1959
Nov. 26

1960
Apr. 22

BETWEEN:

FRONT & SIMCOE LIMITED .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

Revenue—Income Tax Act, R.S.C. 1952, c. 148, ss. 3 and 4—Money paid to lessor under terms of lease to be held by it under certain conditions—Terms of lease altered by later agreement—Money retained by lessor is rent and was not paid for waiver of a right—Money paid to lessor held to be income from property within the provisions of ss. 3 and 4 of the Income Tax Act, R.S.C. 1952, c. 148—Appeal dismissed.

Appellant leased a hotel property to another company, incorporated for the purpose of operating it, for a term of ten years from September 1, 1949, at a "minimum annual rental" of $75,000 payable in monthly instalments of $6,250. Provision was made for increasing the rent dependent on the lessee's total gross receipts. Upon the signing of the lease the sum of $75,000 was paid to appellant to be kept by it as lessor and to be forfeited on non-payment of rent or as damages in case of bankruptcy, otherwise to be applied as rent. By a later agreement between the parties this lease was altered in certain respects and on March 10, 1954 a new lease was entered into between the parties which was substantially the same as the original 1949 lease but contained the following clause:

> 30. In consideration of the Lessor entering into these presents and releasing the Lessee from its obligations under the said Indenture of Lease dated the 22nd day of August, 1949, as amended by the said Indenture dated the 30th day of April, 1950, the Lessee hereby waives and renounces any and every claim for the sum of Seventy-five Thousand Dollars paid to the Lessor as hereinbefore set out to be applied on account of future rent and to be retained by the lessor upon the happening of certain contingencies, and acknowledges that the Lessor is entitled to retain the said sum of Seventy-five Thousand Dollars free from any claim or demand by the Lessee. The Lessee further waives and renounces any and every claim for the payment of interest on the said sum of Seventy-five Thousand Dollars.

It also provided for a reduction in rent and for renewal privileges. This sum of $75,000 was added by respondent to the appellant's declared income for the year 1955. Appellant asserts that it is a capital asset received for the surrender of the original lease and for the grant of a new lease and appeals from the re-assessment made by respondent. The parties agree that the money was received by appellant in its 1955 taxation year.

Held: That it is the real character of a transaction and not the name given it which governs its taxability under the *Income Tax Act* and to discover the real purpose of the transaction all the surrounding circumstances may be examined; here the real purpose of the agreement was that the lessor should accept lower rent and that the

agreement was for the payment of rent and not a waiver of a right, consequently the sum of $75,000 was income from property within sections 3 and 4 of the *Income Tax Act* R.S.C. 1952, c. 148.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Cameron at Toronto.

W. D. Goodman for appellant.

G. D. Watson, Q.C. and *J. D. C. Boland* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (April 22, 1960) delivered the following judgment:

This is an appeal from a re-assessment dated April 15, 1958, and made upon the appellant in respect of its taxation year ending March 31, 1955. By that re-assessment, the respondent added to the declared income of the appellant the sum of $75,000, said to be "rental deposit forfeited". Following a Notice of Objection, the respondent confirmed the said assessment, in particular on the following grounds:

The amount of $75,000 received by the taxpayer from Barclay Hotels (Toronto) Ltd. has been properly taken into account in computing the taxpayer's income in accordance with the provisions of ss. 3 and 4 of the Act.

There is no dispute as to the facts and the only question for determination is whether the said amount in the circumstances to be mentioned constitutes income in the hands of the appellant or, as the latter submits, was a capital receipt. The only evidence given at the hearing was that of Saul Salzman who has been president of the appellant company since its incorporation, and documents tendered by him.

The appellant was incorporated under the *Ontario Companies Act* on May 17, 1946 (Exhibit 1), its purposes and objects being stated as follows:

Subject to the provisions of any statute or regulations passed thereunder in that behalf for the time being in force, to conduct and operate a hotel business at the northeast corner of Front and Simcoe Streets, in the said city of Toronto.

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The hotel referred to and which I shall refer to as the Barclay Hotel, was operated by the appellant under the management of Salzman from 1946 to 1949. In the latter year, Salzman found that he could no longer carry on the business and it was decided to rent the property. On August 4, 1949, the appellant received and accepted an offer to lease the Barclay Hotel as a going concern, with all its contents, from Messrs. Gould and Torno as trustees for a company to be incorporated under the name of Barclay Hotels (Toronto) Ltd. Exhibit 2 is the lease dated August 22, 1949, subsequently entered into between the appellant and the new company, and attached thereto is a copy of the said offer to lease. The lease was for a period of ten years from September 1, 1949, at a "minimum annual rental" of $75,000 payable in advance in equal monthly instalments of $6,250 on the 1st of each month. Provision was also made for payment of additional rental (which I shall hereinafter refer to as "further rental") in certain circumstances.

> And in addition thereto by way of further rental for each complete year of the said term, the amount, if any, by which the minimum annual rental for such year is less than the percentages of the Lessee's Total Gross Receipts hereinafter set forth derived during such year from the business carried on upon the demised premises, and for any fraction of the year, the amount, if any, by which the proportion for such fraction of a year of the minimum annual rental is less than the percentages of the Lessee's said Total Gross Receipts for such fractions of a year.

Then followed a detailed statement of the percentages of the lessee's total gross receipts, above referred to, the details of which are not here of importance. Provision was also made by which the lessee could secure two five-year extensions of the lease "provided the lessee is not in default hereunder" and "at the same minimum rental and percentages of gross sales and revenue as aforesaid, and otherwise upon the same terms and conditions as are in the Lease set out, *but without any obligation to pre-pay any rent*". (The italics are mine.)

The provisions in the lease regarding pre-payment of rent are found on pp. 20-21:

> Forthwith upon the execution of these presents, the Lessee shall pay to the Lessor the sum of Seventy-five Thousand Dollars ($75,000.00) of lawful money of Canada (the receipt whereof is hereby acknowledged)

to be applied on account of rent as hereinafter provided to be retained by the Lessor and to be forefeited to the Lessor as liquidated damages (in addition to any other rights or remedies that the Lessor may have) for the Lessor's trouble and expense in giving up possession of the said premises, in case the Lessor shall be entitled to determine the term hereby demised because of non-payment of rent by the Lessee, or because the Lessee has made an assignment for the benefit of creditors or become bankrupt, or an order has been made for the winding up of the Lessee, or a final judgment has declared that the Lessor is entitled to determine the terms hereby demised because of the Lessee's failure to observe any other of the provisoes, covenants and agreements herein contained. Provided, however, that if the term hereby demised is not determined by the Lessor for any of the causes aforesaid, or if the Lessor has not obtained a judgment declaring that it is entitled to determine this Lease as aforesaid, the Lessor shall apply the said sum of Seventy-five Thousand Dollars ($75,000.00) on account of rent due, as follows:

Fifteen Thousand Dollars ($15,000.00) on account of the rent due for the quarter-year from the first of September, 1954, to the thirtieth day of November, 1954; Fifteen Thousand Dollars ($15,000.00) on account of the rent due for the quarter-year from the first of September, 1955, to the thirtieth day of November, 1955; Fifteen Thousand Dollars ($15,000.00) on account of the rent due for the quarter-year from the first of September, 1956, to the thirtieth day of November, 1956; Fifteen Thousand Dollars ($15,000.00) on account of the rent due for the quarter-year from the first of September, 1957, to the thirtieth day of November, 1957; and the remaining Fifteen Thousand Dollars ($15,000.00) on account of the rent due for the quarter-year from the first of September, 1958, to the thirtieth day of November, 1958.

The said sum of Seventy-five Thousand Dollars ($75,000.00) or any part thereof remaining from time to time unapplied on any rent payments shall bear interest at the rate of two percentum (2%) per annum, payable yearly on the first day of September in each year to be computed from the 22nd day of August, 1949, and to run until the 30th day of November, 1959. The first payment of interest to be made on the 1st day of September, 1950.

The said sum of $75,000 was paid by the lessee to the appellant in cash in 1949 and placed in the latter's bank account. It appears to have been used for the general purposes of the appellant, including large payments for the transfer of the liquor license in 1949, and again in 1958.

Within six months of the date of the lease, the lessee found itself in financial difficulties and by the terms of an agreement dated April 30, 1950 (Exhibit 3), certain variations of the lease were agreed to, and subject thereto the original lease remained in effect. By that amendment, it was recited that the lessee had observed all the covenants of the lease up to November 1, 1949, but that thereafter

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and up to April 30, 1950, had paid only the minimum monthly rental of $6,250 which the lessee agreed to accept in full of rent to that date.

It was further provided that for the months of May, June and July and August, 1950, the lessor would accept a fixed monthly rental of $6,250, waiving any right to the "further rental" for that period; and that for the four-year period commencing September 1, 1950, and ending August 31, 1954, the fixed annual rental would be $65,000, payable in equal monthly instalments in advance, any right to "further rental" being waived for that period also. It was agreed also that the lessor should pay all realty taxes (under the original agreement the Lessee was not required to pay any part thereof), but that if such realty taxes in any of the years 1951 to 1954, inclusive, should exceed those payable by the lessor in 1950, such excess taxes should be paid by the lessee. The original proviso by which the lessee was entitled to 2 per cent. interest on the sum of $75,000, or on that part thereof not applying to rent, was deleted and the following clause substituted:

"The said sum of Seventy-five Thousand Dollars ($75,000.00) or any part thereof remaining from time to time unapplied on any rent payments shall bear interest at the rate of two per centum (2%) per annum, payable yearly on the first day of September in each year to be computed only from the first day of September, 1954. The first payment of interest to be made on the first day of September, 1955."

The Lessee hereby waives and renounces any and every claim to the payment of interest on the said sum of Seventy-five Thousand Dollars ($75,000.00) from the 22nd day of August, 1949, to the 31st day of August, 1954.

The final clauses of that agreement read as follows:

6. All the other terms and conditions of the said indenture of lease dated the 27th day of August, 1954 (obviously an error for 1949) save as herein amended, shall remain in full force and effect and be binding upon the parties hereto, their successors and assigns.

7. It is hereby agreed and acknowledged by the parties hereto that for the period commencing from the 1st day of September, 1954, all the terms and conditions as set forth in the indenture of lease of the 22nd day of August, 1949, shall again come into effect and be binding on the parties hereto from the said 1st day of September, 1954.

The original lease as so amended remained in force until August 31, 1954. If no new arrangements had been entered into, all the terms of the original lease would have been

in effect for the period September 1, 1954, to August 31, 1959, including the right of the lessor to receive not only the "minimum annual rental", but also the "additional rental" if the circumstances warranted. The appellant would also have been entitled to apply the sum of $75,000 in its hands on account of rent as originally provided. The lessee would have been entitled to receive 2 per cent. interest on the portion of that sum not applied to rent.

However, on March 10, 1954, a new lease of the same property (Exhibit 4) was entered into between the same parties—three individuals, all of whom were shareholders of the lessee company, joining therein to guarantee the due performance by the lessee of all its covenants. It was for a term of five years commencing September 1, 1954, and ending on August 31, 1959, as the original lease had done; it was for a fixed annual rental of $65,000 payable in equal monthly instalments in advance. By clauses 25 and 26 thereof, the lessee had the right to two five-year extensions of the lease on the terms set out in the draft lease attached thereto and called Schedule B. Essentially, the terms of such five-year extensions appear to be the same as those provided for in the original lease of August 22, 1949, the rental reserved being "the minimum annual rental" of $75,000, and "further rental" again being on the basis of the percentages of the lessee's total gross receipts. Clause 30 of the new lease reads as follows:

> 30. In consideration of the Lessor entering into these presents and releasing the Lessee from its obligations under the said Indenture of Lease dated the 22nd day of August, 1949, as amended by the said Indenture dated the 30th day of April, 1950, the Lessee hereby waives and renounces any and every claim for the sum of Seventy-five Thousand Dollars paid to the Lessor as hereinbefore set out to be applied on account of future rent and to be retained by the Lessor upon the happening of certain contingencies, and acknowledges that the Lessor is entitled to retain the said sum of Seventy-five Thousand Dollars free from any claim or demand by the Lessee. The Lessee further waives and renounces any and every claim for the payment of interest on the said sum of Seventy-five Thousand Dollars.

It is the nature of this sum of $75,000 so received by the appellant which is now in dispute. The parties have agreed that it was received by the appellant in its 1955 taxation year.

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Before considering the legal questions involved, it becomes necessary to refer to two other documents put in evidence by the appellant. Attached to the original lease (Exhibit 2) is a copy of the "Offer to Lease" dated and accepted by the appellant on August 4, 1949. It provides for payment to the lessor of $75,000 in cash to be applied by the latter only on account of rent then due, namely, $15,000, on account of the first quarter's rent in each of the last five years of the ten-year lease; it contained no provisions for forfeiture to the appellant of any part thereof in the event of the lessee failing to carry out its agreement or going into bankruptcy, or otherwise. It is apparent, also, that notwithstanding the general release given by the lessee to the appellant of all rights in the sum of $75,000 as set out in clause 30 of the new lease (Exhibit 4), it never was the intention of the parties that it should have that effect. On the same date that the new lease was signed, a further and separate agreement was entered into by the same parties and prepared by the same firm of solicitors. While it is referred to as "an addendum to the said lease", the terms thereof were apparently in the contemplation of the parties at the time the lease was signed. Its operative terms are as follows:

1. Paragraph 13 on page 6 of the said lease of the 10th day of March, 1954, is amended by providing that in the event that the lease is terminated under the provisions of the said paragraph 13 the Lessor will forthwith pay to the Lessee the sum of Fifteen Thousand Dollars ($15,000.00) for each year, or a proportionate amount for part of a year remaining of the unexpired term of the said lease.

2. Paragraph 24 on page 13 of the said lease of the 10th day of March, 1954, is amended by providing that in the event the said lease is terminated under the provisions of the said paragraph 24 the Lessor will forthwith pay to the Lessee the sum of Fifteen Thousand Dollars ($15,000.00) for each year, or a proportionate amount for part of a year, remaining of the unexpired term of the said lease.

3. All the other terms and conditions of the said lease are to remain in full force and effect.

Paragraph 13 so referred to related to the right of the lessee and the lessor to terminate the lease in the event of the demised premises being destroyed by fire, lightning or tempest, or other casualty, act of God, or the Queen's enemies to such an extent as to render them unfit for the lessee's business, and incapable of restoration within 180

days thereof. Paragraph 24 so referred to related to the option given to the lessee to determine the lease if without fault on its own part, it lost the right to sell beer, wine and liquor on the demised premises.

In its Notice of Appeal, the appellant stated its reasons as follows:

11. The Appellant claims that the said sum of Seventy-five Thousand Dollars ($75,000.00) was not received as rent, but as security for the proper performance by the Lessee of its covenants under the said Lease dated the 22nd day of August, 1949. Under certain conditions, which never materialized, the said sum was to have been applied in five equal instalments on acount of rent for the quarter-years commencing the 1st day of September in each of the years, 1954 to 1958, inclusive. However, before the time arrived when the Lessee could avail itself of its right to have the said sum applied on account of rent, the Lessee surrendered all its rights to the said sum, in consideration of the Appellant's accepting the surrender of the lease dated the 22nd day of August, 1949, and granting a new lease dated the 10th day of March, 1954.

12. The Appellant claims that, in all the circumstances of the case, the said sum of Seventy-five Thousand Dollars ($75,000.00) constitutes a capital receipt of the Appellant and that it is not income within the meaning of any of the provisions of the Income Tax Act.

The respondent relies on ss. 3 and 4 of *The Income Tax Act* and says that the sum of $75,000 received by the appellant was income from property; alternatively, that it was income from a business; and in the further alternative that it was income from a source. He says that in adding to the income of the appellant for the 1955 taxation year, in the course of re-assessment, the sum of $75,000, he acted on the following assumptions:

(*a*) that the said sum of $75,000.00 was received by the Appellant from Barclay Hotels (Toronto) Limited at some time prior to the beginning of the 1955 taxation year of the Appellant.

(*b*) that the said sum of $75,000.00 was *beneficially* received by the Appellant during its 1955 taxation year, and

(*c*) that the said sum of $75,000.00 represented part of the income of the taxpayer for the said taxation year within the meaning of Sections 3 and 4 of the Income Tax Act.

While the original lease (Exhibit 2) provided for the forfeiture of the sum of $75,000 to the appellant as liquidated damages if the appellant terminated the lease because of a breach of certain covenants by the lessee, it is not suggested in the pleadings, evidence or argument that such a forfeiture did in fact occur. In the new lease (Exhibit 4), there

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is a recital that the lessee was unable to carry out the terms of the original lease, but no evidence was given on that point and clause 30 thereof expressly states that the consideration for the lessee's renunciation of all claim to the sum of $75,000 was the grant of the new lease and the release of the lessee from the obligations under the original lease. It is not necessary, therefore, to consider the problem that might have arisen had the appellant terminated the original lease by reason of the lessee's breach of its covenants, and had retained the sum of $75,000 as liquidated damages.

Put briefly, the submission by appellant's counsel is this. He says that a lump sum payment received for the surrender of the lease and/or for the grant of a new lease, is not of an income nature but a receipt on capital account. In support of that contention, he cited a number of cases, but in view of the conclusions which I have arrived at as to the real nature of the payment, I do not find it necessary to consider them.

In *Simon's Income Tax,* Second Ed., Vol. 1, p. 50, the author, after referring to a number of decisions, states:

> The true principle, then, is that the taxing Acts are to be applied in accordance with the legal rights of the parties to a transaction. It is those rights which determine what is the "substance" of the transaction in the correct usage of that term. Reading "substance" in that way, it is still true to say that the substance of a transaction prevails over mere nomenclature.

Earlier, the author had referred to the statement of Viscount Simon in *I. R. C. v. Wesleyan and General Assurance Society*[1], in which he expressed the principle in these words:

> It may be well to repeat two propositions which are well established in the application of the law relating to income tax. First, the name given to a transaction by the parties concerned does not necessarily decide the nature of the transaction. To call a payment a loan if it is really an annuity does not assist the taxpayer, any more than to call an item a capital payment would prevent it from being regarded as an income payment if that is its true nature. The question always is what is the real character of the payment, not what the parties call it. Secondly, a transaction which, on its true construction, is of a kind that would escape tax is not taxable on the ground that the same result could be brought about by a transaction in another form which would attract tax.

[1] 30 T.C. 11, 24, 25 H.L.

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The question for determination, therefore, is "What is the real character of the receipt?" and in answering that question I am entitled to regard the surrounding circumstances. In that connection, reference may be made to the speech of Lord Tomlin in *I. R. C. v. Westminster (Duke)*[1], where he referred to "the undisputable rule that the surrounding circumstances must be regarded in construing a document."

In my view, the evidence which I have set out above clearly establishes that when the new lease (Exhibit 4) was signed, the parties thereto, notwithstanding the form and language of the agreement, intended that the sum of $75,000, the right to which in form only was waived by the lessee, should be accepted by the appellant in return for the lower rental which the new lease reserved. The original Offer to Lease dated August 4, 1949, clearly stamped the proposed deposit of that sum with the character of pre-paid rent only. Then, by the terms of the original lease, it was to be applied on account of future rent unless the lessor determined the lease for any of the causes referred to or secured a judgment declaring that it had a right to determine the lease, neither of which events actually occurred.

Prior to the signing of the new lease of March, 1954, the parties were aware that the reduced fixed annual rental of $65,000 provided for in the agreement of April 30, 1950 (Exhibit 3) would be at an end on August 31, 1954; that on that date the original rental terms providing for a "minimum annual rental" of $75,000, as well as "further rental", would be in effect for the succeeding five years; and that in each of these five years, unless a forfeiture occurred, the lessor out of the $75,000 previously paid to him was bound to apply $15,000 annually on account of rent. All this was in accordance with the terms of their contract.

Mr. Salzman, the president of the appellant company, made no attempt to explain the circumstances under which the terms of the new lease were agreed to or why the very large sum of $75,000 (the exact amount of the pre-paid

[1] [1936] A.C. 1, 20.

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rent) should have been agreed to as the consideration for the grant of the new lease and the release of the lessee from the terms of the original lease; and counsel for the appellant was content to rely entirely on the wording of the lease itself. It is clear, however, from the terms of the new lease that the lessee not only waived the right to any claim to the sum of $75,000, but, by the same document, received the benefit of a rental for the ensuing five years substantially below that which it would otherwise have been obliged to pay. The new rental was fixed at $65,000 per annum, replacing the original provision for a minimum annual rental of $75,000, plus "further rental", the amount of which latter item might vary from year to year.

I attach considerable importance, also, to the provisions of Exhibit 5, the agreement signed on the same date as the new lease, and the terms of which I have set out above. That agreement does not in terms refer to the pre-paid rent of $75,000; it does provide, however, for payment by the lessor to the lessee of $15,000 "for each year or a proportionate amount for a part of the year remaining of the unexpired term of the said lease" (the term being for five years), in the event that the lease is determined because of the destruction of the property by fire, or is determined by the lessee should it without fault on its own part lose its liquor license. In certain circumstances, therefore, the lessor under these conditions might be required to pay the lessee as much as $75,000—the precise amount of the pre-paid rent. The amount to which the lessee was entitled under these provisions was based on the unexpired portion of the five-year term at the time the lease would be so terminated. Conversely, the appellant was released from liability for payment under that agreement for such part of the five-year term as the lessee remained in possession.

No explanation was given for entering into this agreement. In my view, only one inference may be drawn from its provisions, namely, that the parties thereto, notwithstanding the provisions of the new lease, regarded the sum of $75,000 as pre-paid rent which in the circumstances

mentioned in Exhibit 5, the lessee could recover in whole or in part, if through no fault on its part, its lease was terminated under the provisions of paras. 13 and 24 of the new lease.

In my opinion, therefore, the substance of the transaction by which the lessee purported to waive its right in the deposit of $75,000 was that all the parties to the new lease intended that sum to be a pre-payment on account of rent, an amount payable in respect of the user of the appellant's capital asset, the Barclay Hotel. It was therefore received on revenue and not on capital account.

A somewhat similar case came before Lawrence J. in *Greyhound Racing Association (Liverpool) Ltd. v. Cooper (H. M. Inspector of Taxes)*[1]. The facts are stated in the headnote as follows:

> In July, 1927, the Appellant Company acquired the lease of a racing track for 14 years expiring in 1941. From June, 1928, a receiver for debenture holders carried on the business as agent of the Company.
>
> In March, 1932, the Appellant Company granted to another company a licence to use the track from 1st May, 1932, to 29th April, 1941, in consideration of a percentage of the gross takings, with certain minimum weekly payments. The licensee company went into voluntary liquidation in March, 1934, and after negotiations the receiver, on behalf of the Appellant Company, agreed to a surrender of the hiring agreement if a new company to be formed would take over the track at a rent to be agreed and provided that a sum was paid equal to the difference, on an actuarial basis, between the old and the new rents. The sum so paid was included in the Appellant Company's accounts for the year ending 31st March, 1934, as a revenue receipt.
>
> On appeal against an assessment under Schedule D on the Appellant Company for the year 1934-35, it was contended on behalf of the Company that the sum so paid was a payment of a capital nature in respect of the diminished value of the goodwill of the Company for the period from 1934 to 1941.
>
> Held, that the sum was a trading receipt in respect of which the Company was assessable to Income Tax.

In that case it was argued that the license of March 11, 1932, was a capital asset of the appellant company and that the sum paid for the surrender of that license was a part realization of that capital asset. There as here, the appellant cited the cases of *Van den Berghs, Ltd. v. Commissioners of Inland Revenue*[2] and *Mallett v. Stavely Coal*

[1] 20 T.C. 373. [2] 19 T.C. 390.

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Company[1]. Lawrence, J. distinguished both these cases from the one he had under consideration. In his judgment he said at p. 378:

> The question as to what receipts are revenue and what are capital has given rise to much difference of opinion; but it is clear, in my opinion, that, if the sum in question is received for what is in truth the user of capital assets and not for their realisation, it is a revenue receipt, not capital.
>
> . . . But here, in my opinion, the only capital asset in fact acquired by the Appellant Company was the track and its equipment. The user of that track, whether by the Appellant Company or its licensee, did not create new capital assets, nor did it realise the original capital asset, which remains the property of the Appellant Company, for which it has received, in the year 1934, the sum of £15,640 and is to receive the new rents provided for by the agreement of March, 1934. The sum of £15,640 was nothing more than a lump sum payment in place of future rents similar to the payments in question in *Short Bros., Ltd. v. Commissioners of Inland Revenue,* 12 T.C. 1955, and similar cases.

In the instant case, the appellant company retained the full ownership of its only capital asset—the Barclay Hotel. In my view, the receipt of the sum of $75,000 by the appellant in its 1955 taxation year, was entirely referable to the future user by the lessee of the appellant's property. It represented the fruit of the tree and not the realization by sale of the tree itself. In my opinion, it was therefore income from property within the provisions of ss. 3 and 4 of *The Income Tax Act.*

For these reasons, the appeal fails and will be dismissed with costs.

Judgment accordingly.

[1] 13 T.C. 772.