**ASSESSMENT COMMISSIONER**

**v.**

**THE SOUTHLAND CORPORATION,**

Supreme Court of B.C. (A820552) Vancouver Registry

Before: MR. JUSTICE M.R. TAYLOR

Vancouver, March 22, 23 and 24, 1982

J.E.D. Savage for the Appellant
B.J. Wallace for the Respondent

**Reasons for Judgment** June 23, 1982

This is one of six consolidated appeals by way of case stated from decisions of the Assessment Appeal Board raising questions concerning the assessment of chattels brought onto commercial premises as "improvements" within the meaning of the *Assessment Act*, R.S.B.C. 1979, c. 21. in respect of all of which I gave reasons for judgment dated May 28, 1982, setting out the basic principles to be applied.

In dealing with the specific questions raised on the present appeal I shall not repeat what is contained in those reasons, nor shall I repeat what is said in subsequent reasons dealing with the *Daon Development Corporation* case stated. (Vancouver Registry No. A814007).

The respondent in the present proceedings, The Southland Corporation, operates grocery, or convenience, stores in the Lower Mainland. The case stated says (paragraph 2) that the issue raised before the Board was "the assessability of certain items of machinery and equipment" in these stores. Most of the items in question were found by the Board not to be "improvements" under the Act. It is from that decision that the Assessment Commissioner brings the present appeal by case stated.

The case stated refers particularly to "walk-in coolers" as included among the items which it found not to be "improvements" under the Act. The Board says that these coolers weigh about 550 lbs. each, sit on the floor without any affixation other than electrical wiring, and are equipped with compressors, presumably for refrigeration purposes.

The reasons of the Board, dated December 8, 1981, describe the items in dispute as "fixtures, machinery, structures or similar things". I accept that description rather than the description used by the Board in the case stated itself, "machinery and equipment" , one which creates difficulty because "equipment" is not a term used in section 1 of the *Assessment Act*. From the phrase used in the decision itself, I conclude that the Board was in the end of the view that the walk-in coolers were "machinery", "structures" or things "similar" to the one or the other, but were not fixtures. For reasons stated in my decision of May 28, 1982, I think it necessary to deal somewhat differently with items in dispute according to the class to which they belong: "machinery" and "similar things", on the one hand, and "structure" and "similar things" on the other.

The Board concludes (at page 8) that "original intention at the time of bringing the article to the premises is fundamental" to the question of whether it has been put there with the degree of permanency necessary in order that it may be said to have been "placed" within the meaning of the statutory definition of "improvements". For reasons already stated in my reasons of May 28, 1982, and in deciding the *Daon* stated case, I find this to be in error in so far as it suggests a subjective test.

The conclusion of the Board in the present case is stated in the following passage of its decision (at pages 8 and 9):

> Suffice it to say, therefore, in respect to this appeal, that having regard to the design, weight, mode of attachment or placement, ease of movement and function of the items in dispute, and the purpose for which the premises are used, the Board concludes without any reasonable doubt that none of such items were put on the premises with any idea whatsoever of permanency. Rather, the evidence supports the view that while the Appellant may have hoped that certain items would not have to be moved, its original intention regarding each of the items was that it would be put in the location where it would best serve the operation of the business from time to time. Built-in mobility appears to be the order of the day by virtue of the approach to merchandising adopted in the kind of business operated by the Appellant.

For these reasons the Board concludes that the items in question had, not been "placed", that is to say put there with the degree of permanence required in order to qualify as "improvements" under the statute.

I have said that it is necessary in respect of non-fixtures first to decide whether an item in question constitutes a "structure "-that is to say "a thing of substantial size built up from component parts and intended to remain permanently on a permanent foundation"-on the one hand, or "machinery" on the other. These are the only general classes of non-fixture chattels capable of being classified under 'the Act as assessable "improvements".

If in the class of "structures" (or "similar things", an expression which may encompass what would otherwise be "borderline" items) the item is one which must, by reason of that definition. have been "placed" with more than the degree of permanence necessary in order to constitute it an "improvement" under the Act. If an item is not a structure but rather "machinery" or a "similar thing" the assessment tribunal must decide on the basis of objective evidence concerning character, function and mode of placement (evidence which would be apparent to an observer who has had the opportunity to see the item-or items of that sort-being installed and in use) whether it falls into the class of things which once put into position can normally be expected to remain in that position, rather than into the class of things which can generally be expected to be moved around from time to time in the normal course of business. Such evidence cannot be contradicted by evidence that the particular person who installed the item, or its particular user, intended or intends either to move or not to move the particular item. Intent for this purpose is to be derived from objective evidence of the manner in which the machine is set down, the nature of the thing and the function which it in fact performs in the context of the particular business. It would not, I have concluded, be acceptable to our law that the same machine, set up the same way and in the same place and used for precisely the same purpose, should be assessed in the possession of one taxpayer and not in that of another.

It will be noted from these observations that to be a "structure" an item must be of substantial size, but that it does not have to be of substantial size, or substantial weight, in order to constitute "machinery".

It will also be observed that to be a structure an item must have been placed permanently on a permanent site and will for this reason inevitably more than fulfill the requirements of the *Assessment Act* definition of "improvements" so far as placement is concerned. It may, indeed,

meet the requirements of the definition by having been "erected" or "affixed". Machinery, on the other hand, need only meet the minimum requirements of the word "placed" as used in that definition, that is to say be in the class of things normally expected to remain in one position rather than in the class of things which can generally be expected to be moved from time to time in the normal course of business in order to constitute an "improvement". If the Board is left in doubt as to which a thing most probably belongs, that doubt must, of course, be resolved in favour of the taxpayer.

The stated case poses four questions, of which I am asked to answer only two at this stage:

> 1. Q. Did the Board adopt and use the correct test of whether an item is "placed" within the meaning of the second definition of "improvements" in the *Assessment Act*?
>
> A. No. For reasons stated previously and in this decision it does not appear that the Board applied the correct test.
>
> 3. Q. Does the Board have jurisdiction to determine the question of assessability of any of the items in dispute?
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> A. This is a question which did not arise in the proceedings before the Board, and accordingly cannot be raised by stated case. But the position taken by the Assessment Commissioner on the case stated is, in any event. such that an attack on the Board's jurisdiction to decide matters of assessability could not succeed. (See the portion headed "The Issue of Jurisdiction" in my reasons of May 28, 1982).

The decision will be remitted to the Board for reconsideration in accordance with principles set forth in these and my previous reasons.

With respect to Questions 2 and 4, which the parties have reserved for further argument, I would ask that the counsel for the appellant provide his submission in writing not later than July 21, 1982, and that the submission of the respondents be filed not later than August 7, 1982. The appellant may file a reply not later than August 15, 1982.

Since the ultimate outcome of the appeal remains entirely uncertain, there will be no order as to costs.