INCOME TAX APPEAL

Appeal Nos. 16, 17, 18 & 19 of 1976

BETWEEN

Morris Burke - Appellant

AND

The Commissioner of Income Tax - Respondent

For the Appellant : Dr. L. Barnett instructed by Mr. Richard Ashenheim of Milholland, Ashenheim & Stone.

For the Respondent : Mr. H. Hamilton instructed by Crown Solicitor.

This is an appeal against Decisions of the Respondent for the Years of Assessment 1967 to 1970 inclusive, in which claims by the Appellant for Depreciation Allowances under Section 13(1)(n) of the Income Tax Act, in respect of each of those years, were refused.

The basic facts are not in dispute and are as follows:

(a) The Appellant was at all material times an employee of the Jamaica Public Service Company Limited of Kingston.

(b) During the relevant years of assessment he earned income from his employment and his wife also earned income from rental of a house situated at No. 12 Violet Avenue, Mona in the parish of St. Andrew which had been let furnished.

(c) Before purchasing the house at Mona a site at St. Albans Lane in Franklin Town had been acquired by his wife from her mother sometime during the year 1959, upon which was built a tenement house of seven apartments, which were let to various tenants. However, problems

arose with regard to the collection of rents and after employing a collector on a commission basis for some time without any significant improvement in that regard, the premises at St. Albans Lane were sold and those at 12 Violet Avenue in Mona, acquired in their stead. That was sometime in 1965.

(d) The Mona house has since been let furnished, to several tenants from time to time until 1971, when a lease arrangement was concluded with the University College Hospital and the house has since been used as a residence for doctors on the staff of that hospital.

(e) Over the period, the Appellant and/or his wife, undertook repairs and were responsible generally for maintenance of the premises at Mona. They also collected the rent, and paid the necessary rates, taxes and insurance premiums. The wife also inspected the premises from time to time to view the state of the furniture and grounds and to effect repairs and additions to the premises and to see to the maintenance of the garden.

(f) The Appellant in computing his 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, in respect of the Mona house at the rate of 2½ percent on the sum of $6,000 (the estimated cost of the house) and, at 11¼ percent on the sum of $2,000, the cost of the furniture; and on the basis that he and/or his wife had been carrying on a business of renting premises.

(g)/.....

(g) The claim was rejected by the Respondent on the ground that the Appellant, and/or his wife, had merely been performing the ordinary functions of a landlord, in respect of the subject premises, which functions, as carried on by either or both of them, did not constitute the carrying on of a trade or business within the meaning of Section 13(1)(n) of the Act.

The Respondent relied on the decision in Hendriks v. Assessment Committee (1941) 4 J.L.R. 60.

The Appellant now appeals.

On these facts, it seems to me that the likelihood of the Appellant succeeding in this appeal will depend largely upon the extent to which the reasoning in the old case of Hendriks v. The Assessment Committee (1941) 4 J.L.R. 60, which was relied on by the Respondent, is still to be regarded as good law today, having regard to the decision in the later case of C.I.T. v. Hanover Agencies Ltd. (1964) 7 W.I.R. 300.

The headnote for the Hendriks case at 4 J.L.R. 60 reads as follows:

> "Section 9(3) of the Income Tax Law, Cap. 201, as amended by Section 5(c) of Law 55 of 1939 provides that a deduction in respect of income shall be allowed - "for a reasonable amount for exhaustion, wear and tear of any property .....used by the owner thereof for the purpose of acquiring the income from a trade, business, profession or vocation carried on by him, ..." (My underlining)
>
> HELD, 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)/.....

9(3) of Cap. 201 as amended by Section 5(c) of Law 55 of 1939, nor is he using those premises within the meaning of that section."

Section 9(3) of Cap. 201 as amended by Section 5(c) of Law 55 of 1939, is the progenitor of the current Section 13(1)(n) of the Income Tax Act, and which in its modern wording provides as follows:

"13-(1) For the purpose of ascertaining the chargeable income of any person, there shall be deducted all disbursements and expenses wholly and exclusively incurred by such person in acquiring the income .....

and such disbursements and expenses may include -

(n) a reasonable amount for exhaustion, wear and tear of any building or structure used by the owner thereof for the purpose of acquiring the income from a trade, business, or vocation carried on by him:

Provided that if at any time the building or structure is sold, or the building or structure is demolished or destroyed, or without being demolished or destroyed, ceases to be used, an allowance or charge shall be made to the owner, and the provisions contained in paragraph 3 of Part I of the Second Schedule to this Law shall mutatis mutandis apply:

Provided that if any allowance is made to an owner under this paragraph, no allowance under any other part of this Law in respect of exhaustion, wear and tear, shall be available to him;"

As will be seen from the headnote to the report on the Hendriks case, just cited, the decision therein dealt with two separate aspects of section 13(1)(n). Firstly, that a person performing the ordinary functions of a landlord in respect of premises owned by him and let to tenants was not carrying on a trade or business within the meaning of the section; and, secondly, that even if he could be said to be carrying on such a business, the premises so let were not being "used" by him in any such trade or business.

At/.....

At page 64 of the report, the late Furness, C.J., dealt with the first point in the following manner:

> "In what sense can the appellant be said to be carrying on a business? He inherited four properties from his father in 1937, namely 72 Princess Street bought by his father in 1923, 121 Water Lane bought in 1929, 120 Harbour Street bought in 1933 and 85½ King Street bought in 1936. We are told that 72 Princess Street was leased to A.L. Darrell deceased during 1937 and then to the Standard Liquor Store under a monthly tenancy in 1938. We are also told that 72 Princess Street was equipped by the landlord with the usual fixtures of shelves and counters and necessary sanitary conveniences and was used as a mineral water factory and liquor store. Rent was paid monthly by the tenants; rates, taxes and insurance were paid by the landlord and, in 1938, the landlord spent £3. 5s. 0d. on painting and repairing the roof. If the appellant's father had only bought and owned 72 Princess Street, it would, to my mind, be absurd to contend that the letting and management of this property in the manner described first by the appellant's father and then by the appellant amounted to carrying on of a business. So to hold would be to hold that every owner of a house let to a tenant was carrying on a business in respect of that house though he only performed the ordinary functions of a landlord. Maybe, if a Company had been genuinely formed for the express purpose of acquiring and letting 72 Princess Street the Company could be said to be carrying on business for in that case, the Company would be formed and organised for that very purpose. That was not the position of the appellant and his father. The appellant's father, no doubt, bought 72 Princess Street as a way of putting out some of his money. Thereafter he collected the rent and paid the rates, taxes and insurance. This went on for six years before the appellant's father bought any other property and, so it appears to me, amounted to no more than looking after an investment. The three other properties were bought and held in the same way and, in my view, the position was not affected by the fixtures provided in some of the premises nor by the sub-division of the King Street property on which stress has been laid. No doubt the management of these properties has involved repetitive acts, some book-keeping and other activities but so does looking after most forms of investment. Section 5(c) of Law 55 of 1939 speaks of carrying on a trade, business, profession or vocation. "Business" in this collocation of words must mean more than looking after investments and I am satisfied that Savary, J. was right in holding that the appellant was not carrying on a business."

and at page 65, he dealt with the second point about "user", in the following terms:

> "If it could be said that the appellant was carrying on a business, then the business would consist in the letting, taking care of and managing the various premises. That business would be carried on, - not on the premises in question but elsewhere, - at the appellant's office or

home/.....

> home. It would be the appellant's office or home that would be used for the purpose of acquiring the income from the business, - not the premises themselves. The premises were used by the various tenants. The appellant, having parted with possession of them, could no longer be said to be using them within the meaning of s.5(c) though it is true, as Mr. Manley urged, that they in fact produced the income."

Some 25 years after these observations were made, the Hendriks case, which had been decided by the old colonial Court of Appeal, came up for review in the present Court of Appeal and before Her Majesty in Council. See Hanover Agencies Limited v. Commissioner of Income Tax (1964) 7 W.I.R. 300 where the whole question of what constituted the carrying on of a trade or business for purposes of section 13(1)(n), supra, was discussed and reconsidered; as well as the second point on the issue of "user". In the Hanover Agencies case the Court of Appeal, (whose decision was later affirmed by the Judicial Committee of the Privy Council - see 10 W.I.R. 295) after holding that it was not bound by a decision of the colonial Court of Appeal, over ruled Hendriks on the question of "user", and held that where there was a business of renting premises, such premises were in fact "used" by the owner thereof in that business, even though not occupied by him. However, the general view expressed by the late Furness, C.J. in the Hendriks case, namely, that a person performing the ordinary functions of a landlord was not carrying on a trade or business within the meaning of the section, was upheld. In so stating I am aware that the Court in Hanover Agencies did find that a trade of letting premises was in fact being carried on, however, I am equally aware that such finding was based upon the special fact that the landlord/taxpayer in that case was a company which had been expressly incorporated for the purpose of letting out its property.

See for example the judgment of Lord Guest at page 297 of the report on Hanover Agencies Limited v. C.I.T. at 10 W.I.R. where he

said/.....

said the following:

> "As the Respondent's claim depends on their satisfying the requirements of section 8(e), it may be convenient to consider this section first. In order to qualify for the deduction the building must be used for the purpose of acquiring income from a trade or business carried on by the Respondent. The word "business" is of wide import and must be given its ordinary meaning unless the context otherwise requires. The Respondent's objects included inter alia acquiring of free hold premises and the leasing of all or any of the company's property. <u>If a company's objects are business objects and are in fact carried out, it carries on a business.</u>"

See also the judgment of Waddington, J.A. at p. 304 of 7 W.I.R. where, after quoting the passage in the judgment of Furness, C.J. to which I have already referred, he said the following:

> "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; moreover, the passage quoted above appears to recognise that a <u>company genuinely formed for the express purpose of acquiring and letting premises could be said to be carrying on a business.</u>"

See also the judgments of Sir Herbert Duffus, P. at p. 314 and Sir Cyril Henriques, J.A. at p. 315, where similar observations are made.

The question of what constitutes the carrying on of a trade or business for purposes of the law relating to Income Tax is one of fact and, so, of degree. Each case must, consequently, turn upon its own peculiar facts. In one sense therefore, it is possible to say, as indeed I was invited to by counsel for the Appellant, that the decision in the <u>Hendriks</u> case, as a mere finding of fact, is not binding on me. But is that really an acceptable approach? I doubt it. In the <u>Hanover Agencies</u> case none of their Lordships disagreed, expressly or otherwise, with the reasoning of Furness, C.J. in his finding that Mr. Hendriks had not, on the particular facts,

been/.....

been carrying on a trade or business. There was no suggestion in any of the judgments that such reasoning was faulty or in error. What their Lordships did was to regard the fact of incorporation of the Appellant/Taxpayer in the case before them as being sufficient to distinguish the one case from the other. In so doing some of their Lordships relied on a passage in the judgment of Furness, C.J. in a manner which, indicated not only that they accepted it as being sound, but that their own finding in the case before them was based upon an exception already indicated by him. An approach which, rather than impugn the reasoning of the learned former C.J., would seem to support it. See for example the passage in the judgment of Waddington, J.A. at p. 304 of 7 W.I.R. - cited earlier where he said:

> ".....the passage quoted above appears to recognise that a company genuinely formed for the express purpose of acquiring and letting premises could be said to be carrying on a business."

In the light of this, it seems to me that the proper approach to the interpretation of the sub-section is to say that a person performing the ordinary functions of a landlord is not, prima facie, to be treated as carrying on a trade or business for purposes of the section. That prima facie position was, modified in the Hanover Agencies case, for the reason already stated - but that's as far as it goes. No doubt there may be other exceptions to the rule, but I can find nothing in any of the reported judgments in Hanover Agencies to suggest that the approach taken by Furness, C.J. on this aspect of the Hendriks case was wrong or was too narrow or was in any other way objectionable.

For these reasons, I have come to the conclusion, and I so hold, that on the current state of the authorities the decision in the Hendriks case, namely - "that a person performing

the/.....

the ordinary functions of a landlord is not carrying on a trade or business within the meaning of the section" - must be accepted as good law and as an authoritative exposition of the statutory language. It therefore follows that such will be the only approadh open to me in any consideration of the matter raised in the instant Appeal.

Basing myself therefore on that statement of the law, I turn now to a consideration of the facts herein as set out earlier in this judgment; and I ask myself the question - was the Appellant, and/or his wife, doing anything more than performing the ordinary functions of a landlord in respect of their property at Mona? I think not. Negotiating leases, collecting rents, supervising the state of repair of the premises and of the furniture, are, in my judgment, activities well within the ordinary functions of a landlord. It is what landlords normally do. Those functions, or others similar thereto, were precisely what Mr. Hendriks had been performing in the Hendriks case, and indeed, the instant case is, in this respect, weaker on its facts than was Hendriks where there was not merely one property being managed, but several.

I have therefore come to the conclusion, and I so find, that the Appellant and/or his wife, in relation to premises at Mona, were performing the ordinary functions of a landlord and were not, therefore, on the authority of the Hendriks case, carrying on a trade or business within the meaning of Section 13(1)(n) of the Income Tax Act.

I wish to add, however, that had this matter come before me free of authority I might well have taken a different view.

It/.....

It seems to me, with the greatest respect and intending no offence whatever, that it is ignoring common sense to say, in present day circumstances, that a person performing the functions of a landlord is not engaged in business activity. Indeed, as counsel for the Respondent disclosed during the arguments, the practice in the Income Tax Department is to grant the allowance, by concession, where there is more than one property involved. That practice seems to me, to be clearly in conflict with the Hendriks case, and might well be a concession to which the Department was driven by the realities of life in the last quarter of the twentieth century.

However, as I understand the approach taken by their Lordships in C.I.T. v. Hanover Agencies Limited the matter is not free of authority, and since I am unable to distinguish the instant case from that of Hendriks v. Assessment Committee I have no recourse but to dismiss this Appeal.

Appeal dismissed with costs to Respondent to be taxed or agreed.

(Dermot Marsh)
Puisne Judge
Revenue Court.