BETWEEN:

OTHELIA TUKE .....APPELLANT;

1963
Oct. 3
Oct. 16

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

Revenue—Income—Income Tax—Theft of taxpayer's money and jewellery —Whether deductible from taxable income—Business loss—Expenditure for preservation of capital asset—Income Tax Act, R.S.C. 1952, c. 148, s. 12 (1)(a), (b) and (h).

Appellant taught school in Brampton, Ontario and owned and operated a boarding house in Toronto, which was supervised by one of her tenants in her absence. She maintained two bank accounts, the one in Toronto being used exclusively in connection with the operation of the boarding house. This property was encumbered with three mortgages and when she defaulted in payment of the third mortgage, the holder thereof commenced foreclosure proceedings. In an attempt to raise the funds to pay the arrears owing on the mortgage, appellant borrowed $1,000 from the supervisor of her boarding house and gave him jewellery and heirlooms valued by him at $250 as partial security. He gave her the $1,000 in the form of a certified cheque. The appellant also withdrew $500 from her Toronto bank account. She then gave the certified cheque and the $500 in cash to the supervisor with instructions to negotiate a settlement with the third mortgagee. He was unsuccessful in this and placed the cash, certified cheque and the jewellery in a box which he locked and placed in the appellant's rooms in the boarding house, the door to which he also locked.

Shortly thereafter sheriff's officers removed all appellant's goods from the boarding house, including those used by the tenants and piled them

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on the street. The supervisor found the abovementioned box when he arrived on the scene but it had been rifled and the $500 cash and the jewellery were missing. Appellant forthwith settled the claim of the 3rd mortgagee by payment of $1,850. Subsequently, in completing her income tax returns, appellant claimed as deductions as outlays and expenses laid out to earn her reported rental income, the value of the stolen jewellery and cash, the amount by which the money required to be paid to the third mortgagee exceeded the amount by which the mortgage was in default and the cost of moving her belongings back into the boarding house.

Held: That the sum of $500 which was stolen was income already earned from the operation of the boarding house and that the theft thereof had nothing whatever to do with the income earning activities of the appellant, nor was it a loss in the normal course of the business conducted by her.

2. The same considerations apply to the theft of the jewellery. In addition, the jewellery was her personal property pledged to obtain funds, the expenditure of which was a capital outlay.

3. The payment made to restore the third mortgage to good standing was an expenditure of a capital nature for the preservation of a capital asset.

4. Appeal dismissed.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Cattanach at Toronto.

Othelia Tuke on her own behalf.

T. Z. Boles and *E. E. Campbell* for respondent.

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

CATTANACH J. now (October 16, 1963) delivered the following judgment:

This is an appeal against the appellant's income tax assessment for the taxation year ending December 31, 1960.

The appellant was employed during part of the taxation year as a teacher at Brampton, Ontario and also derived income from a property known as 591 Dovercourt Road, in the City of Toronto, Ontario by letting furnished portions of the premises, while retaining a part for her own occupancy.

Her employment at Brampton necessitated prolonged absences from the house in Toronto and accordingly she appointed one of her tenants and a fellow countryman of

Czechoslovakian origin to act as a supervisor of the premises.

The house had been bought by the appellant for $18,500. The property was subject to four mortgages, the principal due thereon in the 1960 taxation year being the respective amounts of $7,500, $4,500, $1,450 and $1,000 with interest at the respective rates of 6 percent, 6½ percent, 6 percent and 10 percent.

The appellant had difficulty in making the payments. During the taxation year the holder of the third mortgage began proceedings for foreclosure and recovery of the outstanding principal of $1,450. Previously, the holder of the third mortgage had obtained a judgment for debt in the First Division Court of the County of York in the amount of $412.59 inclusive of costs and obtained a Writ of Execution dated August 19, 1959.

The action for foreclosure and recovery on the covenant was tried and judgment given against the appellant herein, a reference being made to the Local Master to compute and determine the amount owing.

The appellant arranged to borrow $1,000 from the supervisor of her house giving him, as partial security for the loan, personal jewellery and heirlooms which were valued by him at $250. The supervisor then gave the appellant a certified cheque for the amount of $1,000 payable to her.

The appellant had two bank accounts, one in Brampton in which she deposited her earnings as a teacher and another in the City of Toronto which she used exclusively in connection with the operation of the house. In this Toronto bank account she deposited all receipts for rent and from this account she drew cheques for the payment of obligations incurred in operating the premises. Accordingly the appellant withdrew $500 from this bank account which, together with the loan she had obtained from the supervisor (a total of $1500), she placed in the hands of the supervisor with instructions to negotiate a settlement of the judgments against her with the solicitor for the holder of the third mortgage on the appellant's property.

The supervisor approached the solicitor for this purpose and testified that he was informed since the determination of the precise amount owing had been referred to the Local Master, the matter should be left in abeyance pending the

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Master's determination. In any event the solicitor did not accept a lesser amount and was insistent upon payment of the full amount of the judgments.

The supervisor accordingly returned to 591 Dovercourt Road and placed the $500 in cash, the certified cheque for $1,000 and the jewellery in a box which he locked and placed the box in the rooms occupied by the appellant, the door to which he also locked securely. The appellant was absent during this time being engaged in her duties at Brampton.

What happened next was not clearly described in evidence but I can only conclude that satisfactory arrangements were not made to pay the judgments because shortly thereafter the sheriff's officers removed all of the appellant's household goods from the premises, including those used by the tenants, and piled them in the street.

The supervisor, on arriving at the scene, began an immediate search for the box which he found rifled of the $500 cash and jewellery. The certified cheque was not taken.

The appellant, on being notified by the supervisor of her eviction from the premises, forthwith settled the claim on the Writ of Foreclosure and the Writ of Execution on the Division Court judgment by paying an amount of $1850.

In completing her income tax return for the taxation year ending December 31, 1960, the appellant claimed as a deduction, outlays and expenses laid out to earn her reported rental income, in the total amount of $1190 made up of the following items:

1. Stolen business money prepared for payment of the mortgage	$500
2. Jewellery and valuables stolen	250
3. The difference between the principal amount of the third mortgage ($1,450) and the amount of $1,850 the appellant was obliged to pay in settlement of the judgements against her	400
4. The cost of moving her furnishings into the premises following her eviction	40

These four items were set forth by the appellant in her return under the heading of "Loss Incurred by Eviction of the House."

By notice of re-assessment mailed January 31, 1962 the Minister disallowed the "loss of eviction" as an unallowable deduction. The appellant filed a Notice of Objection dated March 1, 1962. By notification dated July 27, 1962 the Minister confirmed the assessment on the ground that the "loss incurred by eviction of the house" claimed as a deduction from income by the appellant was a capital loss within the meaning of s. 12(1)(b) of the *Income Tax Act*, 1952, Revised Statutes of Canada, c. 148.

It is from this assessment that an appeal is brought to this Court.

The appellant, who appeared on her own behalf without benefit of counsel, strenuously insisted that the deduction claimed was a proper one as being outlays or expenses made or incurred by her for the purpose of gaining or providing income from the business conducted by her. In support of this contention the appellant emphasized that the $500 in cash which was lost by theft came from the funds deposited in her Toronto bank account, the source of which was receipts for rents from the house and that all expenditures required in connection with the operation of that business were made from this same bank account. The stolen jewellery, valued at $250, had been pledged to raise part of the money with which she had hoped to compromise the judgments against her. The difference of $400 between the principal amount of the third mortgage and the amount the appellant was eventually obliged to pay to satisfy the judgments against her, she maintained was a management cost.

However much one may sympathize with the appellant in her loss by theft and other difficulties, I cannot agree with her contentions.

In my view none of the losses and expenditures claimed by the appellant as a deduction under s. 12(1)(*a*) satisfy the test expressed by Lord Davey in *Strong & Co. Ltd. v. Woodifield*[1], as follows:

> It is not enough that the disbursement is made in the course of, or arises out of, or is connected with the trade, or is made out of profit of the trade. It must be made for the purpose of earning the profits.

The cash in the amount of $500 which was the subject of theft was income already earned. The action of the

[1] [1906] A.C. 448 at 453.

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unknown thief had nothing whatsoever to do with the income earning activities of the appellant and the loss so sustained by the appellant was not a loss in the normal course of the business conducted by her.

The foregoing comments are equally applicable to the loss sustained by the appellant in the theft of her jewellery and in addition such wares were her personal possessions pledged to obtain funds, the expenditure of which I consider to have been a capital outlay.

Neither was the amount of $400 paid in satisfaction of the judgments against her and claimed by the appellant as a deduction, an expenditure made for the purpose of earning profits, but rather such was an expense of a capital nature for the preservation of a capital asset since the appellant would otherwise have been dispossessed of the house without which she could not carry on her trade.

The sum of $40 paid by the appellant to move the furnishings back into the premises was not a deductible expense. The cost of moving that portion of the furnishings which were used by the appellant personally is clearly precluded as a deduction by s. 12(1)(*h*) of the Act, being personal or living expenses. The remaining furnishings which were supplied for use of tenants were assets essential to the conduct of the appellant's business of renting furnished premises and as such that portion of the cost of $40 to move these furnishings back was an outlay on account of capital within the provisions of s. 12(1)(*b*) of the Act, to enable her to continue that business.

For the reasons outlined, I have no hesitation in finding that the Minister was right in assessing the appellant as he did and the appeal must be dismissed. The Minister is also entitled to costs to be taxed in the usual way.

Judgment accordingly.