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COMINCO LTD.

v.

ASSESSOR OF AREA 18 - TRAIL

Supreme Court of British Columbia (C825183) Vancouver Registry

Before: MR. JUSTICE ESSON (In Chambers)

Victoria, October 12, 1982

J.R. Lakes for the appellant
J.E.D. Savage for the respondent

Reasons for Judgment October 29, 1982

An Assessment Appeal Board, after handing down its decision, has stated a case for the opinion of the court under s. 74 of the *Assessment Act*.

The subject matter of the appeal is some 40 pieces of computer equipment situate in the appellant's Data Processing Centre at Trail. The issue is whether this equipment was properly assessed as an "improvement" under the second definition of that word in the Act, the definition applicable to school assessments. That definition includes the following words:

> (a) all buildings, fixtures, machinery, structures and similar things erected or placed in, on, under or affixed to land or to a building, fixture, or structure in, on, under or affixed to land and, without limiting the generality of the foregoing, includes aqueducts, tunnels other than mine workings, bridges, dams, reservoirs, roads, transformers and storage tanks of whatever kind or nature, and fixtures, machinery and similar things of a commercial or industrial undertaking, business or going concern operation so erected, affixed or placed by a tenant, except those exempted by regulation;

The respondent assessor says the equipment is machinery placed in a building on land. The appellant says that it is not machinery or, if it is, it has not been "placed" within the meaning of the Act.

The Board gave written reasons for upholding the assessment. The facts are set out in its decision from which I will quote. The quotation follows a list of items which the Board held should be deleted from the roll.

> The common characteristics of the above items are that they are small, light, readily movable and are, in fact, frequently moved from place to place in the building in which they are housed or out of that building as need dictates. A general likeness would be to a typewriter, television set or cash register.
>
> The following facts are found to apply to the remaining items in dispute:

(1) they range in weight from 150 lbs. to 3,000 lbs., with the mean being 700 to 800 lbs. approximately;

(2) 15 of the 20 types have 208 volt power supply;

(3) the power connection to the 208 volt system is plug-in, but not of the type that the housekeeper uses for plugging in a vacuum cleaner-far more elaborate;

(4) the power supply is all by heavy duty cable, some of it with coaxial and some with telephone line connections;

(5) 17 of the 20 types sit on the main computer room floor, ground floor of the building; one type is on the 2nd floor; two types are on the floor in the DPS annex;

(6) 12 of the 20 types require air conditioning, 8 do not;

(7) a special flooring has been installed in the main computer room to accommodate the power and other connecting lines to the computers and to allow for the air conditioning and air circulation;

(8) the various items have differing numbers of connections to various parts of the computer system, ranging from 1 to 100;

(9) the size of an item is not necessarily indicative of the number of its connections. For example, the lightest item, 150 lbs., has 33 connections; the heaviest, 3,000 lbs., has 1-20 connections; and an 800 lb. item has one connection;

(10) the requirement of air conditioning and location on the special floor is generally connected with the size of the unit, but not necessarily so. For example, the smallest item, 150 lbs., is located in the main computer room, whereas a 300 lb. item is on the building's 2nd floor with no special flooring; one item of 300 lbs. has air conditioning, whereas a 1,500 lb. item does not require it;

(11) all types, smallest to largest, appear to be on casters, with adjustable, dropdown stiff legs to position them in their respective locations;

(12) all types can be moved by varying degrees of exertion, but they are not comparable as to moveability with, say, the usual types of household plug-in, electrically operated equipment;

(13) all types are in location with a substantial degree of permanence, subject to the possibility of minor movement for inspection, repair or to accommodate additional equipment. We liken the degree of permanence somewhat to that of the adjustable shelves in a built-in law library bookcase; one can move the shelves, but one hopes one won't have to;

(14) the only substantial ground of impermanence arises from the rapid technological changes in the computer industry. While the Appellant places the items in the first instance with some degree of permanence as mentioned in (13) above, its experience has been that a given item may be outdated in a year. Some items have been in service ten years or longer, but the average life appears to be 4 to 5 years;

(15) the building in which the items are housed was built in 1929 as a store and office building. It was occupied for a number of years by West Kootenay Power & Light Co. (WKP) as a display room and head office. In or about 1967, the Appellant, of which WKP is a close corporate affiliate, took space on the ground floor for its embryo computer and data processing division. The ground floor was substantially altered to allow it to take the computer equipment at great expense. The computer enterprise has grown rapidly over the years. Expansion of the computer centre to the upper floors of the building above the 2nd floor is presently prohibited because of insufficient structural strength;

(16) it was put to us by the Appellant that the computer system and the disputed items comprising it are independent, not a part of the building in which they are housed. It is submitted by the Respondent that both are substantially one. Because of the wiring, flooring, air conditioning, and fire and smoke prevention systems installed for and connected with the computers, we find the Respondent's position to be more compatible with the evidence;

(17) in 1980 the Appellant acquired title to the building from WKP;

(18) all the disputed items are owned by and leased from IBM.

We have been told that in order to make the disputed items assessable, we must find them to be "placed" within the meaning of that word as it is used in the second definition of Section 1 of the *Assessment Act*. We have been invited by both Counsel to consider a decision of the Supreme Court of Canada, referred to as Mountjoy, and many other cases. However, it is our understanding that Stated Cases now before the Supreme Court may be helpful in clarifying the law applicable to the above facts, and at the request of the Senior Chairman of the Assessment Appeal Board we withhold a decision on this issue pending the final outcome of those Stated Cases.

The Stated Cases referred to, six in all, were heard before Taylor, J. in March, 1982. His reasons, applicable to all six cases, are now reported as *Assessment Commissioner* v. *Woodwards Stores Limited, Daon Development et al.* 1982 Stated Cases 167.

After receiving those reasons, the Board handed down a further order in which it repeated the findings of fact and concluded by stating:

Upon the basis of those findings of fact, and applying to them the principles set out in the decisions of Mr. Justice Taylor in the Daon and Southland cases, the Board finds that the items referred to in issue 1) in this appeal are assessable. The appeal to the Board on issue 1) is therefore dismissed save for the items which, on the recommendation of Respondent's Counsel, were ordered to be deleted from the roll.

The questions stated by the Board which, it says, were propounded by counsel for Cominco, were:

1. Did the Assessment Appeal Board err in finding that the items in dispute in this appeal, which are owned by IBM, are properly assessable against the Appellant as "machinery" placed in the Appellant's building?

2. Did the Assessment Appeal Board misdirect itself in holding that it had applied the proper principle of whether the items were "placed" within the meaning of the definition of "improvements" in the *Assessment Act*?

3. Did the Assessment Appeal Board err by determining that all of the items were properly assessable against the Appellant?

> 4. Was there any evidence upon which the Assessment Appeal Board could properly find that the said items were properly assessable against the Appellant by being included on the Appellant's assessment as "machinery"?

The third of those questions is so broad and general in its scope as to amount simply to asking: "Was the decision right?" The jurisdiction of this court on an appeal under s. 74 is to hear and determine a case submitted on "a question of law only". No question of law emerges from the third question, and the court therefore has no power to answer it: *The Municipal Corporation of the Township of Tisdale* v. *Hollinger Consolidated Gold Mines Limited*, (1933) S.C.R. 321; *Regina* v. *Phelps* (1972) 4 W.W.R. 748 (B.C.C.A.).

I will deal next with the second question, which concerns the meaning of the word "placed". I will take the question as being whether the Board directed itself correctly as to the meaning of that word in the second definition of "improvements". In *Assessment Commissioner* v. *Woodwards Stores Limited et al.* (supra) Taylor, J., after reviewing all of the authorities, held that the proper test of whether an item is placed so as to render it assessable as an improvement is whether it has been given "some permanency of position". He also held that, in every case, the question to be asked is not whether the item concerned is in fact intended to be moved by the particular owner but whether, by reason of its character, function, and placement as determined from all the evidence, it falls into the class of things which, once put in position, can normally be expected to remain in that position, rather than falling into the class of things which can generally be expected to be moved around from time to time in the normal course of business. The test of "some permanency of position" is taken directly from the leading case: *Northern Broadcasting Company Limited* v. *The Improvement District of Mountjoy* (1950) S.C.R. 502, (1950) 3 D.L.R. 721.

It is clear from the decision of the Board that that is the test which it had in mind and which it applied. That test is at the root of the distinction which it made between assessable items and those which are non-assessable.

On this aspect of the case, Mr. Lakes places great emphasis on the fact that the Board did not, in its second order, alter in any way the findings which it had set out in its first order. That, he suggests, is an indication that the Board did not review all of the evidence in the light of the Reasons for Judgment of Taylor, J. The fact that the Board did not change its findings does not indicate that it was not cognizant of all the evidence. It is not right to say that it disregarded the evidence that the taxpayer, because of the element of obsolescence, intended to replace much of the equipment in a short time. It appears from Finding #14 that it considered that matter, but did not conclude that it outweighed the elements of permanence, especially those referred to in Finding #16. Those were properly matters for its consideration which give rise to no question of law. It is, however, of some interest that the equipment in question here appears to have had many points of similarity with that which was held to be assessable in *Assessment Commissioner* v. *Woodwards Stores Limited*, Stated Case 147, [1981] 28 B.C.L.R. 22, a decision of Andrews, J.

The fact that many of the items are likely to be replaced or superseded in a short span of time does not lead to the conclusion that they have not been placed with a sufficient degree of permanence to satisfy the definition. I can find no support in the authorities or in the statute for the suggestion that each machine must have the same degree of permanence as the building in which it is installed. The suggestion that the degree of affixation must be such as to make the items part of the real property is, with respect, quite wrong. On this question, I adopt what was said by Davey, J. A. in *Re Assessment Equalization Act Re Trans Mountain Oil Pipeline Co. Appeal* (1966) 56 W.W.R. 705 at p. 710 when he said:

> (For purposes of assessment) . . . the common law distinction between real and personal property seems to have been dropped for a more practical distinction between land and its improvements as defined in the Act, and chattels which are not improvements to land, thus, arbitrarily cutting across the classical distinction between real and personal property.

That passage appears in a dissenting judgment but the difference of opinion between the members of the court was not on that question.

The first and fourth questions relate to the word "machinery". The appellant's position, as I understand it, is not that the equipment could not be machinery but rather that the Board committed a fatal error in failing to make an express finding that it is machinery or one of the other things referred to in the definition. I observe that it is implicit in the wording of the first and fourth questions in the Stated Case that the Board did hold the equipment to be machinery. When regard is had to the course of the proceedings before the Board, the absence of an express finding in the order is quite understandable. The equipment was described as machinery in the assessment. The only issue raised in the Notice of Appeal to the Board was the contention that the assessment was in error because the equipment was not intended to improve the quality of the freehold. *Assessment Commissioner* v. *Woodwards Stores Limited* (supra) holds that not to be a requirement for assessability. Perhaps as an acknowledgment of that authority, the emphasis of the appellant's case was switched, at the hearing before the Board, to the question whether the equipment had been "placed". There is no indication of an issue having been raised as to whether it was machinery. Indeed, Mr. Lakes in his opening to the Board referred to the items as machines. The evidence makes it clear that the purpose and function of each item is to do the work of the appellant, particularly in the area of accounting and record keeping or, as the name of the building implies, to "process the data" arising in the conduct of the business. That is evidence from which it can be concluded that the items constitute machinery within the plain meaning of that word. In the circumstances, the absence of an express finding by the Board is of no significance.

The appellant also says that, as a matter of law, the equipment cannot be assessed because, as the Board found, it is owned by IBM and held by the taxpayer under lease.

It is not clear from the record that this point was raised before the Board. It was held in *Assessment Commissioner* v. *Woodwards Stores Limited, Daon Development Corporation et al.* (supra) at p. 934 that it is not open to a party to require the Board to state a case on an issue not raised before it. However, as the point is raised by the language of the first question, and in particular the reference to the items being owned by IBM, I will deal with it.

Improvements are not limited, by the definition of that word in the Act, to property owned by the person assessed. The Act contemplates, in general, that the person responsible for meeting the assessment will be the owner of the land described in the roll. But it does not follow that nothing can be assessed which is not owned by that owner.

On this aspect of the case, the appellant relies upon the decision of this court in *Re Orr's Assessment* (1955) 16 W.W.R. 25 (Wilson, J.). It was there held that the definition of improvements, which was the same in substance as the present definition, should not be construed to include tenant's fixtures. One of the grounds for so holding was that there was not a sufficiently clear expression by the legislature of an intention to "tax A for B's property". It was also held that the legislature, by adding to the definition the words ". . . as, if so erected, affixed or placed by a tenant, would, between landlord and tenant, be removable by the tenant" gave by necessary implication an indication of its intention that those things actually placed by a tenant would not be assessable.

No similar indication of legislative intent applicable to the circumstances of this case arises from the words of the legislation. Nor, in my view, is this a case of taxing A for B's property. The appellant has a property interest, as lessee, in the equipment which is on the land for its sole use and benefit. That property is in an entirely different position from the property of the tenant. In a real sense, the items can be said to be the property of Cominco. It is machinery placed there by it for its purposes. The relationship between the taxpayer and the machinery is much more analogous to that dealt with in *Richmond and Richmond* v. *Ashton* (1962) O.R. 49 (Gale, J.). It was there held to be irrelevant that the machinery was subject to a conditional sales contract so

that title was in a person other than the taxpayer. The statutory provisions construed in that case were somewhat different but the principle is the same.

Mr. Lakes has referred to and analyzed a large number of cases from British Columbia and other provinces on the question of assessability of improvements. The large majority of those cases hold the items dealt with in them to be assessable. The submission, as I understand it, is that in each case there was a greater degree of affixation and permanence than is present here. I am not sure that that is so but, even if it is, it does not create a ground upon which the board can be found to have erred in law. With respect to each of the items, there clearly is evidence of a degree of permanence and, the Board having correctly instructed itself as to the law to be applied to the facts, it follows that its decision as to whether these items are properly included in the assessment is one of fact rather than law.

The answers to the four questions are as follows:

1. The Board did not err in law in finding that the items are machinery placed in the appellant's building.

2. The Board did not misdirect itself as to the meaning of the word "placed".

3. No question of law arises.

4. There was evidence upon which the Board could find that the items are machinery.