and a lease at a premium and rent (Strick);

(7) that a lease is still a capital asset even though it is non-

assignable and has no balance sheet value (Tucker);

(8) that, in general, interests in land are capital assets (E.C.C. Quarries);

(9) that a payment to get rid of an onerous commercial contract is of a revenue nature (Anglo-Persian) unless the commercial contract relates to "the whole structure of a taxpayer's profit-making apparatus" when it is of a capital nature (Van den Berghs and Vodafone); and

(10) that, however, a payment to get rid of an onerous lease which is not "the whole structure of a taxpayer's profit-making apparatus" is still a capital payment (Lord Wilberforce in Tucker).

56. Applying those principles to the facts of the present appeal I have to find that the Lease, which was for ten years at a rack rent, was a capital asset and that the payment to surrender it was of a capital nature even though the lease did not form "the whole structure of the Appellant's profit-making apparatus".

Decision.

57 My decision on the issue for determination in the appeal is that the Lease was a capital asset.

58. The appeal is, therefore, dismissed.

59. As this is a decision in principle either party has liberty to apply.

DR A N BRICE

SPECIAL COMMISSIONER

Date Released : 18th July 2000