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COMMISSIONER OF INLAND REVENUE

v.

DONALD MAXWELL MacKENZIE

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[SUPREME COURT, 1966 (Hammett Ag. C.J.) 3rd, 26th August]

Appellate Jurisdiction

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Revenue—income tax—sale of cattle—whether “trading stock” or capital asset—purpose of acquisition—whether for sale or control of weeds and undergrowth—meaning of “trading stock” in s.3(13) (a) of Income Tax Ordinance—Income Tax Ordinance (Cap. 172) ss.3(13) (a) and (d) 43, 44(1), 44(2).

Interpretation—Ordinance—section 3(13) (d) of Income Tax Ordinance—“trading stock” includes “livestock” subject to limitation as to purpose of acquisition—Income Tax Ordinance (Cap. 172) s.3(13) (d).

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The respondent was a planter running a coconut plantation owned by his family for many years. As from 1950 it was owned by a partnership, of which the respondent was a member, but one partner died in 1962 and in 1963 the plantation was transferred to Nagasau Estates Ltd. in which the respondent was a principal shareholder. The respondent made a return of his income for 1963 and in 1965 the appellant raised an amended assessment claiming £1,022-14-5 additional tax. Before the Court of Review the appellant sought to increase this figure; it is the additional tax which is in issue in these proceedings.

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In accordance with a general practice on coconut plantations in Fiji, and one approved by the Department of Agriculture, the method of controlling the weeds and undergrowth on the plantation was to run cattle and goats there. Over the years the growth of the number of cattle by natural increase had been controlled by slaughtering cattle for consumption by plantation labour and by an appreciable number of sales from time to time; but as from 1954 a butchery was started on the estate and the surplus meat was sold in this way, the sales and expenditure of the butchery being brought into the plantation's annual accounts. The number of cattle kept on the estate increased from about 220 in 1954, to between 1150 and 1200 in 1965. The value of the cattle taken over from the partnership by Nagasau Estates Ltd. in 1963 was accepted to be £5,978, and the appellant contended that the cattle were trading stock, and that the respondent's partnership share of this realisation was to be included in his 1963 income. The respondent's contention was that the cattle were necessary plantation equipment and therefore a capital asset; that only when surplus cattle had been slaughtered and sold as meat should the return be taken into account as income. In the Court of Review the contention of the taxpayer was upheld.

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Held : 1. Cattle are livestock and therefore "trading stock" within the meaning of section 3(13) (a) of the Income Tax Ordinance, provided that they are acquired for sale and not for some other purpose.

2. The finding of the Court of Review that the stock on the plantation was not acquired for the purpose of sale was justified in respect of stock kept on the property prior to the opening of the butchery.

3. In the absence of any explanation of the rapid build-up of the herd since that date, it was not possible to draw the inference that all of the stock acquired after 1954 was acquired for "weeding" purposes; some must have been acquired for sale through the butchery.

4. On the transfer to Nagasau Estates Ltd., not the total value of the cattle transferred, but the value in excess of the "weeder", should have been brought to account for tax purposes.

5. There being insufficient evidence for the determination of that question, the appeal would be stood over for directions (if necessary) as to the hearing of further evidence, and argument as to whether the whole increase in value of the "trading stock" should be allocated for tax purposes to the year 1963.

Cases referred to : *Benmax v. Austin Motor Co. Ltd.* [1955] A.C. 370; [1955] 1 All E.R. 326; *Bishop (Inspector of Taxes) v. Finsbury Securities Ltd.* [1966] 3 All E.R. 105; [1966] T.R. 275.

Appeal by Commissioner of Inland Revenue against decision of Court of Review allowing an appeal against an amended assessment of income tax. The facts are set out in the judgment of the learned Acting Chief Justice.

D. McLoughlin, Solicitor-General, and *G.N. Mishra* for the appellant.

D. M. N. MacFarlane for the respondent.

HAMMETT Ag. C.J. [26th August, 1966]—

The respondent made a return in December 1964 of his nett income for 1963 for tax purposes as £2,821-13-0. On 15th June 1965 the Commissioner of Inland Revenue raised an amended assessment for the sum of £1,022-14-5d. additional tax above the original assessment. The respondent appealed against this amended assessment to the Court of Review which allowed his appeal. The Commissioner of Inland Revenue now appeals to the Supreme Court against the decision of the Court of Review.

The facts found by the Court of Review may be summarised as follows.

At the material time the taxpayer was a planter running a coconut plantation on the island of Taveuni that has been owned by his family for many years. He himself has lived there since 1926. His

Income Tax Ordinance (Cap. 172) s.3(13)(d): "For the purposes of this section the term "trading stock" includes anything produced or manufactured and anything acquired or purchased for purposes of manufacture, sale or exchange; and also includes live-stock;..."

A half brother the late Mr. W. G. Mackay who gave evidence in the court of Review first went there in 1912. It was then owned by their mother Mrs. MacKenzie who continued to own it until 1950 when it was transferred to a partnership consisting of the taxpayer, his half brother the late Mr. W. G. Mackay and their two sisters. In 1962 one of these sisters, Mrs. Snodgrass, died. In 1963 a limited company named Nagasau Estates Ltd. was formed, of which the taxpayer was one of the principal shareholders, and the plantation was then transferred to this company.

B For over 50 years the method adopted for controlling the growth of weeds and undergrowth between the coconut trees has been to run cattle and goats on the plantation. This enables the fallen nuts to be seen and collected without difficulty. This use of cattle is a general practice in coconut plantations in Fiji and is in accordance with the principles of good husbandry. It is a practice fully endorsed and approved by the Department of Agriculture.

C It is clear that the larger the area planted with coconuts the greater is the number of cattle required to control the growth of weeds etc. In 1912 there were about 100 head of cattle on the plantation. In about 1920 some 120 head of cattle were purchased for the purpose of building up the herd required for this essential and integral part of the running of the coconut plantation. According to the taxpayer in his evidence in the Court of Review the herd of cattle was between 200-300 strong in 1926. The entire plantation covers an area of some 4,900 acres and in 1963 about 1,300 to 1,400 acres were planted with coconuts. Evidence was given that the nature of the terrain and the class of cattle were such that it was not practical or possible to have musters of cattle and their exact numbers are not known. The figure given by the taxpayer in his Income Tax Returns and accepted by the Commissioner of Inland Revenue over the years were the estimates made by the taxpayer. There is no other evidence of the numbers of cattle on the plantation at any time.

F From the returns put in in evidence going back to 1943 it appears that in each of the seven years from 1948 to 1954 there were about 200 head of cattle on the plantation. In 1955 it was estimated that there were 300 head of cattle. From 1956 onwards the taxpayer did not disclose the numbers of cattle on the plantation in his annual returns, despite the request of the Commissioner of Inland Revenue that he should do so.

G In the tax return for 1950, i.e. before the partnership was formed and again in 1951, after it was formed, the numbers of cattle were given, in each case as 200 at a stated value of £2 each, namely £400. The valuation of the cattle shown in the accounts at the time of the formation of the partnership in 1950 was held by the Court of Review to be £615. I have not been given any explanation for the discrepancy in these figures.

H In 1962, when Mrs. Snodgrass died, the plantation assets were valued in order to assess the value of her share for Estate Duty purposes. The cattle on the plantation were then valued at £5,978

and this was the value at which they were taken over from the partnership by Nagasau Estates Ltd. in 1963. The Commissioner of Inland Revenue accepted this valuation and considered that all these cattle were "trading stock" and that the taxpayer should bring them to account as such in his Tax Returns for 1963. He originally deducted from this figure of £5,978 the figure of £615 which was the value of the cattle in 1950 when the partnership was formed. From the resulting figure of £5,363, he raised an assessment on the taxpayer's one-third share thereof, namely £1,787 upon which he claimed additional tax in the sum of £1,022-14-5d. At the hearing before the Court of Review he sought to increase this figure.

According to the evidence of the taxpayer, which was accepted, there were about 1,100 to 1,150 head of cattle on the plantation in 1965.

Over the years the growth of the numbers of cattle by natural increase has been controlled by slaughtering cattle for consumption by plantation labour and by sales from time to time. There have also been losses by natural deaths and during periods of drought etc. From time to time new cattle have been purchased to increase or supplement the herd. Until 1954, however, the number of cattle required on the plantation and actually kept there for the express purpose of keeping down weeds and undergrowth was about 200 and did not exceed 300.

In 1954 the taxpayer decided to sell his surplus stock as meat and for this purpose started a butchery on the estate. The total of the annual sales and expenditure of the butchery side of the business were all included each year in the tax returns as part and parcel of the plantation accounts.

It was the contention of the Commissioner of Inland Revenue in the Court of Review and before me, that all the cattle on the estate were "trading stock". On this basis it was submitted that when the plantation was transferred to Nagasau Estates Ltd. in 1963, the sum realised on the sale of the cattle should have been brought to account by the taxpayer as income. It was the contention of the taxpayer that the cattle were a capital asset kept for the sole purpose of keeping the weeds down on the estate. As such, it was claimed they were an integral part of the plantation equipment necessary for the economic collection of nuts and that their value was therefore merely a part of the total capital value of the plantation. The taxpayer submitted that account should only be taken of the value of cattle for income purposes when surplus cattle had been actually slaughtered and sold as meat.

The Court of Review upheld the contention of the taxpayer and it is against that decision that the Commissioner of Inland Revenue has appealed on the following grounds:

1. THAT the Court of Review erred in law in holding that the sum of £1,787 (ONE THOUSAND SEVEN HUNDRED AND EIGHTY SEVEN POUNDS), representing the estimated profit realised by the respondent upon the sale of cattle to Nagasau

Estates Limited in 1963, does not form part of the respondent's total income in respect of the year ending 31st December, 1963, for the purposes of the Income Tax Ordinance (Chapter 172).

2. THAT the Court of Review erred in law in holding that such cattle were not 'trading stock' for the purposes of subsection (13) of section 3 of the Income Tax Ordinance and that the provisions of that subsection did not apply to the sale of such cattle.
3. THAT the Court of Review erred in law in holding that the express provision contained in sub-paragraph (ii) of paragraph (c) of that subsection applies only to the circumstances set out in paragraph (c) of that subsection.
4. THAT the Court of Review erred in law in holding that the phrase 'and also includes livestock' contained in paragraph (d) of that subsection must be read in conjunction with the rest of the sentence in which the phrase occurs and indicates "merely that livestock as well as dead stock, might be included in 'trading stock', if produced or acquired for the purpose of manufacture, sale or exchange".
5. THAT having regard to all of the relevant circumstances including the diversified nature of the business carried on by the respondent the Court of Review erred in law and in fact in holding that the sum of £1,787 (ONE THOUSAND SEVEN HUNDRED AND EIGHTY SEVEN POUNDS), representing the estimated profit realized by the respondent upon the sale of cattle to Nagasau Estates Limited in 1963, does not form part of the respondent's total income in respect of the year ending 31st December, 1963, for the purposes of the Income Tax Ordinance (Chapter 172).
6. THAT the Court of Review erred in law and in fact in holding that the profit derived from the sale of such cattle was not a profit from the respondent's plantation business.
7. THAT the Court of Review erred in law and in fact in holding that such profit was not a profit or gain derived from the sale of personal property in which it was the business of the respondent to deal.
8. THAT such profit was a profit or gain derived from the carrying on or carrying out by the respondent of an undertaking or scheme entered into or devised for the purpose of making a profit.
9. THAT the Court of Review erred in fact in holding that such cattle were not acquired by the respondent for the purpose of selling or otherwise disposing of them.
10. THAT the Court of Review erred in law and in fact in holding that the sale of such cattle did not form part of a series of transactions and was not itself in the nature of a trade or business."

There is no appeal against the Court of Review's finding that the running of cattle on a coconut plantation to control the growth of weeds and undergrowth between the trees was a proper use of cattle in accordance with the principles of good husbandry. On the evidence before the Court of Review such a finding does not appear to be open to challenge, and I agree with it entirely. A

It was the contention of the taxpayer that all the cattle ever purchased were purchased for this purpose and for this purpose only and that all such cattle were therefore capital assets and were not "trading stock". This argument would have been considerably reinforced if it could have been shown that all moneys laid out in the purchase of cattle had been treated as capital expenditure. This was not so however and such expenditure have been shown year after year in the tax returns as a part of the general expenses of the plantation. I have not overlooked the argument put forward by Counsel for the taxpayer that expenditure on cattle year by year or some of it could be treated as money laid out in replacement of cattle that died or were sold. In fact, however, the increase in the numbers of cattle on the plantation was from 200 in 1949 to 220 in 1954 and then from 220 in 1954 to between 1,150 and 1,200 in 1965. B
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The returns of the taxpayer show that there were no purchases of cattle and no sales of cattle or meat in 1954, which was the year the butchery was opened.

The total purchases and sales in the five year periods immediately before and immediately after 1954, the year the butchery was opened, and those for subsequent years were, according to these returns, as follows— D

	Purchases	Sales
1949 — 1953	£ 193	£ 2,848
1954	(Nil)	(Nil)
1955 — 1959	£1,260	£20,645
1960 — 1963	£1,340	£23,748

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No evidence was given to explain why it was that for each of the five years before 1954 only some 200 head of cattle were needed to keep the undergrowth down whereas by 1965 between 1,150 and 1,200 head of cattle should be required for this same purpose.

It is in the light of this evidence that I have considered the ninth ground of appeal. In the course of the judgment of the Court of Review it was held that before 1954 surplus cattle, i.e. its natural increase, was disposed of by supplying meat to the plantation labour force and it then went on to say— F

"In 1954 the appellant decided to sell his surplus stock as meat and for this purpose started a small butchery on the estate." G

It would seem from this part of the judgment that it may have been overlooked that the information contained in the taxpayer's returns for the years 1948 to 1953, which were admitted in evidence, shows that an appreciable number of cattle were sold in each of those years before 1954 in addition to those eaten by his labour force.

In 1948	45 were sold for £430	H
In 1949	Sales of cattle etc. realised £655	
In 1950	30 were sold	

In 1951	101 were sold for £950
In 1952	72 were sold for £730
In 1953	19 were sold for £178

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Again, at page 35 of the record the judgment reads—

“In 1920 or 1921 it was found necessary to buy 120 cattle for the purpose of building up the herd. I am satisfied that these cattle were brought for that purpose and no other, and that no purchases have been made since for any other purpose. The increase in numbers over the years since that date has been almost entirely the natural increase resulting from the bearing of calves by the cows in the herd.”

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I find it a little difficult entirely to reconcile this passage with the purchases of cattle disclosed in the taxpayer's returns from 1949 to 1963 which show that nearly £2,800 was laid out on such purchases. In the earlier years cattle on hand was stated in the tax returns to be worth £2 a head whereas the actual sales showed that they realised £8 or £9 a head. I appreciate the danger of drawing inferences from the bare figures in these returns as they may be somewhat misleading. It does, however, appear to be clear that the increase in numbers of cattle must have been due not only to their natural increase but also, to some appreciable extent, to new purchases of cattle.

It is in the light of these matters that I have considered the finding of the Court of Review at page 36 of the record of which the Commissioner of Inland Revenue complains in the ninth ground of appeal, namely—

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“For the purposes of this appeal I find as a fact that the stock kept on the property were acquired for the general purposes of the plantation, as already outlined, and not for the purpose of sale.”

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It appears to me that such a finding of fact is entirely justified in respect of the stock kept on the property prior to 1954, i.e. before the butchery was opened. There is, however, no explanation of or justification for the sudden and rapid build up of the numbers of cattle kept after the opening of the butchery, in the ten years after 1954, from 220 to nearly 1,200. Nor is there any explanation of why after 1954 more was spent in each and every year (except two) in the purchase of cattle than was spent in the whole of the five years immediately prior to the opening of the butchery. Again there was no evidence given of the practice of other coconut plantations nor of any agricultural expert of the numbers of cattle per acre that is needed to keep down the undergrowth. No explanation has been given of why it should now need nearly 1,200 head of cattle to do the work that only 200 cattle were able to do in 1953. The onus of proof rested on the taxpayer in this regard under the provisions of section 44(2) of the Income Tax Ordinance and in my view he did not discharge that onus.

Whilst an Appeal Court is reluctant to differ from the Court of trial on a finding of fact, it is well established that different considerations apply to the question of what inferences ought to be drawn from the facts (*Benmax v. Austin Motor Co. Ltd.* [1955] 1 All E.R. 326).

On the facts in this case I do not, with the greatest respect, feel that it is possible to draw the inference that all the stock — and I emphasise the word “all” — acquired after 1954 was acquired solely for the purpose of “weeding” and that none of it was acquired for the purpose of sale. I say this in spite of the evidence of the taxpayer himself on the matter. It appears to me to be clear that whilst some may well have been acquired for the purpose of maintaining an appropriately sized herd of cattle for “weeding”, the rest were acquired for the purpose of building up the herd so as to maintain an adequate supply of meat for the butchery. There would appear to be no doubt whatever from the volume of sales by the butchery that in fact this was the purpose for which a fair proportion of such cattle were used. It seems to me, therefore, that the facts are more open to the inference that that was the purpose for which the extra cattle were acquired rather than otherwise.

It was conceded on behalf of the Commissioner of Inland Revenue, in the course of argument in this case, that a weeding herd of approximately 300 head of cattle could reasonably have been needed in 1963 if only about 200 were needed on this plantation before 1954.

It was, however, contended on behalf of the Commissioner of Inland Revenue that even if a herd of 300 cattle was required for weeding purposes and only the balance were held for the purpose of sale in the butchery, all of them were in fact “trading stock” within the meaning of that term in section 3(13) (a) of the Income Tax Ordinance which reads—

“3(13) (a). Where any trading stock is sold together with other assets of a business, the part of the consideration attributable to this trading stock shall, for the purposes of this Ordinance, be determined by the Commissioner and the part of the consideration so determined shall be deemed to be the price paid for the trading stock by the purchaser, and the price received by the vendor.”

As a result it was contended that upon their sale, or transfer, the sum realised or their value must be brought to account as income whatever may have been the purpose for which they were used or acquired.

The definition of “trading stock” for the purposes of section 3(13) (a) is contained in section 3(13) (d). This clearly states that trading stock includes “livestock”. Cattle are “livestock”. There can be no doubt, therefore, that “cattle” fall within the meaning of “trading stock” for the purposes of section 3(13) (a).

It is the contention of the Commissioner of Inland Revenue that the taxpayer is engaged in primary production and that the running of cattle on the plantation for the purpose of both weeding and

supplying meat for the butchery are all part and parcel of a business or undertaking operated for the object of making a profit. On this basis it is his contention that it is immaterial for what purpose cattle were purchased as they are in all circumstances "trading stock" and must be brought to account as such.

The respondent supports the view of the Court of Review which is set out in the judgment at page 40 of the record in the following terms—

"In my view if certain livestock is acquired not for sale but for another purpose altogether, as in the present case, then that livestock would not be included in the term trading stock unless the relevant statutory provision made it definitely clear that it was to be so included."

I do, with respect, agree with that view, the principle of which is well supported by authorities. It has been applied very recently in the so far "unreported" decision of the House of Lords in *Bishop (H.M. Inspector of Taxes) v. Finsbury Securities Ltd.* which appeared in the London "Times" for 27th July, 1966.*

In that case the taxpayer company was incorporated as a dealer in shares and securities. Its "trading stock" or "stock-in-trade" consisted, *inter alia*, of shares. It purchased a number of shares, not for the purpose of trading in them but for the purpose of engaging in "dividend-stripping" operations. In order to succeed in this it was necessary for the taxpayer company to treat such shares as part of its "trading stock" so that it could bring nominal losses to account and it did so. The Inspector of Taxes objected to the taxpayer company treating shares which it had purchased not for the object of being dealt with as trading stock in the ordinary course of business but in order to secure certain peculiar tax advantages arising out of "dividend-stripping" operations.

Lord Morris, in his judgment in the House of Lords which allowed the appeal, said—

"These transactions were in no way characteristic of, nor did they possess, the ordinary features of share-dealing. The various shares acquired ought not to be regarded as having become part of the company's stock-in-trade. They were not acquired for the purpose of dealing in them. In no ordinary sense were they current assets. For the purpose of carrying out the scheme devised the shares were to be, and had to be, retained. These transactions were not within the definition in section 526 'an adventure or concern in the nature of trade' at all but were a wholly artificial device remote from trade to secure a tax advantage. The Commissioners were wrong in holding that the shares were part of the company's stock-in-trade. The appeal should be allowed."

It is clear, therefore, that the mere fact that the company taxpayer in that case dealt in shares and held shares as its "trading stock" did not result in every share it purchased being treated as "trading

* Reported [1966] 3 All E.R. 105; [1966] T.R. 275. —Ed.

stock". The question that had to be considered was— "What was the purpose for which the shares were acquired?" Since they were not acquired for the purpose of dealing or trading in them they were not "trading stock".

Precisely the same principles apply, in my view, in this case. The cattle purchased and carried by the taxpayer for the express purpose of keeping down the undergrowth on the plantation were not acquired for the purpose of dealing or trading in them. In my view they never formed a part of the taxpayer's stock-in-trade and should not be brought to account as such in his return of income. All cattle in excess of the number reasonably properly and in fact acquired and required for the purpose of weeding and used for that purpose were, however, in my view, part of the trading stock of the taxpayer. They were part and parcel of the butchery side of his diversified operations in the business of running a coconut plantation and should be brought to account as such in his Tax Returns. In my opinion when the transfer to Nagasau Estates Ltd. took place it was not the total value of the cattle transferred but the value of the cattle in excess of the "weeders" which should have been brought to account for tax purposes.

To this extent I am therefore of the view that the appeal by the Commissioner of Inland Revenue must succeed.

Section 44(1) of the Income Tax Ordinance clearly indicates that it is the duty of the Court, in so far as it may be practicable or possible to do so, to determine the true and proper tax to be paid in any case that comes before it. Under section 43 the Court may give directions as to the calling of further evidence.

There is insufficient material before me for me to decide how much of the total value of cattle in 1963, namely £5,978, ought properly and reasonably to be attributed to the herd of "weeders" and treated as capital and how much should be treated as the value of trading stock, and thereby to determine the true and proper tax to be paid in this particular case. It may well be that now that I have indicated the basis upon which I consider tax should be assessed it will be possible for the parties to agree to an adjusted assessment. If not I shall deal with the matter but for this purpose I shall require to hear certain further evidence and to hear Counsel further on one or two legal points which appear to me to require consideration.

One of the questions which it appears to me ought to be considered is whether the increase in value of the cattle to be treated as "trading stock" from 1954 to 1963 ought properly all to be brought to account for tax purpose in the year 1963. If, as seems likely, the increase took place over the years and not all in one year, it would appear that it is open to argument whether the assessments for past years ought to be re-opened. In that event the increase in value in each year could perhaps be brought to account more equitably for tax purposes than bringing it all to account in one year. I say this particularly because it seems to me that the taxpayer had some reason to think that the basis upon which he believed his liability

A to tax should be assessed was the correct basis. Both sides have agreed that this is in fact a “test” case in Fiji and that this point has never been raised before. The taxpayer’s view was certainly shared by the Court of Review in the first instance and it cannot be said that it was an entirely unreasonable view to adopt.

B I shall therefore now stand this appeal over to a date to be fixed to enable Counsel to take any further instructions they may consider to be necessary. I shall then, if need be, after giving both sides further opportunity of being heard, give such further directions as may be necessary concerning the question of the calling of further evidence. I reserve the question of costs and liberty to apply to both sides.

Appeal allowed in part; stood over for directions.