BETWEEN:

CONSOLIDATED BUILDING CORPORATION LIMITED .... APPELLANT;

AND

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

Toronto 1965 June 24, 25 Ottawa Aug. 13

Income Tax—Real estate company—Principal business sale of houses—Building built for investment—Sale to preserve bank credit—Whether profit from business or trading venture. Income Tax Act, ss. 3, 4 and 139(1)(e).

Appellant company was mainly engaged in the business of building houses for sale on a large scale in the Toronto area but on four occasions built or bought properties which were leased to others. On the last of these occasions, in 1959, it constructed a large office building but as the cost of the building greatly exceeded the estimated cost the company sold the building in 1960 in order to preserve its bank credit, making a profit of $588,000, for which it was assessed to tax. On appeal the Court reviewed the objects and actual operations of the company and concluded that the transaction was part and parcel of the general trading operations of the company.

Held, dismissing the appeal, appellant had not demolished the basic fact on which the assessment rested, *viz* that the profit was from a business or adventure in the nature of trade.

[*Johnston v. M.N.R.* [1948] S C.R. 486; *Sutton Lumber and Trading Co. Ltd. v. M.N.R.* [1953] 2 S.C.R. 77, p. 83 applied.]

Income tax—Lease-option agreement—99 year lease with option to purchase—Determination of capital cost allowance—"Price fixed by contract or arrangement", meaning of—Income Tax Act, ss. 11(1)(a), 18(1)(b).

In November 1960 appellant as lessee leased an office building for 99 years at specified rentals ranging from approximately $240,000 a year for the first 24 years to approximately $175,000 a year for the next 55 years and approximately $575,000 a year for the final 20 years, plus additional amounts varying with the gross rental received by the company from tenants The contract also gave appellant an option to purchase the building at the end of the lease for $1,500,000. In its 1961 taxation year, which ended on February 28, appellant claimed a capital cost allowance of some $1,400,000, being 5 per cent of the total of the specified annual rentals for the 99-year term plus the sum payable upon exercise of the option less the value of the land, totalling approximately $28,000,000, but the Minister permitted a deduction only of the rent payable under the lease for the four months of the appellant's 1961 taxation year, approximately $81,000.

Held, dismissing the appeal, under s. 18(1) of the *Income Tax Act* appellant was entitled to a capital cost allowance calculated on $1,200,000, which was "the price fixed by the contract", i.e. the amount required to exercise the option to purchase ($1,500,000) less the value of the land ($300,000).

[*Harris v. M.N.R.* [1965] 2 Ex. C.R. 653 followed.]

1965

CONSOLIDATED BLDG. CORP. LTD. v. MINISTER OF NATIONAL REVENUE

APPEAL from income tax assessment.

H. Howard Stikeman, Q.C. and *Wolfe D. Goodman* for appellant.

T. Z. Boles and *D. G. H. Bowman* for respondent.

CATTANACH J.:—This is an appeal from an assessment under the *Income Tax Act,* R.S.C. 1952, c. 148 of Consolidated Building Corporation Limited for its taxation year ending February 28, 1961.

In this appeal there are two issues.

The first issue is whether a profit of $588,162.11 realized by the appellant upon the sale of an office building erected by the appellant on lands municipally known as 99 Avenue Road, in the City of Toronto, in the Province of Ontario, constituted income from a business or an adventure in the nature of trade within the meaning of sections 3, 4 and paragraph (*e*) of subsection (1) of section 139 of the *Income Tax Act,* as contended by the Minister, or whether the aforesaid office building was erected as an investment, for the purpose of gaining or producing rental income and not for resale, and the sale thereof became necessary through circumstances, to be related, over which the appellant had no control and that, accordingly, the sum of $588,162.11 so realized by the appellant did not constitute income within the meaning of the Act but was merely the realization of the enhancement in value of an investment, as contended by the appellant.

The second issue is whether the appellant is entitled to deduct a capital cost allowance of $1,409,391.38 which it has claimed under section 18 of the *Income Tax Act* as the said section applied to its 1961 taxation year.

By his assessment dated July 5, 1962 the Minister added to the appellant's declared income the aforesaid sum of $588,162.11 and disallowed as a deduction the capital cost allowance of $1,409,391.38 but did allow as a deduction the sum of $81,159.15 being rent paid by the appellant under a lease of the premises at 99 Avenue Road in its 1961 taxation year.

The appellant duly objected to such assessment by Notice dated September 21, 1962. As the Minister did not

1965

CONSOLIDATED BLDG. CORP. LTD. v. MINISTER OF NATIONAL REVENUE

Cattanach J.

reply to the said Notice of Objection within 180 days of the service thereof, the appellant appealed to this Court in respect of the assessment.

The appellant was incorporated pursuant to the laws of the Province of Ontario by Letters Patent dated April 4, 1957, as a private company under the name of Fairfield Builders Limited. John D. Feinberg, who was president of the appellant company at all material times testified that the appellant came into being as a result of the "merger" of four existing companies which were owned by four different groups of shareholders. He further testified that these four companies were in the business of building houses for sale. The business of these four companies was continued by the appellant. The objects for which the appellant was incorporated are set out in seven paragraphs of the Letters Patent filed in evidence as Exhibit F and may be summarized as follows: to carry on the business of builders and contractors, engineering, to purchase lands and to take mortgages for any unpaid balance of the purchase price of any land, buildings or structure sold by it and to deal in real and personal property.

Mr. Feinberg also testified that the business of the appellant was to build homes for sale and to develop raw land for building sites. The appellant frequently sold lots without having first built homes thereon.

The shares in the capital stock of the appellant were owned equally by the shareholders of the four predecessor companies.

By supplementary Letters Patent dated May 24, 1957, the original corporate name of Fairfield Builders Limited was changed to Consolidated Building Corporation Limited by which name the appellant is described in the style of cause.

By further supplementary Letters Patent dated June 2, 1961, the objects for which incorporation had been obtained were extensively varied to authorize the appellant to engage in a plethora of objects bearing some relationship to the business of builders and contractors. While neither the original objects nor the revised objects make a specific or direct reference to erecting buildings for rental purposes, nevertheless, I have no doubt that such activity would be within the corporate competence of the appellant under the

1965

CONSOLIDATED BLDG. CORP. LTD. v. MINISTER OF NATIONAL REVENUE

Cattanach J.

wide ancillary powers provided in the *Ontario Corporation Act*.

The supplementary Letters Patent dated June 2, 1961, in addition to varying the objects, converted the status of the appellant from that of a private to a public company, so that the public could be invited to subscribe to its securities, and substantially increased its authorized capital stock.

Since 1955 the appellant, either on its own behalf or through its four predecessor companies above mentioned in association with each other and under the trade name of Consolidated Building Corporation, constructed and sold about 3,800 houses located in various sub-divisions in or near Metropolitan Toronto.

Mr. Feinberg also testified that in addition to the construction of residential buildings for resale, the appellant also constructs and purchases properties for investment purposes. Among such properties he made specific mention of a residential project in Aurora, Ontario. In accordance with an arrangement with the municipal authorities the appellant was obliged to build and lease three small factory buildings to preserve the balance between residential and industrial assessment. There is no question in my mind that the appellant would sell these factories were it not for the necessity, as explained by Mr. Feinberg, of building others to maintain the proportional relationship of industrial to residential assessment. In addition he also mentioned one hundred and four garden courts or maisonnettes in the Township of Etobicoke which were held for rental purposes. However, in cross-examination Mr. Feinberg admitted frankly that the appellant offered to sell this development to the Ontario Housing Authority as low cost housing in view of the urgent need of housing of this type but the appellant's offer to sell was not accepted.

Another project of the appellant mentioned in the evidence of Mr. Feinberg is one known as Don Valley Village, undertaken in association with other interests, which is comprised of a number of single family homes which were sold and 840 apartment dwelling units. Mr. Feinberg was emphatic that these apartments were not for sale.

The fourth and last property which Mr. Feinberg mentioned in his examination in chief as being held by the

appellant for rental income is 99 Avenue Road which is the subject matter of the present appeal.

In June 1958 the appellant acquired land on the east side of Avenue Road, being municipal number 99, from Brighton Apartments Limited, a company owned and controlled by Mr. Feinberg's family, at a cost of $300,000.

In 1959 the appellant began the construction of a ten storey office and medical building in which the head office of the appellant was to be located. The original plan was for a seven storey building with two or three floors to be rented to doctors exclusively. However, as early as August, 1958 it is quite apparent from the minutes of the meetings of the executive committee of the appellant that substantially more than three floors were to be devoted to use as doctors' offices. The original plan also provided for one floor of basement parking but the revision of plans to provide for an additional three storeys of office space also necessitated a revision of the parking facilities to provide for three floors of parking by acquisition of a lot abutting the back of the property. The basement which was originally to be used for parking became a banquet room connected to the Regency Towers Hotel, located at 89 Avenue Road, by an underground tunnel. The appellant also owned the eight storey building occupied by the hotel and all furniture and equipment. The hotel business was operated through a wholly owned subsidiary of the appellant.

Mr. Feinberg testified that these changes resulted in a cost far in excess of the estimated cost.

The appellant obtained a first mortgage in the amount of $1,600,000 with the hope that the construction costs would be covered entirely by the mortgage. The appellant had a line of credit with its bank to the extent of $950,000, one of the conditions being that no more than $200,000 should be used for the acquisition of land or land development. It was a revolving type of credit, as homes were sold the proceeds went to reduce the bank loan and further money to the extent of the limit of the line of credit was then available to the appellant for its further use. While the bank had made an exception in the case of the appellant to the extent of $200,000 to permit it to acquire raw land and provide the necessary services so homes could be built by

1965

CONSOLIDATED BLDG. CORP. LTD. v. MINISTER OF NATIONAL REVENUE

Cattanach J.

the appellant, nevertheless, it was contrary to the bank's policy to have its money tied up in fixed assets.

The construction of 99 Avenue Road was undertaken by the appellant without prior consultation with its bank. However, the bank was aware that the construction costs exceeded the amount of the mortgage money that the appellant had obtained and that the appellant had an equity in the building of approximately $500,000. The appellant's application to the bank for an increase in its line of credit was refused. The appellant therefore took steps to reduce its overdraft by obtaining second mortgages on vacant land which it possessed and applied the proceeds thereof to the reduction of its bank indebtedness. The appellant decided that to preserve its bank credit, 99 Avenue Road should be sold.

To that end Mr. Feinberg began negotiations with a New York firm which suggested a sale and lease-back arrangement. However, this arrangement was not consummated because the appellant considered the terms too onerous. The appellant then engaged the services of Henry B. Sussman, the president of a real estate firm with extensive experience in the sale and purchase of larger properties to find a buyer in a sale and lease-back transaction. Mr. Sussman approached several groups unsuccessfully. After these abortive attempts to complete such a transaction, Mr. Sussman approached Alvin Rosenberg, Q.C., who was acting on behalf of a number of clients, who made an offer in the name of Ontario Asphalt Paving Materials Limited, which company was the nominee of six companies, Denver Investments Limited, Samolyn Investments Limited, Leaford Developments Limited, Minifor Developments Limited and Pettifor Developments Limited.

The appellant accepted this offer and on November 1, 1960 sold the office building at 99 Avenue Road for a consideration in cash of $1,100,000 and the assumption of an existing first mortgage then standing at $1,578,623.65 whereby the appellant realized the sum of $588,162.11 in excess of its cost. There is no dispute between the parties as to the amount of the profit so realized by the appellant but the dispute between them is as to the taxability thereof. From the $1,100,000 cash received, the appellant discharged

its obligation to the bank and the balance was put into the appellant's working capital.

During the negotiations for the sale of 99 Avenue Road, the property known as Regency Towers Hotel at 89 Avenue Road, also owned by the appellant was also to be included in the transaction because of a common right of way. A compromise was eventually worked out which permitted the sale of 99 Avenue Road without including the adjoining property at 89 Avenue Road. Incidentally, I might mention that prior to the construction of the office building at 99 Avenue Road, the appellant contemplated and attempted to dispose of 89 Avenue Road on a lease-back arrangement which did not materialize.

As part of the transaction for the sale of 99 Avenue Road, the appellant entered into a lease dated November 1, 1960, filed in evidence as Exhibit 24, with the new owners for a term of 99 years commencing on November 1, 1960 at a yearly rental of $241,529.60 per annum until December 15, 1984, i.e. the first 24 years, $175,674.84 per annum from December 16, 1984 until October 21, 2039 i.e. the next 55 years, and $575,760 per annum from November 1, 2039 until October 31, 2059, i.e. the last 20 years of the currency of the lease. The lease also provided for the payment of additional rent equal to one third of the amount by which the gross rent received from the property, less realty taxes, exceeded $269,000 per year.

Paragraph 6 of the Lease dated November 1, 1960 provides as follows:

> The Tenant shall have the option to purchase the property herein being leased at any time between the first day of October 2059 A.D. and the first day of November 2059 A.D. by paying the sum of One Million Five Hundred Thousand Dollars ($1,500,000) by cash or certified cheque, and shall be entitled to receive a deed to the property free and clear of all encumbrance upon such payment being made. Provided that if payment is not made on or before the first day of November A.D. 2059, this option shall be null and void, notwithstanding that the Tenant may or may not remain in possession of the property after said date.

These terms were arrived at by the parties following protracted bargaining over a period of approximately five months.

The rental for the first period was designed to cover the principal and interest on the mortgage plus a 10% return on the purchaser's equity of $1,100,000.

1965

CONSOLIDATED BLDG. CORP. LTD. v. MINISTER OF NATIONAL REVENUE

Cattanach J.

In the second period the annual rent was reduced because of the expiry of the mortgage on the beginning of that period.

The substantial increases during the last 20 years of the lease was based primarily upon a projection of an increase in the land value.

The total of the rental payable under the lease during its 99 year term is $26,987,827.65. When the option price of $1,500,000 is added to the total rental the result is $28,487,827.61. When $300,000, being the value of the land, is deducted, the resulting figure is $28,187,827.61 and that is the figure upon which the appellant contends it is entitled to an annual capital cost allowance of 5%, which amounts to $1,409,391.40 per annum.

I might add that, by agreement between the appellant and the new owners of 99 Avenue Road, completed on an unspecified date in December, 1961 and filed in evidence as Exhibit 23, paragraph 6 of the agreement dated November 1, 1960 (Exhibit 24) was deleted and replaced by the following language:

> The Tenant shall have the option to purchase the premises herein leased at any time during the ninety-ninth year of the term hereof or at any time during the twenty-first year after the death of the last to die of the issue now alive of the following persons:
>
> (*a*) His late Britannic Majesty King George V
>
> (*b*) Joseph P. Kennedy, father of the thirty-fifth President of the United States of America
>
> (*c*) John D. Feinberg of the City of Toronto, in the County of York, presently Chairman of the Board of Consolidated Building Corporation Limited, and
>
> (*d*) Alvin D. Rosenberg, Q.C., of the City of Toronto, in the County of York, Barrister and Solicitor
>
> whichever period shall first occur, by paying the sum of $1,500,000 by cash or by certified cheque, and the Tenant shall then be entitled to receive a deed to the property free and clear of all encumbrances upon such payment being made. Provided that if payment is not made on or before the last day of the year for exercise of this option as set out above, this option shall be null and void notwithstanding that the Tenant may or may not remain in possession of the demised premises after the said date. A Certificate of the Secretary of State or Assistant Secretary of State of the Dominion of Canada shall be conclusive proof of the date upon which the last of the issue of His late Britannic Majesty King George V died.

However, since such amendment was effective subsequent to the appellant's 1961 fiscal year the present appeal must be considered upon the basis of the unamended option

clause being paragraph 6 as appearing in the agreement dated November 1, 1960 and reproduced above.

It was also agreed at trial that the amount fixed by the contract or arrangement as the price at which the property might be repurchased by the appellant is an amount not less than 60% of the fair market value of the property at the time the lease for 99 years was entered into. Therefore, the exception in subsection 4 of section 18 is not applicable.

Turning to the first issue in the present appeal, that is whether the profit of $588,162.11 arising from the appellant's disposition of 99 Avenue Road constituted part of its income as profit from its business within the meaning of sections 3 and 4 of the *Income Tax Act*, I am of the opinion that the Minister was right in adding that amount to the appellant's income for its 1961 taxation year as he did.

The objects for which the appellant was incorporated and as subsequently amended, though unduly prolix, are those of the wide and general character which is normally appropriate to company trading in real estate. However, one is not entitled to infer from the circumstance that a company has been incorporated for trading purposes that the transactions in which it engages necessarily constitute any particular transaction a part of the company's trade or business. The fact that a particular transaction falls within the objects contemplated by the Letters Patent is merely a *prima facie* indication that a profit so derived is a profit derived from the business of the company. However Locke J. in *Sutton Lumber and Trading Co. Ltd. v. M.N.R.*[1] said:

> The question to be decided is not as to what business or trade the company might have carried on under its memorandum, but rather what was in truth the business it did engage in.

To determine this, I must consider what the appellant has actually done since its incorporation. The appellant owes its existence to the fact that it was a convenient entity through which the business of building and selling houses carried on by its four predecessor companies in concert could be conveniently continued. In this business the appellant was successful selling and disposing of in excess of 3,000 houses. The appellant was so successful that when a sufficient supply of serviced lots was not readily

[1] [1953] 2 S.C.R. 77 at p. 83.

1965

CONSOLIDATED BLDG. CORP. LTD. v. MINISTER OF NATIONAL REVENUE

Cattanach J.

available it adopted the policy of acquiring raw land supplying the services and constructing houses thereon. In many instances the appellant sold such building lots to other builders when it was advantageous to do so.

Mr. Feinberg also testified that in addition to constructing residential and commercial buildings for sale the appellant also constructed properties for investment purposes as illustration of which he mentioned four such properties as being retained by the appellant:

(1) three factories built in connection with a residential project in Aurora;

(2) a number of garden courts in Etobicoke;

(3) Don Valley Village, undertaken as a joint venture with other interests; and

(4) 99 Avenue Road.

It transpired however that the factories in Aurora would be sold were it not for the necessity of replacing them, the garden courts were offered to the Ontario Municipal Authority, and the apartments at Don Valley Village are a joint enterprise which would, in all likelihood, require the consent of the other joint entrepreneur to this sale. This I assume because no evidence was adduced on the point and accordingly I do not know.

Mr. Feinberg admitted that the appellant was not in the least adverse to selling any of its assets which it termed investment properties whenever the opportunity arose and whenever it was advantageous to do so. If the advantage so dictated the appellant would take active steps to sell such properties. The only exceptions, as Mr. Feinberg testified, to this general policy were the apartments at Don Valley Village and 99 Avenue Road. Mr. Feinberg was quite emphatic that the apartments were not for sale and stated that 99 Avenue Road was only sold because of the circumstances above related so strongly militated against its retention.

I can see no convincing reason why 99 Avenue Road should be considered an exception to the appellant's general policy.

It is well established that a taxpayer's statement of what his intention was in entering upon a transaction, made subsequent to its date, should be carefully scrutinized.

What its intention really was may be more accurately deduced from what it actually did than from its *ex post facto* declarations.

Here the appellant erected a building designed to cater to a profitable type of tenant, the medical profession, knowing that such tenants required an expensive and technical type of accommodation. To an experienced builder such as the appellant this fact was well known. The original plans for about five floors of the building being devoted exclusively to doctors was increased by the addition of three more storeys with an appreciable increase in rental returns exceeding the additional cost of construction but necessarily increasing that cost and also resulting in greater cost for further parking facilities. These additional costs were foreseen. Instead of the cost of the building being entirely covered by the mortgage as originally contemplated by the appellant, the appellant utilized its line of credit with its bankers and acquired an equity in the building of about $500,000.

This resulted in the appellant's line of credit with its bank being placed in jeopardy to the detriment of its corporate activities as a whole, a circumstance of which the appellant could not have been unaware. The appellant, therefore, undertook deliberate steps to negotiate the sale of 99 Avenue Road, but necessarily at a price in excess of the cost to it. The appellant received $1,100,000 in cash on closing which was used to discharge its bank indebtedness thereby preserving its credit with its bank for the more effective carrying on of the appellant's corporate enterprises as a whole and the balance of the cash payment was placed in the appellant's working capital to be devoted to the same end.

Therefore, there is no doubt in my mind that this particular transaction was part and parcel of the general trading operation of the appellant conducted from its inception and that it was doing precisely what it was formed to do, namely, dealing in real estate.

Accordingly, in my opinion, the appellant has not discharged its onus which, in the language of Rand J. in *Johnston v. M.N.R.*[1], was "to demolish the basic fact on

[1] [1948] S.C.R. 486.

1965

CONSOLIDATED BLDG. CORP. LTD. v. MINISTER OF NATIONAL REVENUE

Cattanach J.

which the taxation rested". The appeal against the Minister's addition of the sum of $588,162.11, being the profit on the sale of 99 Avenue Road, to the appellant's declared income for its 1961 taxation year, is therefore unsuccessful.

I now pass on to the second issue raised in the appeal, which is whether the appellant was entitled to deduct, in computing its income, capital cost allowance of $1,409,-391.40 which it has claimed under section 18 of the *Income Tax Act* and, if so, whether the capital cost allowance claimed was properly calculated having regard to subsections (1) and (2) of section 18.

The basis for the appellant's contention is found in section 11 (1)(*a*) and section 18(1) of the *Income Tax Act* reading as follows:

11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may 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;

18. (1) A lease-option agreement, a hire-purchase agreement or other contract or arrangement for the leasing or hiring of property, except immovable property used in carrying on the business of farming, by which it is agreed that the property may, on the satisfaction of a condition, vest in the lessee or other person to whom the property is leased or hired (hereinafter in this section referred to as the "lessee") or in a person with whom the lessee does not deal at arm's length shall, for the purpose of computing the income of the lessee, be deemed to be an agreement for the sale of the property to him and rent or other consideration paid or given thereunder shall be deemed to be on account of the price of the property and not for its use; and the lessee shall, for the purpose of a deduction under paragraph (*a*) of subsection (1) of section 11 and for the purpose of section 20, be deemed to have acquired the property,

(*a*) in any case where, at the time the contract or arrangement was entered into, the lessee and the person in whom the property was vested at that time (hereinafter referred to as the "lessor") were persons not dealing at arm's length, at a capital cost equal to the capital cost thereof to the lessor, and

(*b*) in any other case, at a capital cost equal to the price fixed by the contract or arrangement minus the aggregate of all amounts paid by the lessee

(i) in the case of a contract or arrangement relating to moveable property, before the 1949 taxation year, and

(ii) in the case of any other contract or arrangement, before the 1950 taxation year,

under the contract or arrangement on account of the rent or other consideration

Counsel for the Minister contended that section 18(1) did not apply because the option granted by the owners under this leasehold agreement with the appellant dated November 1, 1960 is void as being contrary to the rule against perpetuities and therefore section 18(1) does not apply to the transaction. Counsel for the Minister went on to submit that if, contrary to the above contention, section 18(1) did apply, the appellant did not acquire depreciable property for the purpose of gaining a producing income but as part of a scheme calculated to avoid the incidence of tax, and is not entitled to capital cost allowance with respect thereto in accordance with the provisions of section 1102(1)(*c*) of the Income Tax Regulations and, being a transaction which, if allowed, would unduly and artificially reduce the appellant's income, the deduction is prohibited by section 137 of the *Income Tax Act*.

In view of the manner in which I propose to deal with this issue of the appeal it is not necessary for me to express any opinion on the foregoing contentions.

It was also contended on behalf of the Minister that on the correct interpretation of section 18, as applied to the transaction, the capital cost allowance should be computed on a capital cost of $1,500,000 less the cost of the non-depreciable land, since such amount was the price fixed by paragraph 6 of the contract or arrangement rather than on a capital cost of $28,187,827.61, being the total of the rents payable over the period of the lease and the option price less the value of the land, as contended by the appellant.

I have had the advantage of reading the judgment of my brother Thurlow in *Harris v. M.N.R.*[1], the facts of which I consider to be on all fours with those of the present appeal.

In the *Harris* case, the appellant was a successful obstetrician and the first tenant of 99 Avenue Road whereas in

[1] 64 D.T.C. 5332.

1965

CONSOLIDATED BLDG. CORP. LTD. v. MINISTER OF NATIONAL REVENUE

Cattanach J.

the present appeal the appellant is a corporate entity. A natural person has a limited life expectancy while, in theory, a corporation never dies. In the *Harris* case a service station was purchased by Douglas Leaseholds Limited who leased it to B.P. Canada Limited at an annual rental of $3,900 for 25 years. By concurrent lease Douglas Leaseholds Limited as lessor leased the same property to Harris for a period of 200 years at an annual rental of $3,100.08. Harris was required to deposit $10,000 with the lessor as security for the performances of his covenants, which was to be returned to Harris on the expiration of the lease. Harris therefore received the difference in the annual rent paid by B.P. Canada Limited of $3,900 and that of $3,100.08 paid by himself, that is $799.92. It was also agreed in the lease that Harris should have the option of purchasing the property from the lessor for $19,500 at the expiration of the term of the lease if not in default thereunder. In my view, the facts that Harris was a natural person rather than a corporation as the appellant herein is, that the lease was for 200 years rather than 99 years as in the present case, and that the lease in the *Harris* case was a concurrent one rather than a sale and lease-back as in the present case, are differences that do not form any basis for distinguishing the facts of the *Harris* case from those of the present case.

Thurlow J., in agreeing with the contention of the Minister advanced in the *Harris* case that, on the correct interpretation of section 18, the deduction must be based on the capital cost as being the price fixed by the contract for the eventual purchase, had this to say:

> On the first submission in (*f*) the matter to be determined is the capital cost to be fictitiously attributed for the purpose of s. 11(1)(*a*) to the property which is the subject matter of the fictitious purchase created by s. 18(1). This is defined in s. 18(1) as "the price fixed by the contract or arrangement" and in approaching the interpretation to be put upon these words a few observations of a general nature may be useful.
>
> First, s. 18(1) must in my opinion be taken as meaning neither more nor less than precisely what it says. Its interpretation may be influenced by reading it with the other provisions of s. 18, of which it is a part, but the principle that there is no equity about a tax is well established and there is no basis for the admission of any principle of "equitable construction".

Vide Partington v. Attorney General (1869-70) L.R. 4 H.L. 100 where Lord Cairns said at p. 122:

> "I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

The principle so expressed is usually cited in support of a taxpayer's submission but it appears to me to operate both ways.

Secondly, the subsection is plainly divided into two parts. The first is directed to achieve a statutory conversion of the contract or arrangement into an agreement for the sale of the property and to declare that the rent or other consideration which the taxpayer has agreed to pay shall be regarded as having been paid or given on account of the price of the property and not for its use. The consequence of regarding the transaction as an agreement for the sale of the property to the taxpayer is that the property of which he is then in fact only lessee, is regarded as his and in computing his income he is entitled to the deduction provided by s. 11(1)(*a*). The consequence of the declaration that the rent or other consideration paid or given shall be deemed not to have been paid or given for the use of the property is that it cannot be deducted as an expense in computing the taxpayer's income. The statute also declares that the rent or other consideration paid or given is to be regarded as paid or given on account of the price of the property. A consequence of this is that if the money was borrowed the interest on it would qualify for deduction under s. 11(1)(*c*)(ii). This part of the subsection, however, as I read it is concerned only with the statutory conversion of the transaction into an agreement of sale and with certain stated consequences which are to flow from such conversion. The definition of the capital cost of the property to the taxpayer for the purpose of calculating the deduction under s. 11(1)(*a*) to which the taxpayer is to be entitled is not dealt with in this part of the subsection but is the subject matter of the second part of it. In the second part the subsection declares that the taxpayer shall for the purpose of s. 11(1)(*a*) be deemed to have acquired the property at a capital cost equal to "the price fixed by the contract or arrangement" less, in the case of contracts made before 1950, amounts paid as rent or other consideration prior to certain stated times. Here it is I think of importance to note that the expression used is "the price fixed by the contract or arrangement" and that the expression "contract or arrangement" appeared earlier in the subsection in company with the words "for the leasing or hiring of property . . . by which it is agreed that the property may, on the satisfaction of a condition, vest in the lessee or other person to whom the property

1965

CONSOLIDATED BLDG. CORP. LTD. v. MINISTER OF NATIONAL REVENUE

Cattanach J.

is leased or hired". It is thus this contract or arrangement, rather than the "agreement for the sale of the property" fictitiously created by the subsection, which is referred to in the expression "the price fixed by the contract or arrangement".

Thirdly, in the subsection the expression "rent or other consideration paid or given thereunder" is used in contradistinction to the expression "the price fixed by the contract or arrangement" the former being used with reference to rent or consideration for the use of the property during the lease or hiring and for the option itself while the latter includes the word "price" and appears to me to refer to the consideration to be given for the property under the terms of the contract in the event of the transaction resulting in the property vesting in the taxpayer.

Fourthly, it is apparent that contracts or arrangements of the kind with which s 18(1) deals may take more than one form. One well known variety consists of a leasing or hiring at a rental but contains a provision that at the conclusion of the lease or hiring the owner will at the option of the lessee or hirer sell the property to him for the amounts paid as rental, or for parts of such amounts, in some cases with, and in others without some further consideration payable at that time. Another variety provides for payment of either a nominal or substantial payment on acquisition of the property by the lessee or hirer but does not purport to treat any part of the rental payments as part of the price payable for the property. Cases are also readily conceivable wherein no price whatever may be payable at the time of vesting as for example where the vesting might be simply dependent on some extraneous or fortuitous event In all these cases it appears to me that the determination of what is "the price fixed by the contract or arrangement" must accordingly depend on the interpretation of the particular contract or arrangement.

Next it is to be observed that Parliament in enacting s. 18 appears to have contemplated that "the price fixed by the contract or arrangement" may be less than the total rent or other consideration paid or given under the contract or arrangement since it provides in s-s. (2)(*b*) that on rescission of the contract or arrangement the amount of such rent or consideration paid in excess of the capital cost at which the lessee is deemed to have acquired the property shall be deemed to have beeen paid for use of the property and not on account of its price and would accordingly be deductible as expense in the year in which rescission occurred.

Finally, neither the remaining clauses of s-s. (1) nor the definitions of s-s. (3) nor the exclusions effected by s-s. (4) appear to me to have any influence one way or the other on the interpretation of the expression "the price fixed by the contract or arrangement" in s 18(1).

These considerations lead me to conclude that the words "rent or other consideration paid or given thereunder shall be deemed to be on account of the price of the property" do not bear the interpretation which the appellant's contention requires They do not say that rent or other consideration is deemed to be part of the "price fixed by the contract or arrangement" or of the capital cost of the property for the purpose of

s. 11(1)(*a*) but merely that for the purpose of computing the taxpayer's income rent or other consideration paid or given shall be deemed to be "on account of" the price of the property. To find what the capital cost of the property is to be for the purpose of s. 11(1)(*a*) one must look to the contract or arrangement itself.

In the present case the pertinent provision of the contract or arrangement is paragraph 6 of the indenture dated November 1, 1960 which has been quoted above.

As I accept the reasoning of Thurlow J., it is clear that as a matter of interpretation paragraph 6 means that $1,500,000 is the price and the whole price to be paid for the property at the material time. There is no other provision in the lease nor anything about the nature of the property to indicate any other intention. It follows that $1,500,000 is "the price fixed by the contract" within the meaning of section 18(1) and the capital cost at which for the purpose of section 11(1)(*a*) the appellant is deemed to have acquired the property.

During argument, counsel for the appellant submitted that Thurlow J. was in error in concluding as he did and did not give full effect to the legislative intent. The original purpose of section 18, as I conceive it, was to overcome the use of lease option agreements to enable a purchaser to deduct substantial amounts of the purchase price in the form of rent thereby gaining an advantage of a person who purchased property outright and got a much lower write off through capital cost allowances. By a number of tables counsel sought to show that under the interpretation put upon the section by Thurlow J., the appellant herein was deprived of a greater portion of the rent paid which, but for section 18, would have been deductible otherwise thereby leading to manifestly absurd results. In answer to such contention I can only say that the appellant has no monopoly upon absurdities and as pointed out by Thurlow J., the principle expressed by Lord Cairns in *Partington v. Attorney General* (*supra*) "if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute,

1965

CONSOLIDATED BLDG. CORP. LTD. v. MINISTER OF NATIONAL REVENUE

Cattanach J.

where you can simply adhere to the words of the statute"—operates both ways.

I am satisfied that my brother Thurlow was right in the *Harris* case and that the same reasoning applies in this case.

Therefore, in my opinion, the Minister was right to disallow the deduction of the capital cost allowances claimed by the appellant in the amount of $1,409,391.40.

Upon the basis of the above conclusions, I would compute the correct amount of the deductible capital cost allowance to have been $60,000 which I arrive at by taking the price fixed by the contract at $1,500,000 deducting $300,000 for the cost of the land and by applying the rate of 5% in accordance with Schedule B of the Income Tax Regulations to the resultant figure of $1,200,000.

In my view, the Minister wrongly allowed a deduction of $81,159.15 as rent which is in excess of the deduction of $60,000 to which I believe the appellant to be entitled. For the reasons outlined by Thurlow J. upon this same point in the *Harris* case, I do not propose to allow the appeal and refer the matter back to the Minister to disallow the rent deduction and to allow a proper deduction for capital cost allowance. In respect of the second issue, the appeal is also unsuccessful.

It follows that the appeal herein must be dismissed, with costs.

Appeal dismissed.