JAMAICA

IN THE COURT OF APPEAL

REVENUE COURT APPEAL NO. 2 OF 2005

SUPREME COURT CIVIL APPEAL NO. 71/2007

BEFORE: THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MR. JUSTICE MORRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag)

BETWEEN	D.R. HOLDINGS LIMITED	APPELLANT
A N D	THE COMMISSIONER OF TAXPAYER APPEALS (INCOME TAX)	RESPONDENT

Mr. Herbert Hamilton for the appellant

Miss Kathy-Ann Pyke, Miss Luciana Ramsay and **Miss Keisha McDonald** for the respondent

2, 3 and 4 June, and 31 October 2008

COOKE, J.A.

I have read in draft the judgment of my brother Morrison, J.A. I agree with his reasoning and conclusions and there is nothing further that I wish to add.

MORRISON, J.A.

Introduction

1. This is an appeal from the judgment of the learned judge of the Revenue Court (Anderson J) dated 25 May 2007, confirming the assessment of the appellant by the Commissioner of Taxpayer Audit and

Assessment Department (TAAD) to additional income tax in the sum of $1,616,445.53 for the year of assessment 1997.

2. The dispute between the appellant and the TAAD turns on the perennial question in tax law of whether an income generating activity carried on by a taxpayer, in this case, the sale of five residential apartments, is to be categorized as a trading or investment activity. This is how Anderson J put it in the court below:

> "The question of whether profits derived by a taxpayer represent trading profits or capital profits is one which has bedeviled taxing authorities and taxpayers for well over one hundred years. The basic problem arises because income tax legislation seeks to impose tax on 'income' and not on 'capital'. As Lord Buckmaster said in ***Jones v Leeming*** [1930] A.C. 415 in relation to income tax: 'The tax is an income tax and charged on income as distinct from capital'."

The facts

3. The appellant company was incorporated in 1998 and its Memorandum of Association provided that the main objects of the company were the development and management of real estate, including the management and rental of townhouses, apartment complexes, dwelling houses and commercial buildings. The appellant acquired premises at 20 Dumbarton Avenue in the parish of St. Andrew in 1993, at which time there was a dwelling house occupied by tenants on the premises. The tenants in due course vacated the premises and at

some point thereafter the appellant decided to construct a residential apartment complex on the site. Construction of this complex, which consisted of eight apartments, was completed in 1996 and between November of that year and 1997 five of the apartments were sold by the appellant to third parties. In its income tax return for the year of assessment 1997, which is when all five sales were in due course completed, these sales were treated by the appellant as sales of fixed assets and the income from them is therefore not eligible to tax.

4. In 1999 the TAAD issued a notice of additional assessment to the appellant for 1997 in the sum of $1,658,597.00 on the basis that profits derived by the appellant from the sale of the apartments was trading income. By letters dated 6 September 1999 and 28 January 2000, the appellant objected to the assessment on the ground that the property was purchased as an investment which was consistent with the activities of the company. By a decision dated 12 May 2004, the TAAD determined that the apartments were part of the company's stock in trade and that the profits derived from the sales were subject to income tax. However, the assessment was reduced to $1,616,445.44.

5. By letter dated 7 June 2004, the appellant filed an appeal against the TAAD's decision to the respondent who, by a decision dated 10 February 2005, confirmed the TAAD's assessment.

6. This is the appellant's account of the circumstances surrounding the acquisition and disposal of the apartments in question, as set out in its letter dated 7 June 2004 to the respondent in support of the appeal against the additional assessment:

> "...In view of the fact that the file will be available to you for examination I will do no more than give a cursory outline of the case in support of my appeal for a reversal of the position taken by the Income Tax Department:
>
> 1. The property in question when acquired with borrowed funds was a private dwelling house intended to be rented thereby providing rental income for the company.
>
> 2. The then occupant having vacated the premises the building was quickly vandalized largely because of its location.
>
> 3. An apartment building was constructed on the site as it was felt that this would enhance rental income.
>
> 4. Interim financing was arranged for construction, the intention being to secure a long term mortgage on completion, repayable from rental income.
>
> 5. Efforts to rent the apartments proved futile. It was also realized that even if tenants could be found the level of rent projected could not service the loan as interest rates had risen dramatically.
>
> 6. In the meantime the major interim lender had made a call for the monies loaned for construction. This was honoured by securing a further demand loan from another financial institution.

7. The second demand loan secured as an interim measure soon became due for payment. In addition there was no income from the property or available to the company to service the debt. If funds were not immediately realized the entire project would have been in serious financial difficulties consequently the decision was taken to sell some of the apartments.

8. It is noted that the Tax Authorities are not disputing the circumstances leading up to the sale of the apartments but are relying for their decision on the terms of the company's memorandum. This we contend is unreasonable and does not constitute a fair and objective basis for the decision reached.

9. The company relies entirely on rent for its income. It also has substantial debt obligations having acquired plots of land with borrowed funds for development purposes in order to increase its rental income but this it has been unable to do as a result of rising costs and market instability.

10. The company naturally has no cash reserves and relies for its existence on income from rent which places it in a precarious financial position when its property is not rented as has been the case at times. To meet the proposed tax obligation if this appeal is not upheld together with other outstanding debts could result in the sale of its income earning assets and consequently effectively compelling it to cease operations. It is to be noted that the company has only been involved in two such projects in its fourteen year history which serves to question the reliance on its memorandum as the determining factor in making the assessment"

7. The appellant also filed an affidavit to similar effect and, in support of the contention that it had found it difficult to rent the apartments at the material time, produced a letter written to its auditors by D.C. Tavares &

Finson Realty Ltd. ("Tavares &Finson")dated 27 June 2000, in the following terms:

> "Dear Sirs:
>
> Re: Dumbarton Manor
> 20 Dumbarton Avenue, Kingston 10
>
> This is to advise that during the month of September 1996 the 8 units comprised of one and two bedrooms on the captioned complex were listed with our firm for lease/rental at the rate of $15,000.00 and $18,000.00 respectively.
>
> Our market research then indicated that the price demand was unrealistic for the neighbourhood. As a result of this, they were withdrawn and subsequently placed on the market for sale."

8. The respondent relied on several affidavits, which essentially (with one exception) provided an account of the investigations and analysis carried out by members of the TAAD, including interviews with the appellant's principal officer, Ambassador Donald Rainford.

9. Mrs. Jennifer Wilmot Simpson, the officer who had dealt with the appellant's original objection to the assessment, recounted a discussion with Ambassador Rainford in 2000, during which he stated that "he was in the process of seeking a loan from Horizon Building Society but the institution was taken over by FINSAC". She also swore to an occasion late in 2000 when she was told by Ambassador Rainford that the application for strata titles for the apartments "was prompted by the need of each tenant to apply for their own utilities."

10. A more complete account of the details of the appellant's financing of the construction project was put forward by the respondent as having been provided to Mr. Raule Plummer, another officer of the TAAD, in these terms:

> "...
>
> 8. On the 5th day of May, 2004, on appointment, I met Ambassador Donald Rainford, who identified himself to me as the Managing Director of the Appellant. This meeting took place at the offices of the Appellant being 99 Dumbarton Avenue, Kingston 10.
>
> 9. This meeting was held as a standard procedure in the objection process of the Taxpayer Audit & Assessment Department.
>
> 10. During the course of the meeting, Ambassador Rainford informed me that he bought the said property with the intention to rent it and that the building was vandalized before he had a chance to do so as a result of which he decided to construct an apartment complex.
>
> 11. I was informed by Ambassador Rainford that thereafter he obtained a loan from the National Housing Trust for the construction.
>
> 12. Ambassador Rainford further informed me that he obtained a loan from Horizon Merchant Bank to repay the loan from the National Housing Trust which was a short term loan and that the loan requested from Horizon Merchant Bank was a long term loan.
>
> 13. I was informed by Ambassador Rainford that the Horizon Merchant Bank loan was preferred because the mortgage repayment would then be lower than the rent to be collected which would provide a guaranteed source of income.

> 14. Additionally, Ambassador Rainford informed me that this decision did not operate in his favour as mortgage interest rates became so high that the mortgage repayment became higher than the projected income from the apartments.
>
> 15. Ambassador Rainford further informed me that he could not rent the property because it was posited by prospective tenants that the rent was too high for the area."

11. Mr. Ralston Johnson, an Appeals Officer with the Tax Administration Services Department, produced the various agreements for sale between the appellant and the purchasers of the five apartments and stated that at a hearing at the Taxpayer Appeals Department on 23 November 2004, Ambassador Rainford "also admitted that he sold other properties, namely apartments at Kingsway in 1990 and land at Rest Haven during 2000."

12. Miss Yasmin Jackson, yet another officer of the Tax Administration Services Limited, produced copies of correspondence written during the objection/appeal process by Nash, Anderson Tapper & Company on behalf of the appellant, as well as other documents received from the appellant, including a policy of insurance on the apartment building and letters from the National Housing Trust ("NHT") and Horizon Merchant Bank Limited ("HMB").

13. Finally, the respondent produced an affidavit from Mr. Denis Lawrence, former Project Manager of the Financial Sector Adjustment

Company Limited ("FINSAC"), who outlined the mandate and role of that agency and stated that it was established in January 1997 and intervened in the Horizon Group on 5 March 1998.

14. There was no cross-examination at the hearing of the appeal before Anderson J of either Ambassador Rainford or any of the persons who swore affidavits on behalf of the respondent.

15. The learned judge treated it as "settled law that where a taxpayer purports to challenge an assessment on the ground that it is excessive the burden of proving that proposition rests on him," citing in support section 76(2) of the Income Tax Act ("the Act"). Against this background, he then examined the evidence in the case with a view to identifying "the presence or absence of common features or characteristics of trade" ("the badges of trade"), canvassed in some detail the question of the taxpayer's intention and concluded that on a balance of probabilities the appellant had failed to discharge its obligation under the provisions of section 76(2). The learned judge accordingly found in favour of the respondent and confirmed the assessment.

The Appeal

16. The grounds of appeal are as follows:

> "(a) Where, as in this case, the issue raised is one of liability as distinct from quantum the onus rests on the Commissioner to prove

that the Appellant falls within the charge to tax. The Appellant has no obligation to prove that the assessment is excessive as found by the Learned Judge.

(b) The Learned Judge failed to consider facts which were germane to a proper determination of the issue.

(c) The Learned Judge's decision is based upon a mis-interpretation of the facts regarding the financing arrangements and submissions made thereon.

(d) Considered in the context of the Learned Judge's analysis of the facts and the law his decision that the Appellant was trading is unreasonable and implausible."

17. The appellant supported these grounds with detailed skeleton arguments and written submissions. At the heart of the appeal is Mr. Hamilton's submission on ground (a) that it is incumbent on the respondent to establish the taxpayer's liability to tax before the question of assessment of quantum can arise. It is only in respect of the latter consideration, Mr. Hamilton submits, that the statutory onus of proof falls on the taxpayer, but in respect of the former (i.e. liability) the onus is always on the respondent to demonstrate to the satisfaction of the court that the particular activity falls within the charge to tax. In support of this submission the appellant relies primarily on ***Whitney v Commissioner of Inland Revenue*** (1924-26)10 Tax Cases 88, ***Argosy v the Commissioner of***

Inland Revenue (1971) 15 WIR 502, the Scottish Case of ***Commissioner of Inland Revenue v Reinhold*** (1953) 34 Tax Cases 388, 386, ***Commissioner of Inland Revenue v Winston Lincoln*** (1988) 25 JLR 44, 52 and ***Karl Evans Brown v Commissioner of Income Tax*** (1987) 24 JLR 277, 280.

18. The other three grounds are essentially challenges to Anderson J's findings of fact, Mr. Hamilton relying primarily on the decision of this court in ***Keith C. Burke v Commissioner of Valuations*** (1987) 24 JLR 368 for the submission that this court is entitled to review findings of fact of the judge of the Revenue Court where it is satisfied that the judge in arriving at those findings proceeded on some incorrect principle.

19. The respondent, on the other hand, in equally detailed skeleton arguments and written submissions, submitted "that the onus of proving that the assessment complained of is erroneous rests on the taxpayer, throughout the matter from objection, appeal to the Taxpayer Appeals Department and Appeals to the Court thereafter". For this submission, Miss Pyke for the respondent primarily relied on the provisions of sections 75 (4a) and 76(2) of the Act, the decision of the Court of Appeal of Hong Kong in ***Commissioner of Inland Revenue v Common Empire Ltd.*** (Inland Revenue Appeal No.1 of 2004, 2006-07 of Volume 21 Inland Revenue Board of Review Decisions), ***Karl Evans Brown*** (supra), ***Inland Revenue Board v Boland Maraj*** (Trinidad & Tobago Civil Appeal No. 43 of 1981)

and "Income Tax Law in the Commonwealth Caribbean", by Dr. Claude Denbow, (Butterworths, 1997).

20. On the factual issues, Miss Pyke maintained that there was "overwhelming evidence" that the appellant was liable to pay the additional tax, that the evidence had been "weighed appropriately" by the learned judge who had drawn the relevant inferences and had considered all matters relevant to his determination. In addition, she cited a number of authorities to support the learned judge's approach to the assessment of the evidence in the case, relying in particular on the well known decision of Browne-Wilkinson V.C. (as he then was) in ***Marson (Inspector of Taxes) v Morton*** [1986] 59 TC 381

Ground (a) – the onus of proof

21. Against this background, I turn firstly to a consideration of the question of the onus of proof, to which a considerable amount of time was devoted in argument. The starting point is section 76(1) of the Act, which provides for an appeal to the Revenue Court by any person "who has disputed his assessment by notice of objection and who is dissatisfied with the decision of the Commissioner of Taxpayer Appeals". On any such appeal, section 76(2) provides as follows:

> "The onus of proving that the assessment complained of is erroneous shall be on the objector". (emphasis supplied).

22. Prior to 2002, the word "excessive" appeared in section 76(2) in place of "erroneous". However, in that year the section was amended (by the Revenue Administration (Alteration of Laws) Order, 2001) to adopt the present wording. Some minor confusion was caused at the outset of this appeal by the fact that Anderson J referred throughout his judgment to the old wording, thus potentially giving rise to a consideration of whether the word "excessive" in this context could as a matter of language carry the meaning contended for by Miss Pyke, which is that the onus was placed on the appellant to prove that the Commissioner's assessment was wrong, both as to liability and quantum.

23. This point in fact arose in passing in ***Common Empire Ltd.*** (supra), where the comparable section in the Hong Kong legislation had originally used the word "excessive", but by the time of the litigation had been expanded by amendment to read "excessive or incorrect". Deputy High Court Judge commented on this change as follows (at paragraph 20):

> " 'Incorrect' is a term of wider import than 'excessive'. An assessment which is excessive must be incorrect but it is inappropriate to label an assessment which is wrong in principle and which should not have been issued at all as excessive. Such an assessment should be properly labeled as incorrect rather than as excessive."

24. Similarly in the instant case, while it might in my view have been arguable whether the word "excessive" was an appropriate label for an assessment that was wrong in principle, it does appear on the face of it

that the word "erroneous" is wide enough to embrace both a complaint that the assessment is wrong in principle and that it is excessive in amount.

25. But the appellant nevertheless contends that the provisions of the Act must be read subject to well established learning as to the structure of taxing statutes generally. Thus in ***Whitney*** (supra), Lord Dunedin made the following "a general observation" (at page 110):

> "Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That *ex hypothesi* , has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

26. Mr. Hamilton submitted that this dictum describes "the conceptual scheme of a taxing statute," making a clear distinction between issues of liability and quantum, and I agree with him. The Act, it will be seen, adheres to this scheme in general terms by providing in section 5 for the imposition of income tax ("the declaration of liability"), then in section 72 *et seq* for the making of assessments (the determination of "the exact sum which a person is liable to pay") and in section 77 *et seq* for collection ("methods of recovery").

27. But in my view, liability to pay income tax is in fact determined by the provisions of the Act itself (section 5) and the making of an assessment pursuant to section 72 is the manifestation of the Commissioner's

judgment as to the extent of the taxpayer's liability, in respect of which the taxpayer's input is provided for in the first place by the mandatory requirement to make "a true and correct return of the whole of his income from every source whatsoever for that year of assessment" (section 67).

28. Thereafter, the taxpayer's recourse is by way of objection (section 75(4)) and ultimately by way of appeal to the Revenue Court (section 76(1)). In respect of both processes the Act in my view makes a clear and unequivocal allocation to the taxpayer of the burden of proving that the assessment is erroneous, both from the standpoint of liability and quantum (sections 75(4A) and 76(2)). This is how Dr. Denbow puts it (at page 172 of Income Tax Law in the Commonwealth Caribbean):

> "The taxing statutes in the Commonwealth Caribbean invariably provide that, in a tax appeal, the burden of proof rests on the taxpayer to show that the assessment in dispute is wrong or unfounded. This means that the taxpayer bears the legal burden on the whole of the case to show that the income being imputed to him by virtue of the Revenue's assessment is not taxable and the reasons why this is so. However, this does not mean that the Revenue is entitled to raise an assessment on a taxpayer and then leave it to him to show that he is not taxable on the income imputed to him. While the onus of the whole case rests on the taxpayer and he is obliged to begin, his mere denial of any imputed income throws upon the Revenue the evidential burden to adduce testimony in order to support its assessment so that it may be tested by cross-examination as to the new information upon which it has based its assessment of the

> taxpayer. The matter has perhaps been best expressed by the Court of Appeal in Trinidad and Tobago in the case of ***Inland Revenue Board v Boland Maraj*** by Kelsick CJ when he said:
>
> > 'On the Revenue rests only the evidential onus that it rightly 'appears' to the Revenue to act, which it discharges by adducing evidence of the information or material which caused it to appear to the Revenue that the taxpayer was under-assessed. On the other hand, the statutory burden of the whole case is on the taxpayer'."

29. But this does not mean that on an appeal to the Revenue Court, it will in every case be possible – or indeed prudent – for the Commissioner to stand idly by and to rely on the burden of proof in resisting a challenge to the correctness of an assessment by the taxpayer. Quite apart from the fact that this may be a risky course, even from a purely tactical point of view, there may also be, as Dr. Denbow points out and as this court held in ***Karl Evans Brown*** (supra), an evidential burden on the Commissioner in a proper case. In that case, Carey JA said this (at page 281 D):

> "`In my judgment the matter stands thus: there are two distinct burdens of proof in an appeal to the Revenue Court. There is first, the burden on the appellant to show that the assessment is excessive. This onus is a heavy one because of his duty to make a full disclosure of all his income from whatever source. <u>The burden on the Commissioner is the lighter one because in the vast majority of cases, the objector is not claiming that he is not liable to tax; he is challenging quantum</u>; the burden on the Commissioner is evidential. It only arises or shifts to him when the taxpayer on whom the initial

> burden rests, leads evidence that he is not liable for any tax whatever." (emphasis supplied).

30. As is clearly implicit from the words emphasized in this passage, the onerous task of the evidential burden on the Commissioner may vary from case to case according to the nature of the taxpayer's challenge: where it is to quantum only, it may be relatively light, but something more might be required if the taxpayer challenges liability particularly in a case such as the instant case, in which the Commissioner purports to proceed under the provisions of sections 72(2)(b) of the Act by making an assessment "to the best of his judgment". ***Argosy*** (supra) is an example of a case in which it was held that even though there was a statutory onus on the taxpayer to show that the assessment was excessive, the Commissioner must nevertheless show on a challenge on appeal the grounds on which he formed the opinion that a liability to tax arose (see especially per Lord Donovan at page 504).

31. The statement by Lord Keith in ***Reinhold*** (supra, at page 356), upon which Mr. Hamilton heavily relies, that "it is for the Revenue to bring the case within the taxing provisions of the statute", may in fact also be explicable on the same basis, though I am also inclined to agree with Miss Pyke's submission on this case that that can only be of limited assistance in the absence of any knowledge of the applicable statutory regime in similar circumstances in Scotland.

32. Finally, on this aspect of the matter, I do not think that the reference by Downer JA in ***Winston Lincoln v Collector of Taxes*** (1988)25 JLR 44, 56 to the "fair hearing requirements contemplated by" the Act, can readily be transposed into the context of the instant case. ***Winston Lincoln*** was a case in which the Commissioner had raised an assessment against the taxpayer without having fulfilled what the court held to be statutory conditions precedent to the exercise of that power, thus leading to the assessment so raised being declared to be a nullity. The "fair hearing requirements" referred to by Downer JA were that the Commissioner by virtue of section 70(1) of the Act had to serve a notice on the taxpayer requiring him to make and deliver a return before proceeding to assessment. No such question arises in the instant case, where the appellant's complaint is not as to process, but as to the correctness of the outcome.

33. My conclusion on this aspect of the matter is therefore that Anderson J correctly treated the appellant as bearing the burden of proving that the assessment was erroneous (despite the judge's no doubt inadvertent substitution of "excessive" for "erroneous" in section 76(2)), and that the appellant's ground of appeal (a) cannot therefore succeed.

Grounds (b), (c) and (d) – the challenge to the decision on the facts

34. Section 10(1) of the Judicature (Revenue Court) Act provides that a decision of the court "shall be final on any question of fact, but... an

appeal shall lie on any question of law to the Court of Appeal". However, it is well recognized that, where a tribunal reaches a conclusion on matters of fact that no reasonable tribunal could have reached, the validity of the decision is a question of law which will attract the attention of the Court of Appeal (see ***Edwards v Bairstow*** [1957] A.C. 14). This is the basis of the decision of this court in ***Keith C.Burke*** (supra), a Revenue Court Appeal, in which Rowe P stated that "this court will interfere if it is satisfied that the tribunal of fact has given no weight or no sufficient weight to those considerations which ought to have weighed with it or if it has been influenced by other considerations which ought not to have weighed with it or not weighed with it so much" (page 371). The respondent does not dissent from this proposition.

35. It is on this basis that the appellant's grounds (b) (c) and (d) invite this court to say that the decision of Anderson J on the facts was unreasonable and (to borrow language from another context) cannot be supported having regard to the evidence.

36. The issue in the case, it will be recalled, was whether the profit generated by the appellant's sale of five apartments in 1997 derived from trading, as the respondent contends, or from the realization of a capital asset, as the appellant contends. If it is the former, then it is exigible to tax pursuant to section 5(1)(a)(ii) of the Act, as income "from any trade, business, profession, employment or vocation", while if it is the latter, it is

common ground that it is not subject to tax (there being no capital gains tax in Jamaica). "Trade" is defined in section 2(1) of the Act to include "every trade, manufacture, adventure or concern in the nature of trade".

37. As Anderson J accepted, the question of whether or not a trade exists is a question of fact. This will depend, as Browne-Wilkinson V.C. put it in ***Marson v Morton*** (supra), "on all the facts and circumstances of each particular case and ...on the interaction between the various factors that are present in any given case". In this regard, the intention of the taxpayer at the time of acquisition of the asset in question is a relevant consideration, as was lucidly explained by Lord Wilberforce in ***Simmons v Inland Revenue Commissioners*** [1980] 1WLR 1196, 1199 (in a passage also cited by Anderson J):

> "Trading requires an intention to trade: normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory, that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. Intentions may be changed. What was first an investment may be put into the trading stock – and I suppose vice versa. If findings of this kind are to be made precision is required, since a shift of an asset from one category to another will involve changes in the company's accounts, and possibly, a liability to tax: see ***Sharkey v Wernher*** [1956] A.C 58. What I think is not possible is for an asset to be both trading stock and permanent investment at

> the same time, nor to possess an indeterminate status – neither trading stock nor permanent asset. It must be one or other, even though, and this seems to me legitimate and intelligible, the company, in whatever character it acquires the asset, may reserve an intention to change its character. To do so would, in fact, amount to little more than making explicit what is necessarily implicit in all commercial operations namely that situations are open to review."

38. Anderson J then went on to consider the matter in the light of the so-called "badges of trade" (a term first used, as the learned judge very helpfully pointed out, in the Report of the Royal Commission on the Taxation of Profits and Income in 1955), as identified by Browne-Wilkinson VC in ***Marson v Morton*** as follows (at pages 470-471):

> "The matters which are apparently treated as a badge of trading are as follows:
>
> (1) That the transaction in question was a one-off transaction. Although a one-off transaction is in law capable of being an adventure in the nature of trade, obviously the lack of repetition is a pointer which indicates there might not here be trade but something else.
>
> (2) Is the transaction in question in some way related to the trade which the taxpayer otherwise carries on? For example, a one-off purchase of silver cutlery by a general dealer is much more likely to be a trade transaction than such a purchase by a retired colonel.
>
> (3) The nature of the subject matter may be a valuable pointer. Was the transaction in a commodity of a kind which is normally the

subject matter of trade, and which can only be turned to advantage by realisation, such as referred to in the passage that the chairman quoted from ***Reinhold***? For example, a large bulk of whisky or toilet paper is essentially 'a subject matter of trade, not of enjoyment.

(4) In some cases attention has been paid to the way in which the transaction was carried through: was it carried through in a way typical of the trade in a commodity of that nature?

(5) What was the source of finance of the transaction? If the money was borrowed that is some pointer towards an intention to buy the item with a view to its resale in the short term; a fair pointer towards trade.

(6) Was the item which was purchased resold as it stood or was work done on it or relating to it for the purposes of resale? For example, the purchase of second-hand machinery which was repaired or improved before resale. If there was such work done, that is again a pointer towards the transaction being in the nature of trade.

(7) Was the item purchased resold in one lot as it was bought, or was it broken down into saleable lots? If it was broken down it is again some indication that it was trading transaction, the purchase being with a view to resale at profit by doing something in relation to the object bought.

(8) What were the purchasers' intentions as to resale at the time of purchase? If there was an intention to hold the object indefinitely, albeit with an intention to make a capital profit at the end of the day, that is a pointer towards a pure investment as opposed to a trading deal. On the other hand, if before the contract of purchase is made a contract for resale is already in place,

> that is a very strong pointer towards a trading deal rather than an investment. Similarly, an intention to resell in the short term rather than the long term is some indication against concluding that the transaction was by way of investment rather than by way of a deal. However as far as I can see, this is in no sense decisive by itself.
>
> (9) Did the item purchased either provide enjoyment for the purchaser (for example, a picture) or pride of possession or produce income pending resale? If it did, then that may indicate an intention to buy either for personal satisfaction or to invest for income yield, rather than do a deal purely for the purpose of making a profit on the turn. I will consider in a moment the question whether, if there is no income produced or pride of purchase pending resale, that is a strong pointer in favour of it being a trade rather than an investment."

39. I accept, as Anderson J did, that this is the correct approach sanctioned by the authorities to the question at issue in the instant case, subject always to Browne-Wilkinson VC's important caveat that the specific factors identified "are not a comprehensive list and no single item is in any way decisive." It is against this background therefore that I come to consider whether Anderson J's findings on the evidence before him were justified.

40. With respect to eight of the nine badges of trade identified and considered by him, Anderson J found on the evidence that they provided no useful assistance in categorizing the alleged trading activity by the appellant in this case. So with regard to:

(i) the question whether this was a "one off transaction", he characterized the respondent's evidence to the contrary as "tenuous at best";

(ii) the subject matter (i.e. land as against some other asset), he did not think provided any "significant analytical help";

(iii) the question whether the transaction was carried through in a manner typical of the trade in the asset in question, this was also found not to provide "much help";

(iv) the source of finance for the transaction, this was not regarded as a factor to which "undue weight should be attached;"

(v) supplementary work on the asset, he was not at all convinced that the supplementary work alleged by the respondent should be so regarded;

(vi) whether the item resold was broken down into several lots, he regarded as having "no application in the instant case";

(vii) the question whether the asset provided enjoyment or produced income pending resale, he considered this to be "rarely applicable to real estate" and thus of "little help in this case";

(viii) the profit motive, the learned judge found that there was no evidence to suggest that there was any agreement to sell one of the units at the time to purchase.

41. However, the learned judge did find that the transaction in the instant case was related to the business otherwise carried on by the appellant thus making this, in his view, a factor which "would clearly be of some importance".

42. It is clear, I think, that the badges of trade are not a scorecard, with the result that the existence of any one of them in a particular case "may be sufficient to establish trading" (per Marsh J in ***Commissioner of Income Tax v St. Elmo Hotels Ltd.,*** Revenue Court Appeal No. 99A of 1967, judgment delivered 31 May 1972, at page 10). But neither is the applicability of any single item on the list "in any way decisive", as Browne-Wilkinson VC was at pains to point out (at pages 470 - 471) in ***Marson v Morton***. So that just as Anderson J's having found that eight out nine badges were not applicable in this case is not necessarily decisive in the appellant's favour, so too is his having found one of them to be applicable not necessarily decisive against it.

43. It is therefore necessary to take a further step beyond the consideration of the applicability of the individual badges of trade, as Browne-Wilkinson VC also points out in ***Marson v Morton*** (at page 471) :

> "I believe that in order to reach a proper factual assessment in each case it is necessary to stand back, having looked at those matters, and look at the whole picture and ask the question - and for this purpose it is no bad thing to go back to the words of the statute - was this an adventure in the nature of trade? In some

> cases perhaps more homely language might be appropriate by asking the question, was the taxpayer investing the money or was he doing a deal."?

Or, as Anderson J himself put it, "it remains incumbent on the Court to look at the application of the badges of trade to determine whether the disposal and the attendant profit arose by virtue of a 'trade, adventure or concern in the nature of a trade'"

44. It is at this point in the analysis that it seems to me with respect that Anderson J started to go off the very course that he had set himself. For at this stage, in seeking for a "proper factual assessment", I would next have expected the learned judge to attempt to relate the results of his detailed assessment of the applicability of the badges of trade to the case as a whole. In particular, I would have expected some weighing – up of the significance, if any, in the overall context, of the finding that the transaction in the instant case was related to the business otherwise carried on by the appellant (in which regard, it might have been of interest to know, for instance, what weight, if any, the learned judge considered that this factor should bear in the light of his own earlier finding that the evidence of alleged other instances of similar trading by the appellant was "tenuous, at best").

45. Instead, it seems to me, the learned judge left the entire badges of the trade exercise in a state of inconclusiveness and moved on to what

may be described as "one of the critical issues" in the case, viz, "whether the reasons given by the Appellant for disposing of the property is to be believed on a balance of probabilities". While this was without a doubt also a critical issue, it seems to me that the whole purpose of the badges of trade exercise was lost when the results of that exercise were not made the backdrop against which to assess the credibility of the appellant's case. In other words, at the end of the day the whole elaborate exercise appeared to remain wholly academic.

46. Rather, the learned judge's next step was to identify four aspects of the appellant's evidence and to base his ultimate finding against it explicitly on his rejection of the evidence on these points. I cannot avoid setting out in full his conclusion on these matters:

> "With respect to the reasons for disposal of the apartment put forward by the Appellant, the letter from the realtors, D.C. Tavares and Finson Realty Ltd. dated June 27, 2000 is being prepared years after the alleged listing of the apartments with that company. This evidence is at best self-serving, I would be far more inclined to accept its credibility if it was accompanied by a copy of the listing agreement between itself and the Appellant. The fact is that the letter referred to specific rental rates being asked for and one must therefore assume that the institutional memory of the real estate firm provided those numbers. Nor were there any copies of advertisements for rental provided to assist in the determination. Why was this not provided to the Respondent or to this court? Moreover,

> with respect to the terms of the letter, it states that the apartments were listed "during the month of September 1996." That they were "withdrawn and subsequently placed on the market for sale." It is instructive that the first of the agreements for sale exhibited to the affidavit of Ralston Johnson, for the Respondent, was dated November 19, 1996, merely weeks after the alleged withdrawal from the rental market and being put on sale.
>
> A submission by counsel for the Respondent that the fact that the property was insured by the Appellant indicates that there was an intention to sell, reveals a lack of appreciation for how business operates and completely misses the point. However, the question arises? Why would there have been a need to secure separate Strata Titles for the apartments if they were going to be held for rental? It seems to me that unless there was nascent or inchoate intention to sell, it seems that there would have been no need to have secured strata titles for the units, since they would have remained in the ownership of the Appellant on a single title.
>
> Finally, in this regard, one of the critical findings of fact which I make is that FINSAC the government "White Knight Agency" which was set up to assist the crippled financial sector in the mid 1990s, had not made its entry at the time when the apartments would have been advertised for sale in the latter part of 1996. This deals a major blow to the submissions of counsel that this was the reason for the disposal, and, I find that it is perhaps decisive in arriving at a conclusion on the matter. I accordingly hold that the disposal was a trading transaction".

47. The four points that the learned judge thus found to weigh most heavily against the appellant's credibility were in respect of (i) the

evidence provided on its behalf by Tavares & Finson; (ii) the date of the first agreement for sale; (iii) the securing by the appellant of strata titles for the apartments and (iv) the date of the FINSAC intervention. I will examine each point with a view to testing the appellant's submission that the judge's conclusions were unreasonable in the light of the evidence.

(i) **The realtor's letter**

48. Tavares & Finson, it will be recalled, had provided a letter in support of the appellant's initial objection to say that the apartments had indeed been listed for rental with the firm in 1996 without success. This evidence was summarily rejected by the learned judge as "at best self-serving". I confess that I have not found this conclusion easy to understand (and it is to her credit that Miss Pyke did not embrace it as her strongest point). A self-serving statement, as I understand it, is one put forward by a witness in support of the evidence given by him as having also been made by him on a previous occasion to the same effect as his evidence in court, with a view to enhancing the credibility of his own evidence (see Murphy, "A Practical Approach to Evidence," 4th edition at paragraph 13.13; and see also ***Rankin and McHargh v R*** SCCA 72 & 73/2004, delivered 28 July 2006, per Panton JA at paragraph 16)

49. In my view the realtor's letter is plainly not in this category: it was adduced by the appellant in support of its objection as independent

evidence coming from a reputable source. At the end of the day, it remained unchallenged, either through cross-examination of Ambassador Rainford, who put it forward, or at an earlier stage by a summons from the Commissioner to the realtor to attend before him and be examined on oath on the matter (see section 75(5)(a) of the Act). The absence of any further documentary support for the evidence falls to be considered, in my view, in the light of the learned judge's own assessment of the significance of documentary evidence (rejecting a submission on behalf of the respondent) on another issue in the case:

> "En passant, may I say in relation to this minor issue that the approach to the treatment of documentary evidence was appropriately summed up in the following passage from a judgment in a case from Singapore, and I adopt it for the purposes hereof:
>
> > 'In this case certain explanations given by the appellant to the officers of the Income Tax Department were rejected on the ground that there was no documentary evidence to support them. No doubt documentary evidence can in many cases be very cogent and convincing. The lack of it, however, should not invariably be a reason for rejecting an explanation. Not every transaction is accompanied or supported by documentary evidence. Much depends on the facts and circumstances of the case, but if the person who is giving the explanation appears to be worthy of credit, does not reveal any inconsistency and there is nothing improbable in the explanation, it can, in my view be accepted'."

(ii) **The date of the first agreement for sale**

50. The learned judge found it "instructive" that the first of the agreements for sale exhibited was dated 19 November 1996, "merely weeks after the alleged withdrawal from the rental market and being put on sale". The significant implication of this fact is, presumably, the one contended for by the respondent, which is that the date of sale, "is close to the date of rental." Again, it is not clear to me why this should be regarded as significant in the absence of any evidence whatsoever to suggest that a period of 7 weeks (between the placing of the apartment on the market for sale and the date of the first agreement) would have been insufficient for the conclusion of an agreement for sale. That agreement itself provides for completion in a further three months from its date, is subject to mortgage and other usual conditions and there is absolutely nothing on its face to indicate one way or the other what was the period of negotiation leading up to it (neither would it in any event have been necessarily inconsistent with the appellant's case if persons had shown an interest in purchasing before the appellant itself had taken the decision to sell instead of to rent).

(iii) **The strata titles**

51. I think it is fair to say that in her very able submissions Miss Pyke did not seek to support the learned judge's conclusion on this point with much force. And rightly so, for there can be absolutely no reason why, it seems

to me, the obtaining of strata title should necessarily be a significant indicator of "a nascent or inchoate intention to sell," as opposed to an intention to hold the apartments for rental. Strata titles can facilitate individual utility contracts for each unit (a point made by the appellant to the TAAD, again without contradiction). They also give the owner of the strata lots greater flexibility to deal with the units, both inter vivos (whether by way of sale upon a decision to realize a part of his investment only or by way of security if it is decided to seek financing for any reason on the strength of a part only of the property), as well as by testamentary disposition.

(iv) **The date of the FINSAC intervention**

52. The learned judge described this as one of his "critical findings", which dealt "a major blow" to the appellant's case. This finding was based on the evidence of Mr. Denis Lawrence that FINSAC was established in January 1997 and intervened in the Horizon Group in 1998. With the greatest of respect to the learned judge, I think that this conclusion misapprehends the essential nature of the case put forward by the appellant, which was that because of its inability to secure sufficient rental income from the apartments to enable it to service its obligations to its creditors, in an environment of rising interest rates, it was put at risk of losing its investment (see especially the appellant's letter to the respondent dated 7 June 2004, which is set out in full at paragraph 6

above). Against this background, it appears to me to be completely irrelevant whether the creditor to whom the appellant would be at risk of losing its investment was a member of the Horizon Group or FINSAC, which after its intervention in the group would have become the entity entitled to enforce the security for non payment as part of its mandate "to restore stability to Jamaica's financial institutions", as Mr. Lawrence described it.

Conclusion

53. I have already expressed my view that Anderson J failed to give any effect to the badges of trade exercise to which he devoted so much attention in his judgment. For all of the reasons set out in the preceding paragraphs, I have also come to the conclusion that the learned judge's stated bases for rejecting the appellant's account of its reason for disposing of the apartments demonstrate that the court gave "no weight or no sufficient weight to those considerations which ought to have weighed with it [and was] influenced by other considerations which ought not to have weighed with it or not weighed with it so much "(per Rowe P in ***Keith C. Burke*** at page 371).

54. The respondent (despite the fact that it filed no cross-appeal and was therefore limited on appeal to supporting Anderson J's judgment on the bases stated by him) made much of the fact that the appellant had produced two letters, the first dated 21 June 1996 from HMB offering a "Guarantee Facility" in the sums of $6,714,082.19 to the appellant for the

purpose of establishing a guarantee "for a Mobilization Payment to the National Housing Trust" and the second from the NHT dated 31 December 1996 confirming that the amount of $6,604,831.57 was "now due for payment" by the appellant as at that date.

55. The significance of this, the respondent contended, is that the HMB letter indicated that it was a guarantee facility, while the NHT letter showed that the loan from that institution was still active as at 31 December 1996, by which time agreements for sale had already been entered into by the appellant for the first two of the five apartments. Therefore, the argument ran, the loan as at that date had not been repaid by any loan from HMB or any source and it therefore could not be true that the sales were necessary to repay loans as alleged by the appellant.

56. None of this, in my view, impairs the appellant's case in any way. In the first place, it is clear from its terms that the HMB letter was not put forward by the appellant as evidence of the loan facility which it stated was subsequently negotiated with that institution (indeed, in a letter produced by the respondent dated 28 June 2000, it maintained that "Horizon Merchant Bank from which the loan was obtained no longer exists consequently the loan document is not available"). Secondly, in the absence of any evidence as to the date on which the NHT loan was actually paid off by or on behalf of the appellant, it takes the matter no

further than that it was still outstanding as at 31 December 1996 (a date in any event well before the completion of the sales of any of the apartments in 1997).

57. I am therefore of the view that the appellant had indeed adduced sufficient evidence to discharge the burden of proving on a balance of probabilities that the challenged assessment was erroneous. While it is true that some of the appellant's evidence (for example, the treatment of the transactions in its accounts or the provisions of its memorandum of association) "may be considered colorless [sic] in the sense that they do not, in and of themselves, prove the Appellant's point", as the learned judge put it, this does not in my view, in any way affect the appellant's case that it had been forced to liquidate a capital asset by reason of its own financial exigencies. This, as the decision in ***Simmons*** demonstrates, it was fully entitled to do quite apart from any intention to trade: "An investment does not turn into trading stock because it is sold" (per Viscount Dilhorne at page 1203).

58. The respondent for its part chose, no doubt for good reason, not to cross-examine Ambassador Rainford on his evidence which, despite the inevitable inconsistencies to which the respondent was able to point, several years after the event, remained at the end of the day the only coherent account of the circumstances of the transactions.

59. I would therefore allow the appeal on grounds (b), (c) and (d), with costs to the appellant to be taxed, if not sooner agreed.

DUKHARAN, J.A. (Ag.)

Having read in draft the judgment of Morrison, J.A. I too agree with his reasoning and conclusions. I have nothing more to add.

ORDER

COOKE, J.A.

The appeal is allowed on grounds (b), (c) and (d). Costs to the appellant to be taxed if not agreed.