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STOCK EXCHANGE BUILDING CORPORATION LIMITED

v.

CITY OF VANCOUVER

Supreme Court of British Columbia (No. X1105/68)

Before: MR. JUSTICE A.D. MACFARLANE

Vancouver, January 16,17, 1969

J.A. Clark, Q.C. and D.J. Mullan for the Appellant
R.K. Baker, Q.C. and J. Mulberry for the Respondent

Reasons for Judgment

The facts of this case are set forth in clear fashion in the case stated by the Assessment Appeal Board and I will not repeat them.

The questions submitted to the Court by the Board are as follows:

> "1. In determining the 'net income,' was the Board right in failing to allow actual painting and maintenance costs as set up in the appellant's accounts?
>
> "2. In determining the 'net income,' was the Board right in failing to allow a deduction based on the average life of individual items under the heading of 'Painting and Maintenance,' as submitted by the appellant?
>
> "3. Was the Board right in its finding that part of the expense incurred by the appellant should be charged 'to capital account and not to annual expenses except by way of amortization over a reasonable period of years?' If the Board is correct in this finding, should it have directed a deduction equal to an annual amortization sum?"

A preliminary objection was taken by counsel for the respondent when he contended that the Court was without jurisdiction to hear the appeal because the questions submitted were questions of fact and not of law.

I reserved my decision on the preliminary objection and heard argument on the merits of the case.

The Assessor in this case has determined the actual value of the land and improvements primarily by having regard to the revenue value of the property and by applying a capitalization rate of 10 per cent to net revenue.

As the Board has stated in its reasons, the essential question is the amount that should be allowed for annual operating costs in order to determine the net income.

The appellant contends that its figures for operating costs should have been accepted because they represent actual expenditures made as shown by the books of the company.

The respondent accepts the appellant's figures for operating costs other than those related to painting, maintenance, and salaries. The question relating to salaries was clearly a question of fact and is not involved in the questions posed in the stated case. The matters in issue now relate only to painting and maintenance.

Paragraphs 11 and 12 of the stated case set forth the opposing views of appellant and respondent regarding the allowance for painting and maintenance. The Board did not accept the evidence of the appellant with respect to the annual cost of painting and maintenance.

In other words the Board preferred the evidence of the respondent that painting and maintenance costs should approximate 5 per cent of gross revenue rather than about 12 per cent as contended by the appellant.

However, the matter did not end there. Evidence was led by the respondent to show comparative operating costs on a square-foot basis on several properties which the respondent contended were comparable properties in Vancouver. The amount settled on by the Assessor was in excess of the highest of these figures.

When the figure chosen by the Assessor was translated into a percentage of gross revenue, the total operating costs were found to be about 50 per cent of total gross revenue.

The respondent also called evidence regarding the sale price of a comparable property in Vancouver in order to provide confirmation for its finding based on the revenue approach.

The appellant contends that there is no comparable property in Vancouver. However, it is clear that the determination of the question of what is a comparable property is a question of fact and not of law. *Reg.* v. *Penticton Sawmills Limited* (1953) 11 W.W.R. (N.S.) 351, at 353 (Sloan J.A.).

The appellant contends that the cost of its renovation programme should have been amortized over a period of years and charged in part as an operating cost.

The appellant contends further that the very clear evidence presented by its experts to determine the annual amount to be amortized was disregarded by the Board.

The reasons for judgment given by the Board on May 29, 1968, however, would appear to negative this contention. The Board said at that time:

> The essential question is the amount that should be allowed for annual operating costs in order to determine the net income. To paraphrase the language of one of the appellant's expert witnesses, the appellant company is in the process of "ripping the vitals" out of the interior of the building, floor by floor, to the bare walls whenever tenancies permit such action. It is the avowed intention of the appellant to make more office space available and thereby increase income. This massive renovation must be charged to capital account and not to annual expense except by way of amortization over a reasonable period of years. The Board has taken all these facts into consideration.
>
> The Board comes to the conclusion that for 1968 and, possibly 1969, the average allowance for operating expenses taken by the respondent's appraiser is not quite sufficient. Operating costs are likely to be higher during periods of renovation. This is a situation which must be reviewed from year to year. Accordingly, it finds that for 1968 only and after review, if the renovation programme of the appellant is carried on, possibly for 1969, the allowance for operating costs should be 52 per cent.

The Board thereby gave recognition to the appellant's contention and increased the operating costs because of the renovations from 50 per cent to 52 per cent. It did so obviously in exercise of its jurisdiction under section 37 (1) of the *Assessment Equalization Act* to take into account, as the section says, ". . . any other circumstances affecting the value."

What those circumstances are, and how they affect a given assessment is a matter of fact and not of law, and when there is a dispute, as here, on the evidence as to how much of the renovation programme should be charged as an operating cost in a given year, that is a question of fact and not of law as stated by our Court of Appeal in *Vancouver* v. *Township of Richmond* (1958) 17 D.L.R. (2d) 548.

What the appellant contends is that, if proper accounting principles had been applied, the costs charged to operations would have been, on an amortization basis, in the amount of $30,000 a year. However, the determination of any such figure must arise from a consideration of the facts of the case. Judgment varies according to how the person exercising that judgment finds those facts. This is well illustrated by the appellant's evidence, which is that their chartered accountant found, in round figures, $53,000 to be the appropriate allocation to operating costs, their architect thought it should be $37,000, and their appraiser was of the opinion that it should be $30,000.

The City Assessor, on the other hand, was of the opinion that 5 per cent of gross revenues, or about $12,000, was the proper figure.

The Board, after hearing all the evidence, was of the opinion that some further allowance should be made and it thereby raised the allowable total operating costs by 2 per cent to compensate for this factor.

What is in issue here is the method adopted by the Assessor in determining actual value under section 37 (1) of the Act.

Sloan, J.A., in *Reg.* v. *Penticton Sawmills Ltd.* (*supra*), at page 353, found that the section

> . . . clothes the assessor with a very wide and flexible discretion as to the methods he may pursue in his determination of "actual value."

The Assessor and the Board here used other properties as a standard in determining what portion of the total expenses of the appellant for renovations should be allowed as operating costs in the year in question. They chose not to base their assessment upon the estimated expenditures for several years ahead and by amortizing those to produce an annual figure.

I am disposed to adopt the language of the learned Chief Justice in *Dreifus* v. *Harvey E. Royds, Assistant Commissioner for the City of Port Arthur* (1922) 64 S.C.R. 346, at 348 and 349, when he said:

> I am of the opinion that in a question of this kind as to the "actual value" of lands for purposes of assessment this court would not and should not interfere with the finding of fact as to such "actual value" if there was any evidence to sustain that finding. The board is constituted of men of experience on questions of this character. They have the great advantage of visiting and viewing the lands in question, and of seeing and hearing the witnesses who may be called to speak to its value. Unless, therefore, the board misdirected themselves on the proper principles which should govern them in determining this "actual value" or obviously reached their conclusions as to such value by adopting and following some wrong or improper principle, this court would not and should not interfere with their findings.

I am unable to find anything of this kind to justify me in interfering with the findings of the Board.

Furthermore, it appears to me that the Board has given due and proper recognition to the contentions of the appellant, has taken into consideration the evidence of the appellant, and there was a body of evidence before the Board which was sufficient to amply justify the conclusion which the Board reached.

I would have been prepared to allow the preliminary objection taken by the respondent, but even on the merits of this case I am satisfied that there was no error on the part of the Board.

The appeal by way of stated case is therefore dismissed with costs.