JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 42/77

BEFORE: The Hon. Mr. Justice Melville, J.A.
The Hon. Mr. Justice Carey J.A. (Ag.)
The Hon. Mr. Justice White J.A. (Ag.)

BETWEEN	MORRIS BURKE	APPELLANT
A N D	THE COMMISSIONER OF INCOME TAX	RESPONDENT

Dr. L.G. Barrett for Appellant.

Mr. H. Hamilton & Mr. L. Brown for Respondent.

June 23, 24, and July 31, 1980

CAREY J.A. (Ag.)

This is a taxpayer's appeal against a judgement of Marsh J. in the Revenue Court dated 28th July, 1977 whereby he upheld a decision of the Commissioner of Income Tax refusing claims for depreciation allowances under the Income Tax Act in respect of years of assessment 1967 - 70 inclusive.

The facts, which were not disputed in the court below, can be shortly stated. The taxpayer and his wife owned certain premises at 12 Violet Avenue, Mona, St. Andrew. The premises had been acquired in 1965 and from that time until 1971 were let furnished to several tenants. In that year a lease agreement was concluded with U.H.W.I. so that the premises have since been used as a residence for doctors on the staff of that hospital. The taxpayer during the period of the tenancy was responsible for the maintainance and repairs of the premises, collected rental and paid the necessary

outgoings. His wife from time to time inspected the premises to effect repairs and to view the state of furniture and grounds. The taxpayer in compiling the chargeable income for the relevant years, claimed an allowance in respect of wear and tear under section 13 (1) (n) of the Income Tax Act on the basis that the parties were carrying on the business of renting premises.

It was argued on behalf of the taxpayer that the learned judge by holding that where a person is performing the ordinary functions of a landlord, he is by virtue of that fact, not carrying on a business or trade within the meaning of Section 13 (1) (n) of the Act, erred in law and that the only reasonable inference from the facts was that the appellant's wife was carrying on a business.

The learned judge, who is, of course, very experienced in these matters, came to the conclusion that the formulation as appears in the headnote to Hendriks v. Income Tax Assessment Committee 4 J.L.R. 60 that: "a person performing the ordinary functions of a landlord in respect of premises owned by him is not carrying on a business in respect of those premises so as to be entitled to a deduction for wear and tear under Section 9 (3) of Cap. 201 as amended by Section 5 of Law 55 of 1939" must be accepted as good law and as an authoritative exposition of the statutory language. Section 13 (1) (n) of the Income Tax Act should be substituted for Section 9 (3) of Cap. 201 as amended.

Learned counsel for the Commissioner did not seek to support the judgment of the learned judge on this basis however and indeed candidly conceded that the judge had erred in law in

holding that he was bound by the Hendriks case. Although no respondent's notice (see Rule 12 (2) of the Court of Appeal Rules 1962) had been filed, the court nevertheless permitted counsel to support the decision on a ground not relied upon by the court below. He argued that on the facts before this court, the taxpayer was doing no more than protecting his investment, and consequently was not carrying on a trade or business to enable the claim for depreciation to be allowed. He also conceded that the Commissioner, as a matter of course, allowed claims for depreciation under the section where the taxpayer let more than one premises. A great number of authorities was cited to demonstrate the distinction in tax law between "investment activities" and "business activities." Although I found these arguments interesting, I regret that I did not consider the cases cited as of assistance in resolving this matter. The authorities were clearly appropriate to the context of the U.K. legislation with its mutually exclusive schedules. The Jamaican Statute is altogether different.

The issue which falls to be determined may be stated this way: "does a person who owns premises which he lets carry on business?" This is a question of fact, as Marsh J. correctly observed in his judgment, but to which he did not apply his mind because of his mistake of law as to the effect of the conclusion of the decision of the former Court of Appeal in Hendriks (Supra).

Both counsel have conceded that this court is in as good a position as the court below to make a determination in this

regard in view of the fact that there was no challenge of the facts, since costs would be saved, and time as well, if the matter were not remitted for the hearing to be continued before Marsh J.

I start with the decision of this court in Hanover Agencies v. Income Tax Commissioner (1964) 7 W.I.R. 300 at p. 304 where Waddington J.A. a very sound judge, said this:

> "The decision on this aspect of the Hendriks case was based on the particular facts of that case and I do not think that the case decides that in no circumstances can the letting of premises ever constitute the carrying on of a business."

On the other hand Lord Diplock thought that the mere receipt of rent by a private individual probably raises no presumption that he is carrying on business, See American Leaf Co. v. Director General of Inland Revenue (1978) 3 W.L.R. 985. Even in the case of a company, it is not every isolated act of a kind that is authorised by its memorandum if done by a company, necessarily constitutes the "carrying on of a business," per Lord Diplock in American Leaf Co. v. Director General of Inland Revenue (Supra) at p. 990. It may not perhaps be unreasonable to suppose that if a company's objects are business objects which are in fact habitually carried out, the company carries on business. In the case of an individual, one has to examine the nature and scope of the activity in which the taxpayer is engaged, to determine whether he is carrying on a business.

It is not enough to say, as did Furness C.J. in the Hendriks case that the letting of property does not amount to

carrying on business because what was being done was looking after an investment. The term 'business' in 'carrying on a business or trade' is of wide import. 'Business' is a wider term than 'trade' as Duffus P. indicated in Hanover Agencies where he said at 309:

> "It is my view that the words 'trade' and 'business' used in section 8 (o) are not synonymous, for if they were then one for the other would be mere surplusage. I believe that the legislature used both words for the reason that they do not necessarily mean the same thing and that the word 'business' has a wider connotation".

The word 'business' is not defined in the Act and so the word should be given its ordinary meaning of habitual occupation, trade or profession.

To determine therefore whether the label 'carrying on business' is appropriate, all the circumstances have to be considered. Is this a means of livelihood, is it the habitual occupation of the taxpayer, what acts does he perform in relation to the demised premises? This is not intended to be a list of exhaustive test which could be carried out. At the end of the day when the Acts performed by the taxpayer are looked at can it fairly be said that he was carrying on a business? Some situations are easier to categorize than others. I have no doubt, the Commissioner recognized that if a taxpayer lets more than one premises, it would be correct to say that he was carrying on business. The assets in any business may be more or less than another, but if the activity is similar it is all a matter of degree.

A landlord is invariably both a landowner and landlord.

As a landlord, he is involved in a commercial exercise. As a landowner he would be concerned with the maintenance and upkeep of his property, whether or not it was let. When he becomes a landlord, the relationship of landlord and tenant creates legal obligations requiring him to engage in a number of acts vis-a-vis the tenant and the property which he has put to gainful use to realize a profit. I am unable to see a distinction between a company whose objects are business objects putting its assets to gainful use to secure profits for the company, and an individual who puts his property to gainful use to derive a profit and, as well, performs whatever are regarded as the ordinary functions of a landlord. Both the company and the private individual are engaged in precisely the same activity. Incorporation by the taxpayer and his wife would merely be a method of achieving the same objective, namely the realisation of profit.

It should be noted that in the instant case during the years of assessment, the premises was the subject of successive lettings. It was not until 1971 that the parties entered into a lease arrangement with the U.H.W.I.

Prior to the acquisition of these premises the taxpayer owned a tenement house of 7 apartments in Franklyn Town which was let to several tenants, which he sold to acquire Violet Avenue.

I am of the opinion that the only inference which could reasonably be drawn from the facts before the learned judge was that the taxpayer was carrying on the business of letting property.

No principle of law is being articulated; each case has to be decided on its own facts. There is in my judgment no legal principle that a landowner who lets his premises, is not carrying on business. The decision in Hendriks (supra) is therefore, not to be taken as a decision establishing any binding principle in law. I suspect the headnote of the case as reported in the Jamaica Law Reports may have misled the learned judge in the court below. But for what he regarded as this binding authority, he remarked that he would have decided otherwise than he did. We should now do so.

I would allow the appeal and uphold the appellant's claim for depreciation.

WHITE J.A. (AG)

I agree with the reasoning of the judgment of Carey J.A.(Ag.) It is essentially a question of fact whether the letting of premises by a landowner is the carrying on of a business considering the facts and circumstances of this case. I agree that the appeal should be allowed, and the appellant/landlord be allowed his claims for depreciation allowances.

MELVILLE J.A.

I agree and will only add that it was beyond any doubt that the Franklyn Town premises were built from as far back as about 1959, for the sole purpose of being rented to several tenants.

Because of the difficulties in collecting the rental, those premises were sold and Violet Avenue acquired, and rented out as a single unit. It is no doubt easier to collect rental from one person than from several. The evidence clearly shows that the taxpayer was making a business of renting the premises even to the extent of mowing the grass.

The appeal is allowed and the appellant's claims for depreciation allowances are upheld with costs to the appellant in this court and in the court below, such costs to be agreed or taxed.