1953
Nov. 12
1954
Mar. 27

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

J. T. LABADIE LIMITED ..... RESPONDENT.

Revenue—Income Tax—The Income Tax Act, S. of C. 1948, c. 52, ss. 3, 11(1), 20(1), 127(1)(e), 131—An Act to amend the Income Tax Act and the Income War Tax Act, S. of C. 1949, 2nd Session, c. 25, s. 8—Depreciable capital assets—Previous assessment may be reconsidered by Minister in light of subsequent evidence—Profit on sale of motor cars used as service and salesmen's cars—Whether capital profit—Whether inventory profit—Intention of a corporation acting through its officers relevant to the question—Bookkeeping not conclusive of what is capital profit and what is revenue profit—Appeal from Income Tax Appeal Board allowed.

In the course of its business operations as dealer in all kinds of motor vehicles respondent purchased from November, 1947, to January, 1949, twelve new passenger cars which were used as service and salesmen's cars. Of these twelve cars the first eight were carried over from 1948 to 1949 while the last four were acquired in 1949. In its income tax returns for the years 1947 and 1948 made under the provisions of the Income War Tax Act, R.S.C. 1927, c. 97, as amended, by which depreciation was in the discretion of the Minister, the cars in question were shown as depreciable capital assets and assessed as such. The twelve cars were sold in 1949 at prices exceeding the amounts at which they were carried on respondent's books, which according to its method of bookkeeping were capital gains on the sale of capital assets and did not form part of its 1949 taxable income as reported in its tax return made this time under the provisions of the Income Tax Act, c. 52, S. of C. 1948. From an assessment by the Minister whereby he added these amounts to respondent's declared income for the year 1949 the latter appealed to the Income Tax Appeal Board which allowed the appeal and the Minister appealed to this Court from the decision. On the facts the Court found that it was not the true intention of the respondent acting through its officers, to appropriate the cars to plant, i.e. capital, and that it did not actually deal with them as capital assets.

Held: That the fact that depreciation was allowed by the Minister for years 1947 and 1948 on the motor vehicles used as service and salesmen's cars did not preclude him from treating as inventory the same cars sold at a profit in 1949. The decision of the Court on this point in *Minister of National Revenue* v. *British and American Motors Toronto Ltd.* [1953] Ex. C.R. 153 is a correct application of the Income Tax Act, R.S.C. 1952, c. 148, s. 144.

2. That the intention of a corporation acting through its officers may be binding not only on its shareholders but strangers and even revenue authorities. *Bouch* v. *Sproule* (1887) 12 A.C. 385; *Commissioners of Inland Revenue* v. *Blott* and *Commissioners of Inland Revenue* v. *Greenwood* [1920] 1 K.B. 114 and [1921] 2 A.C. 171; *Bagg* v. *Minister of National Revenue* [1948] Ex. C.R. 244; [1949] S.C.R. 574 referred to.

3. That the method in which a corporation is keeping its books is not conclusive of what is a capital profit and what is a revenue profit. *J. and M. Craig (Kilmarnock) Ltd.* v. *Inland Revenue* [1914] S.C. 338; *Doughty* v. *Commissioner of Taxes* [1927] A.C. 327 at 336; *Inland Revenue* v. *Scottish Automobile and General Insurance Company* [1932] S.C. 87; *Cowen's Ideal Stamping Co. Ltd.* v. *Inland Revenue* (1935) 19 T.C. 155 referred to.

4. That the purchase and sale by respondent of the twelve cars in question was really the carrying on of part of its business which by its Letters Patent it was authorized to carry on viz., "to buy, sell, import, export, exchange, rebuild, repair, maintain and generally deal in all kinds of automobiles . . ."

5. That the profit on the sales of the said cars was income within the meaning of the Income Tax Act 1948, c. 52, ss. 3 and 127(1)(e), S. of C. 1948 (now R.S.C. 1952, c. 148, ss. 3 and 139).

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Potter at Windsor.

M. C. Meretsky, Q.C. and *T. Z. Boles* for appellant.

Leon Z. McPherson, Q.C. for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

POTTER J. now (March 27, 1954) delivered the following judgment:

This is an appeal by the Minister of National Revenue, hereinafter called the appellant, from a decision of the Income Tax Appeal Board dated the 22nd day of January, 1952, allowing an appeal from an assessment by the appellant dated the 14th day of February, 1951, whereby the appellant added the sum of $6,996.67 to the respondent corporation's declared income for the year 1949; disallowed

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a deduction therefrom of $5,549.82, claimed as capital cost allowance, and allowed a reduction in the value of the respondent corporation's inventory of $5,549.82.

The respondent corporation was incorporated by Letters Patent issued by the Secretary of State on the 10th day of November, 1945, with powers *inter alia*:—

> To buy, sell, import, export, exchange, rebuild, repair, maintain and generally deal in all kinds of automobiles, buses, station wagons, trucks, tractors, motors, engines, parts and accessories appertaining thereto, including implements, utensils, apparatus, lubricants, fuels, cements, solutions and appliances whether incidental to the construction of motor-cars or otherwise and all things capable of being used in the manufacture, rebuilding, repair, maintenance or servicing thereof respectively.

Following its incorporation the respondent corporation under the direction of its president, treasurer and general manager, Mr. J. T. Labadie, acquired premises in Windsor, in the County of Essex, in the Province of Ontario, and secured the right to distribute Cadillac, Buick, Pontiac and Vauxhall motor-cars and General Motors Company trucks. In 1949 it employed approximately one hundred persons. Its business was conducted from 465 Goyeau Street in Windsor where it operated a main repair garage and new car sales premises and also from 465 Pitt Street West where new cars were serviced before sale and all body and metal work performed. In addition it carried on a business of dealing in used motor vehicles at two locations on Tecumseh Road East, some two or three miles from its main office, and was distributor for General Motors products for the County of Essex (except the town of Leamington) and it supervised four associate dealers located throughout the county. In addition it conducted a business known as "Parts Wholesale" with all service garages in the county.

According to the evidence adduced on behalf of the respondent corporation, it required for the purpose of carrying on and developing its business a number of motor vehicles including wrecking trucks, pick-ups and several types of passenger motor-cars.

Twelve passenger type cars owned by the respondent corporation, and designated by it "Service and Salesmen's Cars", were sold during the year 1949 at prices exceeding the amounts at which they were carried on its books, which according to the respondent corporation's method of bookkeeping were capital gains on the sale of capital assets and

did not form part of its 1949 taxable income. These amounts aggregating $6,996.67 were by the appellant's said assessment added to the income of the respondent corporation for the year 1949.

According to Ex. 1 filed by the respondent corporation this amount of $6,996.67 was arrived at in the following manner:—

Aggregate purchase prices of twelve cars purchased from November 1947 to January 31, 1949, both inclusive		$ 22,342.01
Total depreciation for the year 1949 on those purchased from November 1947 to July 1948, both inclusive		4,337.30
Net value		$ 18,004.71
Aggregate selling prices of same from March 5, 1949 to December 3, 1949	$ 25,001.38	
Profit		6,996.67
	$ 25,001.38	$ 25,001.38

Of these twelve cars it was established that the first eight were carried over from 1948 to 1949 while the last four were acquired in 1949, all twelve however being sold during the year 1949 as above stated.

The evidence of Mr. J. T. Labadie, president, treasurer and general manager of the respondent corporation, was to the effect that the cars described in Ex. 1 were bought by the respondent corporation for particular uses in its operations, viz.—to enable parts salesmen to sell and deliver parts to garages in Essex County; to supervise four associate dealers; for transportation between 465 Goyeau Street and 675 Pitt Street West and the used car locations; to be available for the use of customers when their cars were being repaired; to enable the service manager, sales manager, parts manager and salesmen to be available continuously twenty-four hours each day when needed; to collect accounts; to enable truck managers to travel to different parts of the county to estimate trade-in values and truck requisites; to appraise damage and insurance claims.

The employees, in whose custody such vehicles were given, understood the purposes for which they were intended and were under strict limitations as to who drove the same. In short, the evidence of Mr. Labadie was that

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the cars in question were primarily for helping the respondent corporation to carry on its business and produce its income. Other witnesses who had formerly been in the employ of the respondent corporation and who had had cars issued to them, according to this arrangement, were called and gave evidence corroborating that of Mr. Labadie.

According to the evidence given and Ex. 1, the twelve cars in question had an aggregate net value, after depreciation, of $18,004.71 as of December 31, 1948, and that eight of them had been carried over from 1948 to 1949, the aggregate net value of such cars as of December 31, 1948, and after depreciation, being, according to Ex. 1, $10,463.04. The other four cars shown on Ex. 1 were acquired during the year 1949 from the months of January to July 31, 1949 and had an aggregate value, without deducting any depreciation, of $7,541.67 as of December 31, 1948. Three of the cars acquired in the year 1949 were sold at profits of $77.17, $624.94 and $52.06 respectively, or together a profit of $754.17, but one was sold at a loss of $74.46, making a net profit on the 1949 cars of $679.71. No explanation was given why two of these cars, which were Vauxhalls, brought profits of only $77.17 and $52.06 respectively, why another Vauxhall was sold at a loss of $74.46 or why a Pontiac was sold at a profit of $624.94.

While the questions to be decided are whether the twelve cars in question were capital assets or stock-in-trade and whether the profits on their sale capital gains or income, it is stated in passing that the amount of $5,549.82 which was disallowed as a deduction from the respondent corporation's declared income for the year 1949 and deducted from the value of its inventory appears to have been arrived at in the following manner:—

By schedule No. 2, (sheets 12 and 13) attached to its 1949 Income Tax Return, it claimed depreciation for the year 1949 on service and salesmen's cars, and on a deferred charge, of $6,853.33 plus $48.83 or a total $6,902.16.

By the assessment four of these vehicles only were treated as capital, viz.—one ½ ton pick-up $777.25; one ½ ton pick-up $835.94; one wrecker at $3,185.40; one pick-up at $1,234.09, making a total of $6,032.68. Two of these vehicles were disposed of in 1949, one, which had been carried at $777.25, being sold for $688.95 and another, which

had been carried at $835.94, being sold for $1,225.00. Taking the lesser in each case, viz.—$688.95 and $835.94, gave the sum of $1,524.89, which amount being deducted from $6,032.68 left the sum of $4,507.79.

On this amount of $4,507.79, thirty per cent depreciation or $1,352.34 was allowed, which being deducted from $6,902.16, left the amount of $5,549.82, i.e. the amount disallowed as a deduction from the respondent corporation's declared income and the amount by which its inventory was reduced for the year 1949.

The respondent corporation's Income Tax Returns for the years 1947 and 1948 were made under the provisions of the Income War Tax Act, chapter 97, R.S.C. 1927, as amended, by which depreciation was in the discretion of the Minister. In such Returns "service and salesmen's cars" were shown as depreciable capital assets and, no objection having been made by the appellant to this method of accounting, the respondent corporation contends that assessments made accordingly established a practice of the Department of National Revenue.

The respondent corporation's Income Tax Return for the year 1949 was made under the provisions of the Income Tax Act, 1948, chapter 52, Statutes of 1948, which was assented to on June 30, 1948, became effective for the year 1949, section 131 thereof being as follows:—

131. Part II of this Act is applicable to amounts paid or credited after 1948 and the other provisions of this Act are, unless otherwise specifically provided, applicable to the 1949 and subsequent taxation years.

Section 11 provided as follows:—

11. (1) Notwithstanding any other provision in this Division, the following amounts may, subject to subsections (2) and (3) of section 12, be deducted in computing the income of a taxpayer for a taxation year:

(a) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation.

The respondent corporation relies on section 8 of chapter 25, R.S.C. 1949, by which were promulgated as of December 1949, regulations having a retroactive effect to January 1, 1949, and which were reenacted as section 144 of chapter 148, R.S.C. 1952, entitled the "Income Tax Act, 1948" and which are as follows:—

144. (1) Where a taxpayer has acquired depreciable property before the commencement of the 1949 taxation year, the following rules are

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applicable for the purpose of section 20 and regulations made under paragraph (*a*) of subsection (1) of section 11:

(*a*) except in a case to which paragraph (*b*) applies, all such property shall be deemed to have been acquired at the commencement of that year at a capital cost equal to

(i) the actual capital cost (or the capital cost as it is deemed to be by subsection (3) or (4)), of such of the said property as the taxpayer had at the commencement of that year

minus the aggregate of

(ii) the total amount of depreciation for such of the said property as he had at the commencement of that year that, since the commencement of 1917, has been or should have been taken into account, in accordance with the practice of the Department of National Revenue, in ascertaining the taxpayer's income for the purpose of the *Income War Tax Act*, or in ascertaining his loss for a year for which there was no income under that Act, ...

The respondent corporation argued that the effect of this enactment is a complete answer to the repeated assertion that the practice of the appellant in one year does not prevent a reversal of practice in a subsequent year and that the appellant is in effect estopped from claiming that the profit on the cars in question was income instead of capital gain.

It is also suggested by the respondent corporation that the appellant is relying on the following:—

(*a*) the respondent corporation is a dealer in motor vehicles;

(*b*) the respondent corporation is not entitled to capitalize automotive equipment under the regulations published in the Canada Gazette on December 22, 1949, P.C. 6385, the relevant parts of which are as follows:—

PART XI

Allowances in respect of Capital Cost

1100. (1) Under paragraph (*a*) of subsection (1) of section 11 of the Act, there is hereby allowed to a taxpayer, in computing his income from a business or property, as the case may be, deductions for each taxation year equal to

(*a*) such amount as he may claim in respect of property of each of the classes numbered one to twelve, inclusive, in schedule B to these Regulations not exceeding in respect of property

(x) of class 10, thirty per cent

of the undepreciated capital cost to him as of the end of the taxation year (before making any deduction under this subsection for the taxation year) of property of the class;

Schedule B insofar as it relates to this subsection is as follows:

SCHEDULE B
Class 10
(30 per cent)

Property not included in any other class that is
(a) an automobile,

because:—

First, regulation 1102(1) is as follows:—

1102. (1) The classes of property described in this Part and in Schedule B to these Regulations shall be deemed not to include property
(b) that is described in the taxpayer's inventory.

Second, that the respondent corporation does have in its inventory not the vehicles referred to in Ex. 1 but other motor vehicles and therefore because it has motor vehicles in its stock-in-trade it cannot be permitted to have other motor vehicles "automotive equipment" for the purpose of earning its income.

Or, in other words, all of its "automotive equipment" must be available for sale at all times and be classified as "inventory."

The appellant, however, does not put his argument in that form. He does not say that because articles of a certain class are carried as stock-in-trade, that articles of the same class can not also be carried as plant. He says that the cars in question were purchased by the respondent corporation wholesale, as were all its cars, for re-sale and upon receipt of the same, they formed part of the respondent corporation's inventory of stock-in-trade and were then borrowed temporarily from the same for the purposes described by the president, treasurer and general manager of the respondent corporation and were later returned to the inventory of stock-in-trade and sold in the normal course of the company's business; that the respondent corporation at all times was holding the cars for sale and never with any intention that they should become permanent capital assets.

Mr. J. P. Labadie, president, treasurer and general manager of the respondent corporation said in this connection, that:—

The vehicles in question are ordered specifically by an order number. They are ordered by colour and by model for the specific use they are going to be designated for. When those vehicles arrive, they are allocated

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to the department by which they will be used from the order number in which the order was originally placed. Immediately the Sales Department have allocated the vehicle to its proper department, then within a matter of days it is immediately charged to that particular department through our accounting procedure.

And in cross-examination:—

Q. What determined the time at which you decided to sell that car? —A. The mileage and the general condition of it.

Q. Was there any average mileage?—A. We think economically that it is sound business to replace those vehicles operated in our business at somewhere between 6,000, 10,000 or 12,000 miles.

And further:—

Q. How long would you say it would take a car to run that?—A. It varied a great deal.

Q. Can you give me any idea?—A. Normally it would take to put 6,000 miles on a car—and I will deal with 6,000 miles as an illustration—on one car it might take five months, on another car it might take three months to put the same 6,000 miles on.

Further:—

A. Yes, I would say an average to put 6,000 miles on would be somewhere around five months.

The intention of the officers of the respondent corporation with regard to the cars in question is relevant, as will be stated later, and the foregoing testimony will be considered in that connection.

Referring to the summary of Ex. 1 set out earlier herein, it will be noted that the aggregate purchase prices of the twelve cars in question was $22,342.01 and that the aggregate selling prices of the same was $25,001.38, or an excess of selling prices over purchase prices of $2,659.37. Without applying the depreciation of $4,337.30, therefore the respondent corporation would have made a profit on these twelve cars of $2,659.37.

It is true that three of the cars shown in Ex. 1 were sold at losses of $15.33, .06c and $74.46 or together $89.85, but the profit on the remaining nine cars, that is the difference between the purchase prices and the selling prices was $2,749.22 or a net excess of selling prices over purchase prices of $2,659.37.

The profit of $6,996.67 shown in Ex. 1 is therefore made up of the amount charged for depreciation, $4,337.30 and $2,659.37.

As already stated, the respondent corporation submits that the provisions of section 8, chapter 25, R.S.C. 1949, now section 144 of chapter 148, R.S.C. 1952, preclude the appellant from treating as inventory the motor vehicles designated as service and salesmen's cars.

A similar point was dealt with by Cameron J. in *Minister of National Revenue* v. *British American Motors Toronto Limited,* (1), as follows:—

> In my view, the mere fact that a concession of this nature had been made to a taxpayer in one year, does not, in the absence of any statutory provisions to the contrary, preclude the Minister from taking another view of the facts in a later year when he has more complete data on the subject matter. The provisions of s.42(4) of the Income Tax Act, (1948) (now s.46(4) of the Income Tax Act as amended by chapter 148, R.S.C. 1952) empowering the Minister to reassess or make additional assessments in certain cases within six years from the day of the original assessment, would seem to be a fair indication that a previous assessment is not in all cases final and conclusive, but may be reconsidered in the light of subsequent evidence.

In support of this statement the learned judge cites *Gloucester Railway Carriage and Wagon Co.* v. *Inland Revenue Commissioners,* (2), and the finding of the special commissioners cited at page 472.

While the decision of one judge of this Court is not binding on another, I accept the foregoing as a correct application of the provisions of the statute.

The respondent corporation acknowledges that the sole issue in these proceedings is the determination as to whether the motor vehicles or "automotive equipment" set forth in Ex. 1 were capital assets and consequently the profit arising under their disposition was a capital profit not forming part of the respondent corporation's taxable income under section 20(1) of the Act.

The intention of a corporation, acting through its officers, is relevant to the consideration of a question of this nature as is established by the following authorities, and the method of proof is in effect stated in Halsbury, volume XIII, pages 565 and 566 as follows:—

> The state of a person's mind may be proved whenever it is material. Intention, therefore, may be proved by the direct testimony of the party whose intention is in question; . . . . and much more often, be established circumstantially by the party's conduct, whether prior to, contemporaneous

(1) [1953] Ex.C.R. 153 at 156. (2) [1925] A.C. 469.

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with, or subsequent to the act in question. When the act is unequivocal, the proof that it was done may of itself be evidence of the intention which the nature of the act conveys.

That the intention of a corporation acting through its officers may be binding not only on its shareholders but strangers and even revenue authorities has been established in a number of cases.

In *Bouch* v. *Sproule* (1), the question was whether a number of shares issued as a bonus were capital or income of the estate of a deceased shareholder, and it was held by the House of Lords that the question depended upon the action and intention of the company and that what it declared to be capital was capital as between the parties interested in the trust estate of which the shares formed a part.

Lord Herschell said at page 398:—

> I come now to the question whether the company did in the present case distribute the accumulated profits as dividend, or convert them into capital.

and at page 399:—

> I cannot, therefore, avoid the conclusion that the substance of the whole transaction was, and was intended to be, to convert the undivided profits into paid-up capital upon newly-created shares.

and further at the same page:—

> Upon the whole, then, I am of opinion that the company did not pay, or intend to pay, any sum as dividend, but intended to and did appropriate the undivided profit dealt with as an increase of the capital stock in the concern.

Lord Watson said at pages 404 and 405:—

> I am unable to resist the conclusion that, in adopting the scheme recommended by the directors the company must have intended that each shareholder should get an allotment of new shares, . . . It (the report) states expressly that if the shareholders sanctioned these proposals . . . .

and further at page 405, after stating that the shareholders had sanctioned these proposals, said:—

> If I am right in my conclusion the substantial bonus which was meant to be given to each shareholder was not a money payment but a proportional share of the increased capital of the company.

Lord Bramwell and Lord FitzGerald agreed.

In *Commissioners of Inland Revenue* v. *Blott* and *Commissioners of Inland Revenue* v. *Greenwood,* reported together (2), a company having by its articles power to do so

(1)(1887) 12 A.C. 385. (2) [1920] 1 K.B. 114.

passed a resolution declaring that out of its undivided profits a bonus should be paid to its shareholders and authorizing in satisfaction of that bonus a distribution among its shareholders of certain of its unissued shares credited as fully paid up and the respondent Blott's shares were allotted to him accordingly.

For the Commissioners of Inland Revenue it was contended that the shares received by the respondent were income and that the rule in *Bouch* v. *Sproule* did not apply, and for the respondent Blott that, following the rule in *Bouch* v. *Sproule,* they should have been treated as a distribution of capital. The special commissioners had held that the rule in *Bouch* v. *Sproule* applied and discharged the assessment appealed against.

In the King's Bench Division on special case stated by the special commissioners, it was argued for the respondent that the rule in *Bouch* v. *Sproule* applied and that:—

> If the intention of the company is the governing factor as between life tenant and remainder man it must equally be so as between subject and the Crown.

The appeal of the commissioners was dismissed.

The Commissioners of Inland Revenue appealed to the House of Lords (1), and Viscount Haldane at page 181 said:—

> *Bouch* v. *Sproule* is relied on as decisive of the principle to be applied, as being that the company itself can decide conclusively whether what is given is given as capital or income.

and at page 185:—

> It appears to me that the Court of Appeal have rightly held that the question is concluded adversely to the contention of the Crown by the decision of this House in *Bouche* v. *Sproule.*

and at page 188:—

> I am, therefore, of opinion, both on principle and on authority, that the transaction in the present case was one in which the company was in law dominant on the question whether the money in question was to be capital or income for all purposes, ...

Viscount Finlay and Viscount Cave concurred with Viscount Haldane,—Lord Dunedin and Lord Sumner dissenting.

Lord Sumner stated at page 218:—

> In any literal sense of the word intention has nothing to do with the matter . . . .the company, insofar as intention is a mental act, was

(1) [1921] 2 A.C. 171.

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incapable of having any intention at all. . . . . .The intention, which the final decision assumed, was one of those so-called intentions which the law imputes; it is the legal construction put on something done in fact.

In *Bagg* v. *The Minister of National Revenue* (1), a similar problem was considered by O'Connor, J. and he held that the whole of a company's undistributed income had been capitalized but not the good-will.

On appeal to the Supreme Court of Canada (2), Rand, J. said at page 589:—

An increase of capital assets may be effected in several ways, but where the shares are of one class only with the same rights, I see no reason why the company by such action as was taken here, cannot appropriate profits to lost capital. Whether it does so is a question of intention, and it must appear that the appropriation was to be irrevocable.

Kellock, J. who dissented, stated at page 595:—

Such a change must, in the first place, depend upon some act of the company with the intention of appropriating income to capital.

The true intention of the respondent corporation, acting through its officers, with regard to, and its actual dealings with, the twelve cars sold during the year 1949 are questions of fact; but whether the profits on their sales were capital gains or income is a question of law.

Was it the intention of the president, treasurer and general manager of the respondent corporation, who, according to the evidence, controlled its operations, to make the cars under consideration part of its plant and therefore capital assets?

All the matters permanently used for the purposes of trade, as distinguished from the fluctuating stock, are commonly included in the term "plant".

It consists sometimes of things which are fixed, as for example, counters, heating, gas, and other apparatus and things of that kind, and in other cases of horses, locomotives and the like, which are in this sense only fixed that they form a part of the permanent establishment intended to be replaced when dead or worn out as the case may be. Per Wood V.C. in *Blake* v. *Shaw*, (3).

In *Bagg* v. *The Minister of National Revenue*, (*supra*), Rand, J. said at page 589 dealing with appropriations to capital:—

It must appear that the appropriation was to be irrevocable.

The evidence of the president, treasurer and general manager of the respondent corporation, already quoted, does not indicate that the cars in question were to be made plant

(1) [1948] Ex. C.R. 244. (2) [1949] S.C.R. 574.
(3) (1860) John. 732 at 734.

within the definition of that word given by Wood V. C. in *Blake* v. *Shaw* (*supra*). They were not to form part of the permanent establishment or intended to be kept and replaced when worn out. On the contrary, the intention was to use them until they had been driven on an average of about 6,000 miles or "somewhere around five months." Such use of these vehicles would not result in their being worn out and require replacement in the sense that a machine or tool used in operations may be worn out and require replacement. He said further:—

> We think economically that it is sound business to replace those vehicles operated in our business at somewhere between 6,000, 10,000 or 12,000 miles.

Ex. 1, filed on behalf of the respondent corporation, shows, as already stated, that the aggregate selling prices of these cars exceeded by $2,659.37 their aggregate wholesale prices although it is true that three of the same were sold at small losses.

It can therefore be deduced that when the president, treasurer and general manager of the respondent corporation stated that "We think economically that it is sound business to replace those vehicles . . . at somewhere between 6,000, 10,000 or 12,000 miles" he had in mind, and was expressing his intention, that they should be sold while they would still bring more than the prices at which they were purchased and that there was no intention of using them until they were worn out.

It is clear from the evidence that the vehicles in question were purchased from the manufacturers in the ordinary course of business and, as a whole, sold at a profit, commissions being paid to salesmen in cases in which they effected the sales.

It is true that they were carried on its books as capital assets and that in its Income Tax Returns for the years 1947 and 1948, as well as for the year 1949, a number of vehicles designated "service and salesmen's cars" had been shown among its fixed assets; that eight of the twelve cars in question sold during the year 1949 had been carried over from the year 1948.

It has, however, been held many times that mere bookkeeping is not conclusive.

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In *J. & M. Craig (Kilmarnock) Ltd.* v. *Inland Revenue* (1), Lord Johnston said at page 349 in dealing with book-keeping entries:—

> Figures adopted for bookkeeping purposes can be no true guide to the ascertainment of profit and loss.

and further:—

> The Inland Revenue are not entitled as matter of course to hold the company to entries made in their books for purely bookkeeping purposes and these entries may in many cases be wholly disregarded, and that for two reasons:—The first a general reason, viz., that the Revenue cannot have it both ways; they cannot accept entries in a company's books when they find them to be to the advantage of the fisc, and disregard them when they are to its disavantage. They invariably set aside, and rightly so, entries which favour a company, but do not give the real results of their business. And I do not think that they can be allowed to hold a company to entries which favour the Revenue, but equally do not show the real results of their business. etc. etc.

This ruling was approved in *Doughty* v. *Commissioner of Taxes* (2).

In *Inland Revenue* v. *Scottish Automobile and General Insurance Company* (3), the Lord President (Clyde) said at page 94:—

> The way in which a particular trader keeps his books does not determine, or help much in determining, what is a capital profit and what is a revenue profit.

In *Cowen's Ideal Stamping Company Limited* v. *Inland Revenue* (4), the Court approved the Commissioners' action in not accepting in toto the method in which the company was keeping its books.

The principles on which the foregoing decisions are based would also apply to the manner in which the cars in question were shown in the respondent corporation's Income Tax Returns.

I am therefore constrained to find as facts that it was not the true intention of the respondent corporation to appropriate these cars to plant, i.e., capital, and that it did not actually deal with them as capital assets.

Were the profits on the sale of the cars in question capital gains or income?

The answer to this question may seem to follow logically from the findings of fact but the following cases, though some were decided under other statutes, are of assistance:—

(1) [1914] S.C. 338.
(2) [1927] A.C. 327 at 336.
(3) [1932] S.C. 87.
(4) (1935) 19 T.C. 155.

In *Californian Copper Syndicate Limited* v. *Harris* (1), the Lord Justice Clerk (Macdonald) applied the test:—

> Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

In this case, the syndicate had been formed *inter alia* to acquire copper and other mines and of £28,332 realized by sale of shares, £24,000 was invested in a copper bearing field in the United States which was subsequently sold to another company for £300,000 in fully paid up shares of that company. Although the sale price was to be paid in shares the Court held that the profit was income.

This judgment was approved by Lord Dunedin in *Commissioner of Taxes* v. *Melbourne Trust Limited* (2).

In *Gloucester Railway Carriage & Wagon Co. Ltd.* v. *Inland Revenue Commissioners* (3), cited by Cameron, J. in the case of *Minister of National Revenue* v. *British American Motors Toronto Limited* (*supra*), the Commissioners said at page 472:—

> We do not regard ourselves as precluded by the fact that as long as the wagons were left, they were treated "as plant and machinery" subject to wear and tear, from deciding that they are stock in trade when they are sold, even though let under tenancy agreements, for they seem to us to have in fact the one or other aspect according as they are regarded from the point of view of the users or the company.

A case stated by the Commissioners was heard before Rowlatt, J. (reported (4)) and he said at page 694:—

> On the part of the appellant company it is said that there were really two businesses. They were a manufacturing company and a company which let out wagons as a separate business. The wagons when they were put on the hire list were brought into the accounts at a price which allowed for a profit to the manufacturers as if that were a separate business. But the businesses were never really separated.

and further at pages 694 and 695:—

> It is said for the appellant company that, even if the businesses were not separate, the transaction was a realisation of plant. On the other hand it is said for the Crown that the appellant company manufactures and sells wagons, and although it does not always sell them en bloc, there is no difference in principle between the sale in question and an ordinary trade receipt.
>
> I do not think the case is quite so clear as either side put it, and the commissioners have not recorded a finding in terms that this is a trade receipt. That, however, is in effect how they have looked at it; they have declined to regard the two businesses of manufacturing and letting on hire

(1) (1904) 5 T.C. 159 at 166.
(2) [1914] A.C. 1010.
(3) [1925] A.C. 469.
(4) (1923) 129 L.T.R. 691.

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as separate from each other. On the contrary, they have found that the profit made by the appellant company from the sale is simply a profit made by a company whose business it was to make a profit out of wagons in one way or another. The commissioners have taken this view of the facts, and I cannot say they were wrong.

On appeal to the Court of Appeal (reported (1)) the appeal was dismissed.

In the course of his judgment Pollock, M.R. said that it was argued that the decision of the Commissioners was upon a question of fact and could not therefore be reviewed but he thought the finding of the Commissioners was one of mixed facts and law and therefore open to review.

Warrington, L.J. and Eve, J. at page 105 held that:—

> The question whether the company carried on one business or two businesses was one of fact, and in dealing with it there was no room for misdirection in point of law. On the facts as the Commissioners had found them there was no ground for interfering with their decision. But, assuming that the question in part depended on an inference of law to be drawn from the facts, their Lordships thought that the wagons were sold in the ordinary course of the company's trade, and could not be regarded as having been realised in the winding up of a severable part of the company's business.

On the appeal to the House of Lords which was dismissed, Lord Dunedin said at pages 474 and 475:—

> The appellants argue that this is really a capital increment; and to say so they call these wagons plant of the hiring business. I am of opinion that in calling them plant they really beg the whole question. The Commissioners have found—and I think it is the fact—that there was here one business. . . . .There is no similarity whatever between these wagons and plant in the proper sense, e.g., machinery, or between them and investments the sale of which plant or investments at a price greater than that at which they had been acquired would be a capital increment and not an item of income.

In *Anderson Logging Company* v. *The King* (2), a company was incorporated to take over as a going concern a logging business and had power to acquire timber lands with a view to dealing in them and turning them to account for the profit of the company. At page 49 Duff, J. said:—

> The appellant company is a company incorporated for the purpose of making a profit by carrying on business in various ways including, as already mentioned, by buying timber lands and dealing in them. It is difficult to discover any reason derived from the history of the operations of the company for thinking that in buying these timber limits the company did not envisage the course it actually pursued for turning these limits to account for its profit as at least a possible contingency; and, assuming that the correct inference from the true facts is that the limits

(1) [1924] W.N. 105. (2) [1924] S.C.R. 45.

were purchased with the intention of turning them to account for profit in any way which might present itself as the most convenient, including the sale of them, the proper conclusion seems to be that the assessor was right in treating this profit as income.

And at page 56:—

The sole raison d'etre of a public company is to have a business and to carry it on. If the transaction in question belongs to a class of profit-making operations contemplated by the memorandum of association, prima facie, at all events, the profit derived from it is a profit derived from the business of the company.

On appeal to the Privy Council reported sub nom. *The King* v. *Anderson Logging Company Limited* (1), Lord Dunedin said at page 212:—

It may here be as well to say that their Lordships have not the slightest doubt that the judgment of the Supreme Court on the main question was right, being indeed entirely in conformity with the case of *Commissioner of Taxes (Victoria)* v. *Melbourne Trust,* (1914) A.C. 1001.

In *Cooper* v. *Stubbs* (2), Warrington, L.J. in considering the circumstances of that case said:—

The question therefore is simply this, were these dealings and transactions entered into with a view to producing, in the result, income or revenue for the person who entered into them? If they were, then in my opinion profits arising from them were annual gains or profits within the meaning of para. 1(*b*) of Sch. D.

In *Commissioner of Taxes* v. *British Australian Wool Realization Association Ltd.* (3), while on the facts it was held that a profit made was a capital gain, Lord Blanesburgh, who delivered the judgment of the judicial committee, said at page 250:—

To their Lordships, therefore, there is disclosed, on their view of the facts here, a case entirely within the terms of the following words from the judgment in *Californian Copper Syndicate* v. *Harris,* (supra), which have since been so often cited with approval: 'it is quite a well settled principle in dealing with questions of assessment of income tax, that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit . . . assessable to income tax.'

And at page 251 in making a distinction between the realization of assets by an individual and a corporation he said:—

A company is so bounded by its memorandum that it may be both permissible and essential to consider its authorized objects in connection with the actual transaction in question and even to seek for the principal purpose of its formation.

(1) [1917-27] C.T.C. 210. (2) [1925] 2 K.B. 753 at 769.
(3) [1931] A.C. 224.

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And at page 252 he quoted Rowlatt, J. in *Alabama Coal Co.* v. *Mylam* (1):—

> Merely realizing is not trading.

In *Spiers and Son Ltd.* v. *Ogden (H. M. Inspector of Taxes)* (2), Finlay, J. said at pages 125 and 126:—

> The general principle is laid down in the very well-known case, which has been constantly referred to since, of the *Californian Copper Syndicate,* reported in 5 T.C. at page 159 and the judgment at page 165. There are many other cases (which he cited including *Gloucester Railway Carriage & Wagon Co. Ltd.* v. *Inland Revenue Commissioners,* supra). These cases, all of them, seem to me to be simply illustrations of the general principle which was clearly expressed in the judgment of the Lord Justice Clerk in the *Californian Copper Syndicate,* and I think that what the cases show is that you have to look at the whole of the circumstances of the case and arrive at a conclusion on this: Was this the carrying on of a business or was it simply the realization of a capital asset? To take a case perfectly clearly on one side of the law, if, say a bank, finds that it does not want some premises and sells them, no one would for a moment suggest that because the bank happens to be able to sell the premises for a good deal larger price than it gave for them, that was an assessable profit of banking business. Of course it is not. That is a case perfectly clearly on what we may call from the taxpayer's point of view the right side of the line. Innumerable illustrations may be put. The Wagon case affords quite a good illustration on the other side of the line, but I am not going to multiply references to cases or to multiply illustrations. They all seem to me to be merely applications to particular facts of a general principle which is perfectly well established.

In *Minister of National Revenue* v. *Walker* (3), Hyndman, D.J. said at page 7 in applying the test:—

> I infer that his intention in embarking on this business was to make profits out of it. If that was his intention, then I think it can be said he was engaged in a scheme other than a hobby, or for amusement, and any winnings would be assessable to tax.

The facts in this case were that the taxpayer had regularly frequented race tracks during the racing seasons and over a period of years had won considerable money by betting.

In *Minister of National Revenue* v. *British and American Motors Toronto Ltd.* (*supra*), Cameron, J. had to deal with a similar problem although in that case the vehicles under consideration had been carried in an inventory account and were not segregated from its normal buying and selling operations. He found that they were not worn out or obsolete and said at page 163:—

> I find it impossible to reach any other conclusion than that they were always considered as part of the inventory which would later be sold in

(1) 11 T.C. 232 at 252. (2) [1932] T.C. 117.
(3) [1952] Ex. C.R. 1.

the normal course of business. It is true that they were temporarily removed from the stock of cars immediately available for sale. For a short period they were held for use of the employees pending sale, but the primary purpose of the respondent was that they would be sold. I find that they were not service cars or plant in any ordinary or proper sense.

It having been found as facts that it was not the true intention of the respondent corporation, acting through its officers, to allocate the cars in question to capital as plant and that they were dealt with, that is purchased and sold, as cars ordinarily carried as stock-in-trade, although temporarily used by employees of the respondent corporation, it follows from the foregoing authorities that notwithstanding the method of bookeeping used, and notwithstanding that they were shown as fixed assets in the Income Tax Returns of the respondent corporation, their purchase and sale was really the carrying on of part of the respondent corporation's business which by its Letters Patent it was authorized to carry on viz., "to buy, sell, import, export, exchange, rebuild, repair, maintain and generally deal in all kinds of automobiles . . ."

And it also follows that the profit on the sales of the cars in question was income within the meaning of sections 3 and 127(1)(*e*) of the Income Tax Act, 1948, chapter 52 of that year (now sections 3 and 139(1)(*e*) of chapter 148, R.S.C. 1952), which are as follows:—

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) business, (previously businesses)

(*b*) property, and

(*c*) offices and employments.

139(1)(*e*) 'business' includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

The appeal will therefore be allowed, the assessment restored and the appellant will have his costs.

Judgment accordingly.