IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 112 OF 2002

IN THE MATTER of the Computation of a claim for capital allowances in respect of machinery and plant pursuant to the Income Tax Act

A N D

IN THE MATTER of Part III of the First Schedule to the Income Tax Act

BETWEEN	**CABLE & WIRELESS JAMAICA LIMITED**	**PLAINTIFF**
AND	**THE COMMISSIONER TAXPAYER AUDIT AND ASSESSMENT**	**DEFENDANT**

Hillary Phillips Q.C and Kevin Williams instructed by Grant, Stewart, Phillips & Co. for the Plaintiff
Miss Donna Dodd, Miss Thalia Francis and Mrs. Yolande Lloyd-Small for the Defendant
Present at the hearings were Mr. Rakesh Goswami, Senior Vice President of Finance for Cable & Wireless and Mrs. Betty-Ann Jones-Kerr and Mr. Norman Rainford representing Cable & Wireless Jamaica Limited

Heard on July 30, August 2, 2002 and February 18, 2004.

ANDERSON: J

This is an action commenced by way of Originating Summons seeking certain determinations of certain questions pursuant to Section 531A of Judicature Civil Procedure Code Act. That section provides as follows:

> "Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of a law or an instrument made under a law, may apply by originating summons for a determination of such question of construction, and for a declaration as to the right claimed".

The questions which the court must answer are set out in paragraph 2 and 3 of the originating summons and the summons also seeks a declaration. The questions and the nature of the declaration sought are set out below.

1(a) Does the use by a taxpayer of the method of calculation of capital allowances provided by paragraph 2 of Part III of the First Schedule to the Income Tax Act, constitute an "election" on the part of such taxpayer for the purposes of the said Part III.

(b) If the answer to question 1(a) be in the affirmative, is a taxpayer who is deemed to have made an "election" under the said paragraph 2, precluded from subsequently making an election pursuant to paragraph 3 of the said Part III in respect of the same machinery and plant and for a subsequent year of assessment.

2(a) Must the election by a taxpayer of the alternative method provided by paragraph 3 of the said Part III of calculating capital allowances for machinery and plant owned by him and in use during the relevant year of assessment, be made by such taxpayer only at the time when, and in respect of the year of assessment in the basis period of which, such machinery and plant was acquired by such taxpayer, or

(b) Income Tax being an annual tax, may such election be made by such taxpayer in respect of a claim for capital allowances for the said machinery and plant in any year of assessment for which he is entitled to make a claim for capital allowance for such machinery and plant.

3. Is a taxpayer who fails to elect to use the method of calculation of capital allowances for machinery and plant provided by the said paragraph 3(1) calculating his capital allowances for the year of assessment during which such machinery and plant was acquired, prohibited from so electing when he makes his claim for capital allowances for such machinery and plant in respect of a subsequent year of assessment.

4. If the answer to question 2(a) and 3 be in the affirmative, may a taxpayer, in circumstances where the cost of providing such machinery and plant has increased in the

basis period of a subsequent year of assessment, elect to calculate the capital allowances for such machinery and plant for such subsequent year of assessment in accordance with the provisions of the said paragraph 3.

Declaration Sought:

1. The Plaintiff is entitled, in respect of the year of assessment 2000, to elect to have its annual capital allowances on its machinery and plant in use in the basis period for such year of assessment, calculated in accordance with the provisions of paragraph 3 Part III of the first Schedule to the Income Tax Act, notwithstanding the fact that the said machinery and plant was acquired prior to the aforementioned year of assessment
2. The costs of and incident to the hearing of this Summons be the Plaintiff's.

The originating summons filed by the plaintiff was supported by an affidavit sworn by Rakesh Goswami sworn to on the 22nd May 2002 and filed in this court on the 28th May of the same year. The affidavit purports to set out the history of correspondence exchanged between the Plaintiff and the Defendant Commissioner in respect of its application to use the alternative method of calculating capital allowance. The affidavit also alleges that after the Commissioner had appeared to give her permission to the company adopting the alternative method of calculating capital allowance in respect of its machinery and equipment, she reversed her position and indicated, and later issued a decision to the effect that, an election to use the alternative method would only be applicable to that machinery and plant which was acquired in the year of assessment, and subsequent years. In consequence of this decision, the plaintiff now seeks clarification as to whether the intention of the legislature as set out in paragraph 3 Part III of the First Schedule to the Income Tax Act has been properly construed by the commissioner. The relevant paragraphs of Part III of the First Schedule are set out below:

1. Where a person carrying on a trade incurs capital expenditure on the purchase, alteration or improvement of machinery or plant for the purposes of the trade, then, subject to sub-paragraph (2) of paragraph 6, there shall be made to him, for the year of assessment in the basis period for which such expenditure is incurred an allowance (in this Part referred to as "an initial allowance") equal to 20 *per centum* of such expenditure.
2. (1) Where the person carrying on the trade in any year of assessment has incurred capital expenditure on the purchase, alteration or improvement of machinery or plant for the

purposes of the trade, an allowance (in this Part referred to as "an annual allowance") shall (except in the case in which an election under paragraph 3 of this Part has effect) be made to him for that year of assessment in respect of the wear and tear of any of the machinery or plant of which he is the owner and is <u>in use for the purposes of the trade at the end of the basis period for that year of assessment</u>.

(2) The annual allowances shall, subject to sub-paragraph (3) of paragraph 6, be calculated at the approved rate on the written down value of the machinery and plant at the beginning of the basis period for which the allowance is due.

3.(1) Subject to sub-paragraph (4) of paragraph 6, the annual allowance in respect of any machinery or plant for any year of assessment may, if the person to whom the allowance is to be made so elects <u>when he makes his claim for the allowance</u>, be calculated by reference to the amount of his capital expenditure in providing the machinery or plant; and

(b) Shall in that event be five-fourths of the percentage of that amount specified in sub-paragraph (2).

(2) The said percentage is such percentage as may be determined by the Commissioner in relation to machinery or plant of the class in question for the year of assessment in question, being a percentage which is in his opinion equal to nine-tenths of the fraction of which the numerator is one and the denominator is the number of years in the anticipated normal working life of machinery or plant of that class:

Provided that it shall not be necessary for the Commissioner to re-determine every such percentage yearly, and every such determination of a percentage under this sub-paragraph for any year of assessment shall apply also to subsequent years except so far as it is superseded by any subsequent determination.

(3) Machinery or plant may be treated for the purposes of the paragraph as being of a different class from other machinery or plant where the one is new when it is acquired, and the other is not new when it is acquired, or in the case of machinery or plant which is not new when it is acquired, where different periods have elapsed between the date when the machinery or plant was made or first put into use and the date of the acquisition thereof.

(4) An election under this paragraph shall not be effective for any year of assessment in relation to any machinery or plant unless the Commissioner is satisfied that the person making the election is keeping, and will keep and make available for inspection, all such records as are necessary to secure that the Commissioner can ensure that the total annual allowances made to him for all years of assessment in respect of that machinery or plant do not exceed the limit imposed by paragraph 4, due regard being had to any initial allowance made to him.

(5) In this paragraph "the anticipated normal working life" means, in relation to machinery or plant of any class, the period which might be expected, when machinery or plant of that class is first put into use, to be going to elapse before it is finally put out of use as being unfit for further use, it being assumed that is going to be used in the normal manner and to the normal extent and is going to be so used throughout that period.

<u>THE EVIDENCE</u>

I now turn my attention to the evidence in this matter as contained in the respective affidavits, four (4) of which were filed with several letter attachments as exhibits. These were by Mr.

Rakesh Goswani, Senior Vice President, Finance, of the Taxpayer Company (the Goswani affidavit); Mr. Ainsley Powell, Technical Specialist of the Taxpayer Audit and Assessment Department, (the Powell affidavit); Mr. Norman Rainford, Tax Manager of the plaintiff company's auditors, KPMG Peat Marwick, (the Rainford affidavit) and Ms. Ann McCarthy, Tax Manager, of the plaintiff company (the McCarthy affidavit). In the Goswani affidavit, sworn on the 22nd May 2002 and filed on the 28th of the said month, he avers that during the year 2000, the Plaintiff company, having reviewed its asset register, concluded that while its high technology had a useful life of 3-5 years, the capital allowances being claimed was "not reflective of that fact". It had, by letter dated September 4, 2000, accordingly written to the Commissioner of Taxpayer Audit and Assessment for approval to change to the straight-line method of claiming allowances and proposed new rates to be applied pursuant thereto. It also sought permission to use these rates from year of assessment 2000. The letter in response from the Commissioner dated October 10, 2000 purported to approve certain rates as proposed by the taxpayer. In at least one (1) case, (Central Office Equipment) the Department approved a rate higher than that proposed by the taxpayer, 22½ % as opposed to 20%.

This letter from the Commissioner, TAAD, was the subject of a reply from the plaintiff company's accountants and auditors, KPMG Peat Marwick, dated April 11, 2001. The text of that letter is as follows:

> We refer to the discussions between Norman Rainford/Ainsley Powell, and your letter to our clients dated October 10, 2000 and hereby writes to confirm the following.
>
> The capital allowance rate for certain categories of assets was changed from a reducing balance to a straight-line basis with the approval of the department. For the year of assessment 2000 we are presently computing the cost of the assets, grouped by category, year of acquisition and showing the respective written values (sic) to aggregate to the written down value brought forward from the 1999 return. The new capital allowance straight-line rates will be applied to these respective amounts.

The response to this was a letter from Ainsley Powell of the Department, dated May 8, 2001, which is instructive.

> Further to our letter of October 10, 2000, and agreement indicated on letter from KPMG Peat Marwick dated April 11th, 2001, this is to advise that the department requires verification of:-
>
> - The lifespan and categorization of the portfolio of assets. We therefore require the detailed capital allowance schedule in respect of year of assessment 2000.
>
> In addition, discussions with your auditors KPMG Peat Marwick revealed that all assets were converted at the revised rates. However, the department's policy is that the new rates are applicable to asset acquisitions in respect of the year of assessment in which the election is made and the expenditure incurred.
>
> Kindly provide the information requested in order that the matter can be settled at an early date.

There are three (3) matters worth commenting on in regards to this extra-ordinary letter. In the first place, this letter now almost seven months after the department gave its "approval" for the changed method and the new rates, is requesting information in order to verify "lifespan and categorization of the portfolio of assets". The question must be asked: On what did the Department purport to act when the "approval" was initially given? Is not this the information the Commissioner must have pursuant to sub-paragraph 3(4) in order to allow the election? Secondly, the letter makes no claim that what the department puts forth as its "policy" position is, in fact, mandated by the statute. Thirdly, the letter now asks for "the information requested" in order that the matter may be settled.

Mr. Powell's letter of May 8, 2001 was itself followed by a letter from the Acting Commissioner, Mrs. Keene, dated July 26, 2001 in which she sought to clarify what had been the import of the exchange of correspondence between the parties. The full text of that letter is set out below.

> <u>Re: Cable & Wireless Limited – Capital Allowance Rates</u>
> Reference is made to your letter of April 11, 2001 (copy enclosed) relating to discussions between your Norman Rainford and our Ainsley Powell. This correspondence requested confirmation of the proposed treatment of application of your election of the alternative method for year of assessment 2000 for capital allowance using the straight-line method.

> After careful review and legal consultations, the department wishes to clarify the approval given, countersigned on your letter of April 11, 2001 by our Ainsley Powell.
>
> The election of the alternative method specified in Schedule I Part III of the Act, Machinery and Plant is only eligible to be applied to "Capital expenditure incurred in the year of assessment for purchases, alterations or improvement of machinery or plant". Therefore, an election for the alternative method cannot be applied to the existing assets without alterations and/or improvements.

According to the affidavit evidence, a meeting was subsequently held at the Office of the Director General for Taxation on July 31, 2001 and by way of a further letter of August 8, 2001 the Commissioner confirmed the view earlier expressed in her July 26, 2001 letter.

I have also reviewed the affidavits of Ainsley Hugh Powell, (the "Powell Affidavit") on behalf of the Defendant, sworn and filed on the 20th June 2002, in reply to the Goswani affidavit; the affidavit of Norman Rainford, the Taxation Manager of the plaintiff company's auditors, KPMG Peat Marwick, ("Rainford Affidavit") sworn and filed on July 22, 2002 and that of Ann McCarthy, Vice President of the taxpayer company, ("McCarthy Affidavit"), dated 24th July 2002. These affidavits give interesting information but provide little in the way of assistance to the Court in deciding the issues that must be decided here. The Powell affidavit provides a synopsis of the events as outlined in the letters, and is perhaps most significant for the efforts to downplay any significance in his counter-signing of the plaintiff's auditor's April 11 2001 letter, and to dispute the rates to be applied to various equipment. This affidavit highlights the casualness and lack of attention to detail that appears to have characterized the exchanges herein. Thus, for example, the affidavit makes no mention of what the Plaintiff's accounting period was, and therefore what was its basis period to which reference was being made, in relation to year of assessment 2000. After all, it is in respect of assets in use *__at the end of the basis period,__* for which the allowances may be claimed. In paragraph 13 of the affidavit, he refers to the plaintiff's intention to "file an amended return" and his becoming aware of the plaintiff's Income Tax Return, submitted on or about the 15th day of March 2001. One has to assume that he was referring to the Income Tax Return for Y/A 2000. But why should it have to be assumed? It is the Rainford affidavit, for the defendant, which specifically gives the information that the Tax Return in question was in fact, that for Y/A 2000.

Much of the rest of that affidavit has to do with the efforts of the Tax Department to verify figures that it should have done *before* any approval had been given, and the subsequent decision to carry out a comprehensive audit of the Taxpayer. None of this, with respect, has anything to do with any interpretation of Part III of the Third Schedule. Whether "High Technology Equipment" was initially and wrongly described as "computers", and should have been considered mainly "electronic switching equipment" and subject to lower rates of annual allowance, is important when the Department is determining the rates applicable to machinery or plant for which a claim under the alternative method is being pursued. But it is of singular un-importance in determining whether the law allows an election to be made in respect of equipment after it has been in use, and a claim has previously been made on the normal written-down basis. It certainly is not the role of the Court in this instance, to make nice distinctions between whether particular equipment is or is not "computer equipment". What this court must do, is to discern from the statute, what is its meaning.

The Rainford and McCarthy affidavits also offer little help as they focus on factual issues on which they disagree with the Powell affidavit and seek to advance their interpretation. Thus, there are contrary views concerning whether the counter-signing of the plaintiff's auditor's letter of April 11, 2001 by Mr. Ainsley Powell on April 18, 2001, was intended to reflect an agreement with the contents of that letter or merely to indicate receipt thereof. Another issue is whether the amended returns filed by the Plaintiff Company have been "accepted" by the defendants.

THE ISSUE

The simple issue for decision by the Court is whether the taxpayer may elect for the alternative method of calculating capital allowances in respect of a previous basis period, for which it had already claimed capital allowances on the "normal method".

THE SUBMISSIONS – THE PLAINTIFF

Ms. Hilary Phillips, Q. C., for the Plaintiff submitted that there were essentially two (2) issues to be considered here. The first was the issue of statutory interpretation of a taxation statute. In this

regard, she referred to the case Cape Brandy Syndicate v I.R.C. 12 T.C. 358[1921] K.B. 64. In that case, Rowlatt J. stated with approval, the following:

> "In a taxing Act clear, words are necessary in order to tax the subject. Too wide and fanciful a construction is often sought to be given to that maxim, which does not mean the words are to be unduly restricted against the Crown, or that there is to be any discrimination against the Crown in those Acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used".

Similarly in I.R.C. v The Granite City Steamship Co. Ltd [1927] 13 T.C. 1, where Lord Sands said: "Equity and Income Tax are strangers".

The second was whether the expenditure for the machinery, plant and equipment had been incurred in the basis period for the year of assessment for which the capital allowance could be claimed, on the alternative basis. Section 13 (1) (e) of the Income Tax Act allows the deduction of those allowances available under the First Schedule. She viewed as important the letter which the plaintiff had written to the defendant, dated September 4, 2000. This letter seemed to be consistent with what appeared to be the clear intention of the legislature to allow taxpayers to elect for capital allowances to be granted on the alternative method as allowed in paragraph 3 of Part III of the First Schedule. She pointed out that there was nothing in the statute or in the First Schedule which supported the view set out in the letter of the Taxpayer Audit & Assessment Department dated May 8, 2001 that "the new rates are applicable to asset acquisitions in respect of the year of assessment in which the election is made and the expenditure is incurred".

In looking at the relevant parts of the First Schedule, she pointed out that there was a difference between the wording of paragraph 1 and paragraphs 2 and 3. She treats as significant the fact that whereas paragraph 1 dealing with initial allowances spoke of granting the initial allowance only "for *the year of assessment in the basis period for which such expenditure is incurred*", paragraph 2 grants the annual allowance "for the year of assessment in respect of the wear and tear of *any machinery or plant* of which he is the owner and is in use for the purposes of the trade at the end of the basis period for that year of assessment". Paragraph 3, she says, allows the grant of the aforesaid allowance, "for *any year of assessment*". It was submitted that the right to elect given under paragraph 2, does not relate only to expenditure made in the year of assessment. She submitted that it was clear from the reading of the statute that the taxpayer did

have such a continuing right to make such an election, and the court must give effect to the literal meaning of the statute. The plaintiff's written submission states:

> "The use of the word ANY as used in paragraphs 2 and 3 in respect of both the year of assessment and the machinery or plant, is significant. Had the legislature intended the capital *(annual?)* allowance to be restricted to specific newly acquired machinery or plant, or to specific additions or improvements to the same, or to a particular year of assessment, it would have so stated, as it has done in respect of initial allowance granted pursuant to the said paragraph 1 in respect of capital expenditure incurred ONLY in the basis period for the year of assessment in which it was incurred, and the initial allowance claimed. Thus, it is submitted, if the legislature had intended capital *(annual?)* allowances to be restricted in a manner similar to that in which initial allowances were restricted, then it would have said so".

In this regard it was noted that the taxpayer had, on July 6, 2001, filed amended returns in relation to Y/A 2000 in which it had re-done its calculations based upon a purported valid election for the straight-line method, and determination of rates. Further, she submitted paragraph 3 which set out how the rate to be applied pursuant to the election is to be calculated, does not suggest that the expenditure has to be in the year of assessment in which the election is made. Accordingly, she said, the use of the standard method as set out in paragraph 1 and 2 of Part III of the First Schedule was not an "election" within the meaning of that term for the purposes of this statute. Rather, the use of the standard method was specifically made subject to the right to use the alternative method available under paragraph 3. She submitted that the letter from the Commissioner which spoke of "departmental policy", found no support on a reading of the relevant paragraphs of the First Schedule. It was also further argued that since, pursuant to paragraph 4 of the said Part III of the First Schedule, the taxpayer could never claim in allowances more that the amount of the expenditure on the capital asset, it ought not to matter to the Revenue. It is stated that "the total tax paid over the life of the asset remains the same irrespective of the method of calculation used".

In respect of the submissions for the taxpayer that there is a distinction made in the wording of paragraph 1, (initial allowance), and paragraphs 2 to 3, (annual allowances) on the other hand, I accept that this distinction is a meaningful one and I deal with it below in this judgment.

I wish, however, to make one observation in regard to the proposition that "the total tax paid over the life of the asset remains the same irrespective of the method of calculation used". The truth is, that while annual allowances are an element in arriving at chargeable income, it is but one such element. The amount of tax paid, certainly over time, will be dependent upon other factors such as the availability of losses carried forward, or whether the taxpayer has made profits in the basis period for the year of assessment. If there are significant capital allowances available in a year of assessment in which significant losses brought forward would fall out of assessment if not used, then it may make no difference to the tax paid by a taxpayer. If, on the other hand, significant capital allowances are available when large pre-tax profits have been realized, it could significantly reduce the tax payable by the taxpayer in that year of assessment and over a period as well. There is, therefore, no necessary and immutable correlation between the capital allowances claimed, and the tax ultimately paid by a taxpayer, though there may be some relationship. There is some evidence in an affidavit filed in this matter, that a change in the method of calculating the capital allowances would significantly affect the tax paid by the taxpayer in Y/A 2000. However, that fact cannot to be regarded as being in any way helpful in deciding the issue here.

Ms. Phillips urged the Court to find that on a strict interpretation of the relevant provisions, the taxpayer was entitled to make an election for the alternative method, notwithstanding that it had previously used the normal method of claiming capital allowances, that there was no authority for suggesting that the alternative method of calculating annual allowances is only applicable to newly-acquired machinery or plant, and that accordingly the taxpayer could amend its tax returns to take account of this election. The evolution of a practice by the Taxpayer Audit and Assessment Department as to the way the right to elect under the First Schedule should be treated, cannot be elevated to the status of law, and was of no relevance in determining what the statute provided as the right of the taxpayer.

THE SUBMISSIONS – THE DEFENDANT

Miss Dodd, counsel for the defendant in her written submissions submitted that the taxpayer is not entitled to elect to have capital expenditure treated on the alternative method in relation to years of assessment prior to that in which the election was made. She was prepared to concede

that a taxpayer making his claim for capital allowances and simply using the normal writing down method of Part III of the First Schedule, ought not to be considered to have made an "election" for purposes of the Act. Such an election would only arise if the taxpayer decides to apply for the alternative method of claiming such allowances as permitted under paragraph 3. She submitted further that if the taxpayer failed to make an election under paragraph 3 in the year of assessment in which the capital expense was incurred, then the taxpayer would be bound to use the reducing balance method at that time *and* would also be precluded from exercising any right to an election to use the alternative method of claim in relation to claims for the said asset in the subsequent years of assessment.

It was submitted, further, that the circumstances under which annual allowances may be claimed are those set out in sub-paragraph 2 (1). Among the requirements of sub-paragraph 2 (1) are that the expenditure must be of a capital nature, must have been incurred for the purchase, alteration or improvement of plant or machinery and the expenditure must have been incurred in the year of assessment. These circumstances, it is said, remain the same whether the reducing balance or the alternative straight-line method is adopted. The submission continues: "Consequently, paragraph 3 must be read in conjunction with paragraph 2, it is not an independent provision. In order to make an election to use the alternative method under paragraph 3, the circumstances prescribed in paragraph 2 must first be met..........The entitlement to claim the annual allowances arises in the year of assessment in which the capital expenditure is incurred. Therefore, the method of calculation is determined only in the year of assessment in which the expenditure for purchase is incurred". (My emphasis) While this is an interesting submission, it seems to me that there is in it, a misunderstanding of when the right to claim annual allowances arises. The right arises, not by virtue of the expenditure having been incurred in the year. The expenditure on "purchase, alteration and repair" of machinery or plant is the threshold qualification. However, the taxpayer's *entitlement* to the annual allowance arises if, and only if, the machinery or plant, the subject of the claim is "machinery or plant of which he is the owner and (it) is in use for the purposes of the trade *at the end of the basis period for which the allowance is made*. (See paragraph 2(1).

Ms. Dodd also cited the equivalent statutory provisions in the United Kingdom legislation. She pointed out that the extent to which guidance may be provided by the U.K. provisions is limited because, in her submission, the United Kingdom has made special provision for the change of method from the normal method to the alternative method in subsequent years. (See United Kingdom Capital Allowances Act 1968, sections 20-22). The UK Act in section 22 does specifically contemplate a change from the "normal" to the "straight-line" method, and sets out how that matter is to be dealt with. Section 22 of that statute is set out herewith.

> **Change from normal to alternative method**
>
> 22. (1) Where an election under section 21 above has effect with respect to any machinery or plant, and the writing-down allowance in respect of the same machinery or plant made to the same person for any previous chargeable period has been calculated in accordance with section 20 of this Act, the writing-down allowance for that machinery or plant for the chargeable period with respect to which the election has effect shall be computed in accordance with the following provisions, that is to say-
>
> *(a)* instead of being computed by reference to the amount of the person's expenditure in providing the machinery or plant, it shall be computed by reference to the amount by which that amount exceeds any initial allowance, writing-down allowances, relevant exceptional depreciation allowances and scientific research allowances made to that person in respect of that 2-726 machinery or plant for the chargeable periods up to and including the said previous chargeable period or, if the writing-down allowance was calculated in accordance with the said section 20 in the case of more than one previous chargeable period, up to and including the last of those previous chargeable periods, and
>
> *(b)* it shall be computed as if for the percentage which would otherwise apply there were substituted such other percentage as the Board may determine.
>
> In the case of expenditure to which section 21 (4) above applies, the references in paragraph *(b)* above to a percentage are references to the basic percentage.
>
> (2) The references in subsection (1) above to allowances calculated in accordance with section 20 of this Act shall be deemed to include references to allowances for the year 1948-49 or any previous year of assessment calculated by the application of, or of five-fourths of a percentage intended for application, or for application when multiplied by five-fourths, to a sum which, except in the case of the first year, is less than the cost of the machinery or plant.
>
> (3) Any reference in this section to section 20 of this Act shall be deemed to include a reference to that section as modified by the following sections of this Chapter.

The British Tax Encyclopaedia provides a brief commentary on the provision that I find useful.

COMMENTARY

> This section provides for the case where the alternative method is claimed under section 21, not when the machinery or plant is first provided but in a subsequent year after allowances have already been given in accordance with section 20. In such a case, the capital expenditure by reference to which the allowance is given, is not the original cost, but that cost after deducting all allowances already made; i.e. it is the written down value of the machinery or plant as calculated for the purposes of making the allowance under section 20 for the same year. No rules are laid down for the calculation of the percentage in this case. It is provided merely that it shall be "such other percentage as the Commissioners of Inland Revenue may determine", instead of the percentage prescribed by section 21(2)

It was Counsel for the Defendant's submission that the presence of this express provision in the United Kingdom would suggest that in the absence of such a provision, the taxpayer would be precluded from making such a subsequent election. I might observe that I do not believe that this conclusion follows logically from Miss Dodd's observation about the presence of this specific provision in the U.K. legislation.

Miss Dodd further submitted that the statute must be read as a whole and that the court ought not to read into the provisions under consideration of other provisions not included in the legislation. She said that if the taxpayer is allowed to change his method of claiming calculating allowances in midstream, this would apparently give the taxpayer the right to make an election annually and to change his basis for making such claims in each succeeding year of assessment; that it is inconceivable that such a consequence was intended and therefore, it should be taken as reason for saying such an election after the year of acquisition, repair or alteration, ought not to be allowed. Again, I respectfully disagree. I do not believe that the simple fact that the taxpayer could conceivably elect to change his method of claiming allowances annually necessarily precludes him from making such election. Indeed, the Income Tax Act specifically contemplates the taxpayer making a more fundamental change, the change of his basis period for any year of assessment. This could have profound implications, not only for his claim for capital allowances, but also losses carried forward and indeed tax liability of the entity itself. This option to change basis periods is clearly permitted under the provisions of Section 6 of the Income Tax Act. Section 6(4)(a) and (b) of the Income Tax Act provides as follows:

(4) If a person departs from his permitted accounting terminal date then-

(a) in respect of the year of assessment in which the departure occurred and the next succeeding year of assessment, the permitted accounting period of that person shall be such period as the Commissioner may determine, and (without prejudice to the generality of the foregoing) the period so determined by the Commissioner in respect of the year of assessment in which the departure occurred may include any interval between the permitted accounting terminal date of the old permitted accounting period and the commencement of the new permitted accounting period; and

(b) in respect of the years of assessment after the year next succeeding the year in which the departure occurred, the terminal date of the new permitted accounting period shall be regarded as that person's permitted accounting terminal date, unless and until a different accounting period is adopted in accordance with the provisions of this section.

However, it will be apparent that in those circumstances, any potential benefit that may accrue to the taxpayer, is capable of being neutralized because the Commissioner has the right to determine the period to be used as the basis period for the year of assessment in which the change occurs and the succeeding year of assessment, consequent upon such a change in basis period.

ARGUMENT AND DECISION

What ought the Court to decide in relation to the issues raised herein? I might indicate that I have searched extensively and have found no case either in this jurisdiction or in the UK or in the Australian or New Zealand Taxation Reports which relates to this specific question under consideration. Indeed, the lack of any authorities cited in the various submissions speaks to the dearth of case law on the subject. This is almost entirely, therefore a matter of interpretation of the statutes. It is trite law (See I.R.C v Duke of Westminster, [1936] A.C. p 1.) that there is no equity in taxing statutes and therefore once the actual words are capable of a literal interpretation, that is the interpretation which must be put on the words of the statute. (See also my own observations in Carreras Jamaica Limited v The Stamp Commissioner Revenue Appeal No 3 of 1999, Unreported) What are the words which the Court is being asked to construe here, and what interpretation should be placed thereon? Let me refer again to paragraph 3 of Part III of the First Schedule.

I want to start by looking at the words of the paragraph in question. I have already set out the text of that paragraph above. I would also wish to refer particularly to sub-paragraph 3 (4), dealing with the election, which states:

> "An election under this paragraph shall not be effective for any year of assessment in relation to any machinery or plant unless the Commissioner is satisfied that the person making the election is keeping and will keep and make available for inspection, all such records as are necessary to secure that the Commissioner can ensure that the total allowances made to him for all years of assessment in respect to that machinery and plant do not exceed the limit imposed by paragraph 4 due regard being had to any initial allowances made to him."

The first thing to notice here is that the right to make an election is not an untrammeled right. It is subject to the Commissioner being "satisfied" as to the *previous* and subsequent record-keeping of the taxpayer, in relation to the machinery or plant in question. The election is not automatic. The Commissioner has to make a determination. It is my view, and I so find, that Part III of the First Schedule as exemplified in particular, by paragraph 4 thereof, is largely concerned with ensuring, not merely that taxpayers have options in the method of claiming allowances depending upon the type of asset, but critically, that total allowances granted do not exceed the cost of the acquisition, repair or alteration of the machinery or plant, the subject of the claim in question. Thus paragraph 4 provides:

> "No annual allowance shall be made in respect of any machinery or plant for any year of assessment if the allowance when added to any initial allowance and to any annual allowance given in respect of the machinery or plant to the person by whom the trade is carried on, will exceed the actual cost to the person of the machinery or plant, including in that actual cost, any expenditure in the nature of capital expenditure on the machinery or plant by way of renewal, improvement or re-instatement."

Miss Dodd in her written submission had suggested that to allow the taxpayer to elect for the alternative method in relation to a claim for annual allowance for assets acquired in a year of assessment other than the year in which the asset was acquired, would give to the taxpayer the "right" to make an election annually and that that could then result in the method of calculation possibly changing every year. She seemed to be of the view that if the taxpayer elected the alternative method in the year of acquisition then in every subsequent year, he must make a fresh election for that method. Otherwise upon the failure (to make such an election in any year) the

writing down method of calculation would automatically be reverted to. She said: "This means that for example, if an asset life is 10 years, conceivably, the alternative method can be used for the first year and then normal method for the second year, and then alternative method for the third year and the normal method for the fourth year and so on." I do not agree that this is a correct interpretation of the provisions under consideration. Nor do I agree with the assertion that "the statute does not expressly provide for or even contemplate this switching between methods". In fact, a look at the proviso to paragraph 3 (2), makes it clear that once a determination as to the applicable rates has been made by the Commissioner on an election by the taxpayer, it is that determination which will apply to subsequent claims for capital allowances unless that determination is superseded by a subsequent determination. How could this provision make sense unless there was in contemplation, subsequent application to change the method of claim?

If my view that it is an overriding principle of Part III, that there should not be granted capital allowances in excess of the capital cost of acquisition, repair or alteration of the capital asset (as stated in paragraph 4), is correct, then the proper treatment to be accorded to election, becomes a little clearer. I agree with counsel for the plaintiff that in fact, annual allowances are treated differently from initial allowances. This is not because, as suggested by the plaintiff, there is some difference between the words in paragraph 3 (1) and those in paragraph 3 (2). Rather, it is because annual allowances apply to the cost of "alterations or improvement of machinery or plant", but only if they are "in use at the end of the basis period" for the year of assessment. On the other hand, capiral expenditure gives rise to a claim for initial allowance, whether or not the machinery or plant is put into use.

For example, if this taxpayer spent a million dollars on the purchase of computer hardware to upgrade a platform for mobile services which had been in use for the previous 3 years, and if that upgraded platform with this new computer technology now had a life expectancy of 5 years, it seems to me that there would be no basis to claim initial allowances on the new improved asset ("the improved platform"). However, it may be open for the taxpayer to make an application to the Commissioner for a determination of applicable rates, on the alternative method, to write off the allowances allocable to this "improved or altered asset" over a 5-year period. Further, that

such total allowances over that five (5) year life period, would be the sum of the written-down value of the old unimproved platform *together with* the cost of the improvement.

I am also of the view, and for the purposes herein so hold, that the expression "When he makes his claim for the allowances" as used in paragraph 3 (1)(a) of Part III of the First Schedule means, and can only mean, when he first makes a claim for annual allowance in relation to relevant machinery or plant. It is in that sense only, it seems to me, (that is only in relation to a claim for a prior year of assessment adjustment claim and not in relation to a claim for the year of assessment under consideration) that it is correct to say that the election granted by paragraph 3 cannot be made retrospectively. In the instant case, the mere submission of an amended return for Y/A 2000, does not make it other than a "first" claim, and does not dis-entitle the taxpayer to elect the alternative method if, as a matter of law, it would have been able to elect for the alternative method, in relation to those assets. I believe that whether the amended return with the amended computation can be accepted, depends upon the answer to the question, whether the election could have been made in respect of that equipment. But the words of the proviso to paragraph 3 (2) to which I have referred above, appear to be authority for the proposition that once the determination is made by the Commissioner in response to an election by the taxpayer, that determination remains in place until a further application is made for another determination. Such a determination would only be made where the taxpayer sought to change the basis upon which he received capital allowances. Contrary to the views of Counsel for the Defendant, there would be no need for annual elections for treatment on the alternative method. This would clearly militate against a holding that the taxpayer could only elect with respect to expenditure incurred in the year of assessment.

I do believe that the way the treatment of an election is dealt with under the UK statute, as discussed above, if applied to our position here, would not be inconsistent with the words of Part III of the First Schedule. It makes logical sense of allowing the taxpayer to write off his expenditure over the life of the asset but prevents him from claiming in allowances, more than the amount of the expenditure. And I would hold that that wound be an appropriate way in which Part III of the Schedule is to be interpreted.

If, however, I am wrong on this, I would still hold that there are two bases upon which the claim to elect for the alternative method in relation to the machinery and plant in question, must still be upheld. In the first place, I accept the submissions of Counsel for the plaintiff in relation to sub-paragraphs 2(1) and 3(1). I repeat the words of those sub-paragraph and counsel's submissions in regard thereto here:

> 2. (1) Where the person carrying on the trade in *any year of assessment* has incurred capital expenditure on the purchase, alteration or improvement of machinery or plant for the purposes of the trade, an allowance (in this Part referred to as "an annual allowance") shall (except in the case in which an election under paragraph 3 of this Part has effect) be made to him for that year of assessment in respect of the wear and tear of *any of the machinery or plant of which he is the owner and is in use or the purposes of the trade at the end of the basis period for that year of assessment*.
>
> 3.(1) Subject to sub-paragraph (4) of paragraph 6, the annual allowance in respect of *any machinery or plant for any year of assessment* may, if the person to whom the allowance is to be made so elects when he makes his claim for the allowance, be calculated by reference to the amount of his capital expenditure in providing the machinery or plant; (All emphases mine)

Counsel's submission was in the following terms:

> "The use of the word ANY as used in paragraphs 2 and 3 in respect of both the year of assessment and the machinery or plant, is significant. Had the legislature intended the capital *(annual?)* allowance to be restricted to specific newly acquired machinery or plant, or to specific additions or improvements to the same, or to a particular year of assessment, it would have so stated, as it has done in respect of initial allowance granted pursuant to the said paragraph 1 in respect of capital expenditure incurred ONLY in the basis period for the year of assessment in which it was incurred, and the initial allowance claimed. Thus, it is submitted, if the legislature had intended capital *(annual?)* allowances to be restricted in a manner similar to that in which initial allowances were restricted, then it would have said so".

The other basis upon which I believe that the plaintiff's contention must be accepted is the provision at sub-paragraph 3(4) (See above). There it is clearly stated that the right to elect is subject to the Commissioner being "satisfied that the person making the election *is keeping, and will keep and make available for inspection, all such records as are necessary to secure that the Commissioner can ensure that the total annual allowances made to him for all years of assessment in respect of that machinery or plant* do not exceed the limit imposed by paragraph 4, due regard being had to any initial allowance made to him". It seems that the requirement that

the taxpayer "*is keeping and will keep and make available...in respect of that machinery or plant*", is only explainable on the basis that the machinery or plant has been in use before the year of assessment for which the claim to elect is being pursued.

Looking at paragraph 3 (4) also strengthens me in the view that the importance of proper record keeping, which is a condition precedent to any proper election and determination under paragraph 3, is of critical importance because of the need to ensure that allowances do not exceed the cost of the asset. If that is indeed a critical consideration, then it seems that no harm would be done if the taxpayer were allowed to elect for the current and subsequent years for treatment of capital allowance for the relevant assets to be made on the alternative method, even where they have been before the subject of a claim on a reducing balance basis.

It would follow that for any asset which is in use at the and the end of the basis period for the year for which the election is made, the taxpayer would be entitled to annual allowances based on the written down value of that asset up to the beginning of the basis period for the that year of assessment, divided by the number of years remaining on the life of that asset.

Finally, it is notorious that Income Tax is an annual tax. Implicit in this is that the taxpayer has to determine his statutory income in each and every year. To preclude an election in respect of capital assets which the taxpayer has in use at the end of the relevant basis period for the year of assessment would be, and I so hold it to be, inconsistent with the tax being an annual tax.

Finally, in order to determine whether the taxpayer is entitled to the Declaration sought, I need to consider whether the evidence leads me to the conclusion on a balance of probabilities that the Commissioner had in fact approved the election *and* made the determination as to rates which she must do, to allow for the revised capital allowance schedule and return. I have already commented upon the affidavits and in particular, the Powell affidavit. There seemed to be some conflict as regards whether the changeover from analog to digital technology by the taxpayer was affecting the computations as well as the rates to be applied. It seems to me that, based upon the affidavits as well as the conduct of the parties in having meetings at which attempts were made to agree asset schedules and the rates which would be assigned thereto, and my own view as to

what the Commissioner must be satisfied about in order to allow the election, I cannot say that the plaintiff established the existence of a valid election, on a balance or probabilities.

I hold therefore that on a proper construction of the First Schedule, the taxpayer is entitled to make his election in respect of any asset in use at the end of the basis period for the year of assessment, and subject to the sub paragraphs 3 (2) and 3 (4) such a valid election once made, will apply prospectively until and unless a further determination supersedes it. I would accordingly answer the questions in the originating summons as follows:

Question 1a No. The mere use of the writing down method by the taxpayer will not constitute a valid election unless the Commissioner has made the determinations necessary under paragraph 3(4).

1b Even if the use of the writing down method was an "election", it would not preclude a further election under paragraph 3.

2a No

2b Yes. However, "Any year" relates to the year the election is made and any asset properly the subject of claim for allowances for that year. That year would also be the year when the allowances is first claimed or in subsequent years. So there could not be a retroactive claim related to a prior year of assessment.

3. The taxpayer is not precluded from making an election for subsequent years by such "failure to make an election in the year of acquisition, repair or alteration of a capital nature".

4. Where the cost of the asset has been increased in a basis period for a subsequent year of assessment, (and I take that to mean that the value of the plant or machinery has been enhanced by alteration or repair of a capital nature) the election which is available to the taxpayer for that year only applies to the sum of the written down value of the asset at the commencement of the basis period for the years of assessment ***together with*** the cost of the alteration and or repairs of the asset.

In relation to the claim for a declaration in the terms asked for in the originating summons, the declaration given is that the plaintiff is entitled to elect for the alternative method of computing capital allowances for the Year of Assessment, 2000, subject to the determination of the Commissioner pursuant to paragraph 3(4) of Part III of the First Schedule.

Since each party has partially succeeded in relation to the matters set out herein, my order as to costs is that each party will bear its own costs.