SPECIAL BENCH.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, Mr. Justice Mya Bu, and Mr. Justice Dunkley.

1938

Jan. 14.

DYER MEAKIN (BURMA), LTD.

v.

THE CHIEF EXECUTIVE OFFICER, MANDALAY MUNICIPALITY.*

Municipal assessment—Assessment on premises, not profits—Premises with exclusive profit-making characteristic—Contractor's test—Revenue principle—Application of contractor's test—Outlay and return—Profitable character of business carried on on premises—Absence of competition—Burma Municipal Act, s. 62.

The municipal assessment to be made is upon the premises in the occupation of the person assessed and not upon the profits of the business which he carries on. A test based upon the actual figures of profits can only be applied where a hereditament itself has an exclusive profit-making characteristic so as to single it out from other classes of hereditaments and to make it safe to arrive at the rent which the tenant might reasonably be expected to pay from this consideration only.

Neither the contractor's test, nor the revenue principle, is a principle of assessment. Each, or either, according as circumstances demand, may, in particular cases of assessment of lands or buildings, be used as a method of finding out what the hypothetical rent may be when no direct evidence on this point is available.

In applying the contractor's test regard must be had both to the outlay which would have to be made and to the return which the contractor would expect for such outlay. It is legitimate to enquire whether the business of the assessee is good, bad or indifferent, or whether it is a business which is specially fortunate by reason of the comparative absence of competition. The better the business is the higher the rent which a hypothetical tenant might reasonably be expected to pay for the premises. But this does not mean that the hypothetical rent should be calculated by an investigation into the profits of the assessee.

Ko Po Yee v. *The Corporation of Rangoon*, I.L.R. 5 Ran. 161; *Ladies Hosiery, Ltd.* v. *West Middlesex Assessment Committee*, (1932) 2 K.B.D. 679; *Mersey Docks & Harbour Board* v. *Assessment Committee of the Birkenhead Union*, (1901) A.C. 180; *The Queen* v. *The School Board of London*, 17 Q.B.D. 738, referred to.

Cartwright v. *The Sculcoates Union*, (1900) A.C. 150, distinguished.

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* Civil Reference No. 11 of 1937.

Clark for the applicant. The company had no monopoly in brewing beer or in selling the produce. It has to compete with several importers in the market. This case is not like the case of a tied public house in England. The license is given to the manufacturer, and does not relate to the premises. Rent, not profit, is the measure of rateable value. Ryde on Rating, 6th Ed. pp. 210, 211. The company may make big profits out of the business, but that has nothing to do with the assessment of the premises It is not the business that is to be rated, but the premises. *Mersey Docks & Harbour Board* v. *Assessment Committee of the Birkenhead Union* (1). A famous writer may write his book which will be highly remunerative in any place, but this cannot affect the rating value of the place. No doubt if the book is to be sold only at a certain place, that would affect the value of that place. If the landlord claims too high a rent, the tenant would go somewhere else or build a place for himself. It is only in very special cases that evidence can be given of the occupier's profits. Ryde on Rating, p. 217 : *Assessment Committee of the Bradford-on-Avon Union* v. *White* (2); *Secretary of State for India* v. *Municipal Corporation of Rangoon* (3).

Ba Han for the respondent. There is only one licensed brewery in Upper Burma, *viz.*, that of the company, and there are only two breweries in all Burma. The company enjoys a virtual monopoly. The Commissioner can refuse another person sanction to construct a brewery without assigning any reasons. Rule 128 of the Excise Rules. The privileges of the license can only be enjoyed on the premises described in the license and not elsewhere. Excise Rule 6. Any

(1) (1901) A.C. 175, 180. (2) (1898) 2 Q.B. 630.
(3) I.L.R. 10 Ran. 539.

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advantage the hereditament has must be taken into account and in a business like that of the company its profits are a useful guide to arrive at the rental value of the premises.

The King v. *Bradford* (1) ; *Kirby* v. *Hunslet Union Assessment Committee* (2) ; *Cartwright* v. *The Sculcoates Union* (3) ; *Port of London Authority* v. *Assessment Committee of Orsett Union* (4) ; *Ko Po Yee & Bros.* v. *The Corporation of Rangoon* (5).

ROBERTS, C.J.—This is a reference made by the Deputy Commissioner of Mandalay under rule 4, sub-rule (4), of the Rules published with the Ministry of Education, Local Government (Financial) Department Notification No. 35, dated the 2nd day of July, 1935, and relating to assessments to be made in the Municipality of Mandalay. The question which the Deputy Commissioner has referred to the Court is :

"Whether the assessment of Messrs Dyer Meakin (Burma) Limited by the Mandalay Municipality could be based on what is known as the Contractor's Test or according to the Revenue Principle on the profits of the business."

Messrs. Dyer Meakin (Burma) Limited are brewers carrying on a brewery and distillery in Mandalay, which is in fact the only brewery or distillery in Upper Burma. The tax which is the subject-matter of this case is imposed under section 62 (*1*) (*a*) of the Burma Municipal Act, 1898, which allows for the imposition of a tax on buildings and lands not exceeding 10 per cent of the annual value of such buildings and lands. Section 62, sub-section (*4*), says :

"In this section 'annual value' means the gross annual rent for which buildings and lands liable to taxation may reasonably be

(1) 105 E.R. 852.
(2) (1906) A.C. 43, 48.
(3) (1899) 1 Q.B. 667 ; (1900) A.C. 150, 156.
(4) (1920) A.C. 273, 295.
(5) I.L.R. 5 Ran. 161.

expected to let, and, in the case of houses, may be expected to let unfurnished."

By rule 4, sub-rule (4), of the Rules already referred to,

"if on the hearing of an appeal under this rule any question as to the liability to or the principle of assessment arises on which he entertains doubt, the Deputy Commissioner may of his own motion, and shall on the application of the appellant or the Chief Executive Officer made at the hearing, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer the statement with his own opinion on the point and the record of the case, for the decision of the High Court, who shall send a ruling thereon to the Deputy Commissioner in order that he may dispose of the case in conformity therewith."

As stated by the Earl of Halsbury L.C. in *The Mersey Docks & Harbour Board* v. *The Assessment Committee of the Birkenhead Union* (1), the thing to be done is to answer a plain question of fact, namely: What is the rent which a tenant might reasonably be expected to give for the premises? Lord Halsbury points out that it is not a tenant's trade which is to be rated, but the premises in which he carries on his trade or business: and that it is necessary to look at all the circumstances of the particular occupation, including therein the business that has been done on the premises.

Where it is impossible, as here, by direct evidence to find out what rent a hypothetical tenant would give, recourse must be had to some other method of solving the difficulty. In this particular case it is impossible to arrive at the annual value of the property by comparison with properties of a similar nature in the neighbourhood, since this is the only brewery or distillery in Mandalay. As a means of arriving at the answer to the question of what is the gross annual rent for which these buildings may reasonably be expected to

(1) (1901) A.C. 180.

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let, the Chief Executive Officer came to the conclusion that what is known as "the contractor's test" was not a satisfactory method to adopt. Accordingly, he took as a basis for the assessment figures representing the profits of the Company and arrived from that at a figure of Rs. 1,30,106-5-3. If this figure were taken, allowance would also have to be made for tenant's taxes, though this does not seem to have been done.

In answering the question whether the contractor's test or the revenue principle is the right basis upon which to assess this particular hereditament, we must begin by saying that the only proper basis of assessment is that which enables the gross annual rent, for which the buildings and lands liable to taxation may reasonably be expected to let, to be discovered: in other words, neither the contractor's test, nor the revenue principle, is a principle of assessment. Each, or either, according as circumstances demand, may, in particular cases of assessment of lands or buildings, be used as a method of finding out what the hypothetical rent may be when no direct evidence on this point is available.

In order to see what rent a hypothetical tenant would pay, the whole of the circumstances in each particular case must be examined. As Lord Halsbury pointed out in *The Mersey Docks & Harbour Board* v. *The Assessment Committee of the Birkenhead Union* (1),

"where you have premises of a similar character with equal facilities for carrying on trade, you have a very facile mode of coming to the conclusion what sum would reasonably be given by any tenant from year to year for such premises. But if, instead of doing that, you choose to go into elaborate calculations of how much the building cost to erect, and when erected what would be the value of it, you are only elaborating and making more complex

(1) (1901) A.C. 180.

and difficult the simple proposition which the Legislature has put before the overseers to answer."

In another case, *Ladies Hosiery and Underwear, Limited* v. *West Middlesex Assessment Committee* (1), Scrutton L.J. pointed out that where there was direct evidence of the rent which a hypothetical tenant actually would pay the method of comparison was open to criticism upon the ground that it is assumed that the properties with which comparison had been made had been themselves correctly assessed. The real question in all these cases is: Which is the most practical and direct means of arriving at the figure at which the premises might reasonably be expected to let?

It is contended on behalf of the Chief Executive Officer that the brewery, which is the hereditament in question, is a place from which a trade which is a *quasi* monopoly is carried on since there are no other breweries in Upper Burma, and can be none until application is made for a licence under Chapter III of the Burma Excise Rules. Dr. Ba Han has urged upon us that by Rule 128 of the Excise Rules an application for sanction to construct another brewery might be rejected by the Commissioner of the Division with or without assigning any reason to the applicant, and Dr. Ba Han seeks to say that the present case is comparable with that of *Cartwright* v. *The Guardians of the Poor of the Sculcoates Union in Kingston-upon-Hull* (2). That was a case of a tied public house in which the tenant was bound to purchase all liquors sold by him from the landlords or their nominees, and Lord Morris pointed out that almost the very first question that a hypothetical tenant would ask was whether the house was doing a good

(1) (1932) 2 K.B.D. 679. (2) (1900) A.C. 150.

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business or a bad business before he decided what rent to pay, and that the best way of ascertaining what trade was going on would be the production of the books of the existing tenant. Lord Brampton pointed out that any prudent intending tenant would try to ascertain the trade actually done on the premises and that the landlord would also look at the matter from a similar angle and would demand a somewhat higher rent for a house capable of yielding a large profit than that which he would for a house yielding a small one. But the case of *Cartwright* v. *The Sculcoates Union* (1), being that of a tied public house, has this distinction from the present case, namely, that the hereditament derived its letting value from the special character of the premises and the restrictions placed upon them; whereas here, although the letting value might well be affected by the character of the premises, the circumstances are by no means parallel. Where the number of enterprises is limited the profit which is earned in the enterprise must affect the rent which a hypothetical tenant would pay. On the other hand, in my opinion, it will be fallacious to endeavour to arrive at an answer to the main question by taking the figures of the trade done by the present occupants and endeavouring to arrive from them at the rent which a hypothetical tenant might pay. We have had cases cited to us in relation to railways, which do not seem to have any useful application here: and it must not be forgotten that the assessment to be made is upon the premises in the occupation of the person assessed and not upon the profits of the business which he carries on. A test based upon the actual figures of profits can only be applied where a hereditament itself has an exclusive profit-making characteristic so as to single it out from other classes of hereditaments and to make it safe to

(1) (1900) A.C. 150.

arrive at the rent which the tenant might reasonably be expected to pay from this consideration alone.

The nature of the contractor's test was explained shortly by the Court in *Ko Po Yee & Bros.* v. *The Corporation of Rangoon* (1). The Court quoted with approval the method of assessment set out, which was in the following terms :

"The general theory of this principle is, briefly, that a certain amount of capital would require to be invested to provide a property of similar utility to the one to be assessed and the interest on this sum may be taken as the rent which the occupant would actually be paying."

It was pointed out that the application of this principle required careful handling and each case had to be considered on its merits.

Cave J., in *The Queen* v. *The School Board of London* (2), dealing with the application of the contractor's test where the place was occupied, and occupied by the owner himself, explains that if such occupier-owner could get a place cheaper at a less rent than the interest on the cost, it is to be assumed that he would not go to the expense of building, but would prefer to take the cheaper course and pay the rent.

It may, therefore, be said that in order to arrive at the rent which a hypothetical tenant would pay, the contractor's test may be taken as a rough test in a case of this kind. But the answer which is arrived at must obviously depend upon the rate of interest which the contractor would expect to obtain for his money. To take the contractor's test, therefore, is not, by itself, a solution to the question and propounds two new questions. In order to discover what would the hypothetical tenant pay, one must ask (*a*) what it would cost a contractor to acquire land and build premises of similar utility and convenience, and (*b*) at what rate he

(1) (1926) I.L.R. 5 Ran. 161. (2) (1886) 17 Q.B.D. 738.

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would expect to get a return for his outlay. Careful regard must be had both to the outlay which would have to be made and to the return which the contractor would expect for such outlay. In deciding what return the contractor would expect, I am of opinion that the considerations mentioned by their Lordships in *Carberight* v. *The Scalcoates Union* (1) must not be lost sight of. Before laying out his money the contractor would wish to be satisfied as to the kind of opportunities for lucrative business which the premises were likely to afford, and the better the chance a tenant might have of doing lucrative business upon such premises the greater the return on the outlay which it may reasonably be expected the contractor would get.

Hence it is legitimate to enquire whether the business of the appellants in this particular case is good, bad or indifferent; or indeed, as has been suggested, whether it is a business which is specially fortunate by reason of the comparative absence of competition. The better the business is the higher the rent which a hypothetical tenant might reasonably be expected to pay for the premises. But this does not mean that the hypothetical rent should be calculated by an investigation into the present profits and a conclusion drawn from them that the hypothetical tenant would pay so much per cent of the profit which the present appellants are making.

I observe that in *Ko Po Yee*'s case (2) it is noted that the rate of interest on the contractor's principle

"has been fixed by the Court in the Burma Railways case at 8 per cent on the capital value of buildings and plant and 4 per cent on land."

This does not mean that the figure of 8 per cent is to be taken as a hard and fast rule providing what is a

(1) (1900) A.C. 150. (2) (1926) I.L.R. 5 Ran. 161.

reasonable return to the contractor for his outlay in all cases. A reasonable return may, and will in most cases, vary with the state of the money market and with the special circumstances of each particular case. If the contractor's test is employed as a basis for ascertaining the amount which a hypothetical tenant might reasonably be expected to pay, care must be taken to examine the actual return which the contractor would reasonably expect to receive on his outlay. If money were dear and profits from the particular business likely to be high, it is plain that the percentage on the outlay would be higher than if money were cheap and no particular business opportunities were afforded by the premises erected. In such a case the contractor might be glad to let the premises to a tenant for a comparatively low return for his money.

I would accordingly reply that in the absence of direct evidence or of any standard of comparison with other hereditaments of a similar character, the method of finding the annual value by means of the contractor's test will, within the limits laid down, afford a useful guide. The examination of the profits made by the appellants and a direct calculation from them is, in the present circumstances, a dangerous and unsafe method of discovering the rent which a hypothetical tenant would pay.

We assess the advocate's fee in this Court at twenty gold mohurs.

MYA BU, J.—I agree.

DUNKLEY, J.—I concur.