Vancouver 1968 Sept. 26-27 Oct. 28

BETWEEN:

H. A. ROBERTS LTD. ..... APPELLANT;

AND

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

Income tax—Termination of mortgage agency business—Whether compensation received capital or income.

In 1946 appellant company which carried on a real estate business in Vancouver was appointed mortgage agent for an insurance company and in 1960 for a second company, and later for a third company. In addition to its mortgage business appellant was also engaged in real estate, insurance, property management and appraisals. Its mortgage business, which was carried on separately from its other businesses, produced aproximately one-fourth of its total revenue. In 1963 appellant's three mortgage principals terminated their agencies and appellant received $73,600 from one principal and $10,000 from another as compensation.

Held, the sums so received by appellant on the termination of its agencies were income and not capital The agencies did not relate to the whole structure of appellant's business; the sums received were merely in lieu of future income.

Van Den Berghs, Ltd v. Clark [1935] A.C. 431; *Parsons-Steiner Ltd v. M.N.R.* [1962] Ex.C.R. 174; *Barr, Crombie & Co. v. C.I.R.* (1945) 26 T.C. 406; *Miller v. M.N.R.* [1962] Ex.C.R. 400; [1962] C T C. 199; distinguished. *Kelsall Parsons & Co.* (1938) 21 T.C. 608; *C.I.R. v. Fleming & Co. (Machinery) Ltd* (1951) 33 T.C. 57, applied. *Sabine v. Lookers, Ltd* (1958) 38 T.C. 120; *Jones v. M.N.R.* 63 DTC 964, referred to.

INCOME TAX APPEAL.

P. N. Thorsteinsson and *M. J. O'Keefe* for appellant.

J. R. London for respondent.

SHEPPARD D.J.:—This appeal by the taxpayer, H. A. Roberts Ltd. from an assessment by the Minister of National Revenue is on the contention that the sums received by the taxpayer in 1963 on the cancellation of mortgage agencies, namely $73,633.72 received from the Crown Life Insurance Company and $10,000 from the Burrard Mortgage and Investments Limited are capital and not income.

In 1929 H. A. Roberts Ltd., the appellant, was incorporated as a real estate company and has since carried on business at 562 Burrard Street, Vancouver. From 1929 to 1946 it carried on the usual real estate business exclusively. In 1946 it began a mortgage representative department and from 1946 to 1963 it carried on business in five departments: (1) real estate, (2) mortgages, (3) insurance, (4) property management, and (5) appraisals, and later in 1964 began a sixth, property development. The mortgage department began in 1946 when the appellant was appointed mortgage representative in British Columbia for the Crown Life Insurance Company. At first the appellant and another had an agency for the Crown Life but after the 7th June 1948, the appellant had the sole agency. For the appellant's services to the Crown Life it received 10% of the interest collected up to $100,000 and 7½% thereafter. On the 11th August 1960 the appellant was appointed as the mortgage representative of Burrard Mortgage and Investments Limited. In the result the head office and business of the appellant was carried on at 562 Burrard Street and the various departments other than the mortgage department occupied the first floor and the mortgage department the entire second floor with a staff eventually built up to thirteen. The appellant also had a mortgage agency for the Occidental Life Company of California and from time to time would obtain mortgages for individual customers. The mortgage department had a separate accounting system to conform to the demands of the respective mortgage companies represented, and had a cash register, purchased for $6,000, to render each month a statement of the principal and interest received. The mortgages were obtained at

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first from customers of the appellant, but latterly the majority of the mortgages were obtained through other real estate agents and therefore it was important that the mortgage department be carried on separate from the other departments in order to assure competing real estate agents that any business they brought, or information given, to the mortgage department would be treated in confidence.

The method of accounting and the income from respective departments in the appellant's business are shown in the balance sheets in Exhibit A(1). The balance sheet for 1963 shows that the income of the appellant's business was produced under five headings, *viz.* real estate in schedule 1; insurance in schedule 2; mortgage collections in schedule 3; property management in schedule 4, and appraisals in schedule 5. In each schedule the income thereby produced was entered and the direct expenses in producing that income, then the excess in each schedule was carried to Exhibit C and the general administrative expenses and other expenses of the business were there charged, and the balance is the net income of the business for that year.

Exhibit A(5) shows for the years 1959 to 1962 inclusive the mortgage commissions as 25%, 27%, 22% and 24% of the total revenue; real estate commissions 52%, 48%, 30% and 25%; and insurance commissions 10%, 8%, 27% and 33%. The amounts produced by the respective departments for the years 1958 to 1966 inclusive are shown in Exhibit R(1).

On the 24th February 1960 the Crown Life and the appellant agreed that the servicing fee would be 6% of interest collected and that the Crown Life would have the right to terminate the agency on ninety days' written notice and upon payment of ½% of the then unpaid balances of the mortgages being serviced by the appellant for the Crown Life.

Burrard Mortgage and Investments Limited had the right to cancel on payment of $20,000.

In 1963 the three mortgage companies terminated their agencies. The Crown Life terminated by notice of the 28th September 1962 effective the 1st February 1963, and by paying therefor $73,633.72. The Burrard Mortgage and Investments Limited also terminated, which it had the right to do, but entered into a dispute with the appellant as to

the amount payable and that was eventually settled at $10,000. The Occidental cancelled without payment as of right.

In making an assessment the Minister included as income the two sums received on cancellation and the appellant filed notice of objection and has now appealed on the contention that such sums are capital on the grounds—(1) that the mortgage representation was a separate business and therefore the sums paid were for the total loss of that business and were capital; (2) if the mortgage representation was not a separate business, then the cancellation by the Crown Life and Burrard Mortgage made such a substantial hole in the business of the appellant and so dislocated the business as to be a significant loss of part of the profit-making structure of the business and therefore capital.

The issue here, as to whether the sums received are capital or income raises questions of law as to the meaning of the applicable sections of the *Income Tax Act*, and of the written instruments of employment of the appellant and whether there is any evidence to bring the case within the sections of the *Income Tax Act*, but beyond that the ultimate question is one of fact.

In *Van Den Berghs, Limited v. Clark*[1] Lord Macmillan stated at p. 438:

> While each case is found to turn upon its own facts, and no infallible criterion emerges, nevertheless the decisions are useful as illustrations and as affording indications of the kind of considerations which may relevantly be borne in mind in approaching the problem.

That each case depends upon its own facts has been emphasized in *Kelsall Parsons & Co. v. C.I.R.*[2] by the Lord President.

In *Parsons-Steiner Ltd. v. M.N.R.*[3] Thurlow J. stated:

> What appears most clearly from these cases is that the question is largely one of degree and depends on the facts of the particular case and the inferences to be drawn therefrom.

The following facts, therefore, appear to be relevant: The appellant's business consisted of five departments, in fact, six after the commencement of the property develop-

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[1] [1935] A.C. 431.
[2] (1938) 21 T.C. 608, at p 619.
[3] [1962] Ex. C.R. 174, at p 181.

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ment department, which is not important, but in all these departments the appellant was employed by each customer to render a service, and that service was largely to find someone to enter into a contractual relation with the customer employing the appellant. In real estate the listing was intended to lead to the relation of vendor and purchaser; in the mortgage department to obtain mortgagors for the customer as mortagagee; in the insurance department to sell a policy; in property management to obtain and manage a lease, and in the appraisal department the service probably would not result directly in a contractual relation between the customer of the appellant and a third person but would at least provide for a service by the appellant.

In all, these various departments were carried on by one corporation of H. A. Roberts Ltd. The various statements show the income derived from the respective departments and, while each department was charged with its direct expenses the accumulated income was charged with certain general expenses. In other words, all the various departments were treated as forming one business composed of the various departments whose respective incomes may be seen in Exhibits A(2), A(5) and R(1). The cancellation was of right by the Crown Life upon giving ninety days' notice and paying ½ of 1% of the unpaid balances of mortgages outstanding for Crown Life and by ninety days' notice and payment of $20,000 for Burrard Mortgage. After the cancellation the mortgage department was closed and the staff disbanded, the majority of them being absorbed by the Crown Life and the individual mortgagees who were customers of the appellant were serviced by the accounting department of the appellant. Therefore, while the mortgage department was a separate department, it was not a separate business.

The closing by the appellant of the mortgage department would not be wholly dissimilar to a departmental store closing one department, in that the same store would continue in the same business. The appellant carried on business under the same incorporation before opening the mortgage department and also after the closing of that department.

Both agreements, namely that with Crown Life and that with Burrard Mortgage provided for cancellation,

hence the appellant could not have expected either agreement to continue indefinitely any more than a listing of a property for sale, and the agreements, while continuing, did provide for services which produced income.

On the other hand, the appellant contends that the mortgage department was unique in that, if not a separate business, the cancellations and the necessary closing of the department caused such a significant loss of the profit-making machinery as to denote the sums paid were capital.

In the four following cases the amount paid for cancellation was deemed capital. In *Van Den Bergs, Ltd. v. Clark* (*supra*) by separate agreement the initial agreements of 1908, 1913 and 1920 were to terminate as of the 31st December 1927 rather than run to the 31st December 1940 and these three agreements provided for pooling of the profits and also for the manner of the company carrying on its business. Lord Macmillan, at p. 441, said:

> ...agreements of 1908, 1913 and 1920 being terminated as at December 31, 1927, instead of running their course to December 31, 1940. If the payment had been in respect of a balance of profits due to the appellants by the Dutch Company for the years 1914 to 1927, different considerations might have applied, but it is agreed that it is not to be so regarded.
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> Now what were the appellants giving up? They gave up their whole rights under the agreements for thirteen years ahead. These agreements are called in the stated case "pooling agreements," but that is a very inadequate description of them, for they did much more than merely embody a system of pooling and sharing profits. If the appellants were merely receiving in one sum down the aggregate of profits which they would otherwise have received over a series of years the lump sum might be regarded as of the same nature as the ingredients of which it was composed. But even if a payment is measured by annual receipts, it is not necessarily itself an item of income. As Lord Buckmaster pointed out in the case of the Glenboig Union Fireclay Co. v. Commissioners of Inland Revenue: "There is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the test."

and at p. 442:

> The three agreements which the appellants consented to cancel were not ordinary commercial contracts made in the course of carrying on their trade; they were not contracts for the disposal of their products, or for the engagement of agents or other employees necessary for the conduct of their business; nor were they merely agreements as to how their trading profits when earned should be distributed as between the contracting parties. On the contrary the cancelled agreements *related to the whole structure of the appellants' profit-making apparatus. They regulated the appellants' activities, defined what they might and what they might not do,*

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and affected the whole conduct of their business. I have difficulty in seeing how money laid out to secure, or money received for the cancellation of so fundamental an organization of a trader's activities can be regarded as an income disbursement or an income receipt.

(italics supplied)

and at p. 443:

> The agreements formed the fixed framework within which their circulating capital operated; they were not incidental to the working of their profit-making machine but were essential parts of the mechanism itself. They provided the means of making profits, but they themselves did not yield profits. The profits of the appellants arose from manufacturing and dealing in margarine.

The *Van Den Berghs* case is distinguishable in that the three agreements which the appellants consented to cancel were not ordinary commercial contracts made in the course of carrying on their business, but "regulated the appellants' activities, defined what they might do and what they might not do"... "related to the whole structure of the appellants' profit-making apparatus." Here the agreements cancelled were commercial contracts made in the course of the appellant carrying on this business as the services bargained for produced income and the appellant carried on the same business of real estate agent before the mortgage department was opened and also afterwards. Further, the employment of the appellant by Crown Life and Burrard Mortgage was made with the appellant in the course of its carrying on its business of real-estate agent, and that employment, if carried on in place of being cancelled, would have produced income for that business.

In *Barr, Crombie & Co. v. C.I.R.*[4], there, in 1924 the appellant had agreed to manage the ships of a shipping company for 15 years at agreed rates and in the event of the shipping company going into liquidation or ceasing to carry on business the remuneration to be paid until the date of expiry was immediately to become due and payable. In 1942 the shipping company went into liquidation and for the eight years which the agreement was to run the appellant received £16,000. It was held that that sum was a capital payment, not a trading asset. At the time of liquidation the appellant's revenue for managing ships was 88.23% or, roughly, 9/10th of its revenue and the shipping

[4] (1945) 26 T.C. 406.

company was the sole employer except for four ships temporarily managed by the appellant for the government which amounted to only 2% of its revenue. Hence at the time of the cancellation nine-tenths of the appellant's revenue was derived from the shipping company and 10% from other sources.

The Lord President said at p. 410:

> Upon liquidation of the shipping company it is found that *the Appellant Company lost its entire business,* apart from the abnormal business above referred to which it had obtained from the Ministry of War Transport, and that in consequence of the liquidation the Company was forced to effect reductions of staff and salaries and to move to smaller premises. Upon these facts the Special Commissioners found that the sum of £16,306 16s. 11d. was remuneration under a service agreement and was a trading receipt on revenue account.

and said at p. 411:

> Lord Cave, L.C., in the case of British Insulated and Helsby Cables, Ltd. v. Atherton (1926) A.C. 205, at page 213; 10 T.C. 155, at page 192, said: "But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital." And of course, one may equally say that an expenditure made once and for all as payment for abandoning or surrendering an asset is received by the recipient as a capital and not as a revenue payment, in the absence of any indication to the contrary. In the present case virtually the whole assets of the Appellant Company consisted in this agreement.
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> . . .
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> In Kelsall Parsons & Co. on the other hand, the payment was in return for the loss of a single agency out of about a dozen agencies carried on by the company, and the fact that the payment in that case did not represent the whole capital assets of the company is easily shown by the fact that in the year after the surrender of the single agency profits were no less than they had been the year before the surrender. . . .
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> Here we are not dealing with a single payment in return for the surrender of the prospect of making profits in the final year of the agreement, but with *a payment for the surrender of an agreement while there was still a substantial period*—indeed, more than half of the period of the agreement—to run, and a period which extended to many years of accountancy for the purposes of this Company's business.

(italics supplied)

The *Barr Crombie* case is distinguishable as: (1) there the appellant "lost its entire business", but here, the appellant (Roberts) did not lose its entire business as shown by Exhibit R(1); (2) there the cancellation was by

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negotiation and not of right. In the Roberts case the cancellation was of right and was stipulated for in the agreements by Crown Life and Burrard Mortgage.

In *Parsons-Steiner Ltd. v. M.N.R.* (*supra*) the appellant was a manufacturers' agent and wholesale merchant dealing in china and related wares. From 1930 it represented Royal Albert line and from 1933 the goods of Doulton & Co. as exclusive agent. As exclusive agent it received commissions on all sales in Canada, and also bought and sold goods of Doulton, with the result that 80% of its business was derived from the Royal Albert and Doulton lines. The Doulton agreement was for one year from the 30th March 1933 determinable on three months' notice, but in fact it was continued to the 31st December 1955 and then terminated, not on notice but by agreement and the Doulton Company paying $100,000. It was held that except as to $5,000, which was admitted to be income, the remaining $95,000 received from the Doulton Company was capital.

Thurlow J. stated that 55% of the appellant's sales were Doulton products and said at p. 180:

> On the termination of the agency, two of the appellant's seventeen employees became employees of the Doulton subsidiary and thereafter orders addressed to the appellant for Doulton goods were referred to the Doulton subsidiary as the appellant no longer sold such goods even on its own account. In order to counteract the expected drop in sales the appellant employed several new salesmen and made a greater effort than formerly to augment sales of the lines which it still carried. There was no change made in the premises occupied by the appellant and no salaries were cut as a result of the loss of its Doulton agency. One new agency was obtained but no agency could be obtained for a line of figurines comparable with the Doulton line.

at p. 181:

> So far as I am aware, there is no case of this kind reported in Canada but a number of cases in the Courts of England and Scotland were cited in the course of the argument. What appears most clearly from these cases is that the question is largely one of degree and depends on the facts of the particular case and the inferences to be drawn therefrom. For the purposes of this case the distinction drawn in the cases appears to me to be summed up in the following passage from the judgment of Lord Evershed, M.R. in Wiseburgh v. Domville:
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> > "Was this sum paid by way of damages in respect of this agency contract, "profits or gains" arising from the trade of the taxpayer as a sales agent? The argument of counsel for the taxpayer had the attraction of simplicity. He said the £3,000 was

paid to the taxpayer in exchange for a profit-earning asset which he had lost owing to the breach of the contract by the company, and it followed that it was a capital item. If the question were *res integra* that argument would be more attractive still, but it clearly will not stand as a test in the light of the authorities. For the most part these authorities are decisions of the Inner House of the Court of Session in Scotland which do not bind this court."

further at p. 185:

Turning now to the facts of the present case I think the evidence makes it plain that the loss which the appellant faced when Doulton & Co. Limited made known its intention to terminate the agency was not merely one of the loss of one of a number of agencies but of an agency which accounted for a large proportion of the appellant's total business and in which was included a line of figurines which alone accounted for a considerable portion of the business and which was unique in the trade. For twenty years the appellant had had the agency for that particular line of goods and had built up the market for these figurines and for the other Doulton products which it sold. While the loss of the agency would set the appellant free to take on competitive lines a market for some other manufacturers' dinner ware would have to be promoted and built up and there was not even such an alternative with respect to the *figurines for there was no comparable line* on the market.

at p. 186:

To the extent that there were any such commissions, I think, the payment would represent taxable income. Nor was it a *payment in lieu of commissions that might have been earned to a normal termination of the agency contract and which were lost because of a premature termination of it.*

and at p. 187:

. . . the payment in question was not income from the appellant's business, but was referable to the appellant's claim for loss of what it and Doulton Co. Limited *as well considered to be the appellant's interest in the goodwill and business in Doulton products in Canada.* In my view this was, to use Lord Evershed's expression, "a capital asset of an enduring nature". It was one which the appellant had built up over the years in which it had the Doulton agency and which on the termination of the agency the appellant was obliged to relinquish. The payment received in respect of its loss was accordingly a capital receipt.

(italics supplied)

The *Parsons-Steiner* case is distinguishable as there: (1) the agency agreement provided for an exclusive agency whereby the appellant would get a commission on all goods sold in Canada although the appellant did nothing and had nothing to do with the sale. No doubt that commission might be increased by the appellant increasing such sales in Canada by taking orders or by buying and reselling;

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(2) the cancellation of that agreement was negotiated. Although there was a means of termination as of right, that right was not exercised.

In this case (1) the agreements with Crown Life and Burrard Mortgage provided for services by the appellant, which services produced income, and (2) the stipulated payment on cancellation would be in lieu of such income.

In *Miller v. M.N.R.*[5] Thurlow J. quotes from *C.I.R. v. Fleming & Co. (Machinery), Ltd.*[6], as follows:

> The sum received by a commercial firm as compensation for the loss sustained by the cancellation of a trading contract or the premature termination of an agency agreement may in the recipient's hands be regarded either as a capital receipt or as trading receipt forming part of the trading profit. It may be difficult to formulate a general principle by reference to which in all cases the correct decision will be arrived at since in each case the question comes to be one of circumstance and degree. When the rights and advantages surrendered on cancellation are such as to destroy or materially to cripple the whole structure of the recipient's profit-making apparatus, involving the serious dislocation of the normal commercial organisation and resulting perhaps in the cutting down of the staff previously required, the recipient of the compensation may properly affirm that the compensation *represents the price paid for the loss or sterilisation of a capital asset and is therefore a capital and not a revenue receipt.* Illustrations of such cases are to be found in Van Den Berghs, Ltd. (supra) and Barr, Crombie & Co. Ltd. (supra). On the other hand when the benefit surrendered on cancellation does not represent the loss of an enduring asset in circumstances such as those above mentioned—where for example the structure of the recipient's business is so fashioned as to absorb the shock as one of the normal incidents to be looked for and where it appears that the compensation received is no more than a surrogatum for the future profits surrendered—the compensation received is in use to be treated as a revenue receipt and not a capital receipt. See e.g. Short Brothers, Ltd., 12 T.C. 955; Kelsall Parsons & Co. (1938) S.C. 238.

(italics supplied)

and further[7]:

> Provision was made in the agreement for commissions at specified rates for making sales of meters and so it appears to me that this is not included in the consideration for the 2½ per cent commissions. The substantial consideration for the 2½ per cent commissions, in my opinion, was the waiver by the appellant of his rights under the earlier agreement with McCowan and his consent to McCowan negotiating for a licence under the patent and this, I think, was the giving up by the appellant of a right of a capital nature in exchange for the right to the agency and the 2½ per cent commissions. In this view, the right to such commissions was also a right

[5] [1962] Ex. C.R. 400 at 410; [1962] C.T.C. 199, at 208.
[6] 33 T.C. 57, at p. 63.
[7] [1962] Ex. C.R. 416.

> of a capital nature whether or not the commissions when actually paid would have been income—a question which does not arise in these proceedings—and the $5,000 received by the appellant for the release of such right was also capital and not income. The appeal accordingly succeeds with respect to this item as well.

The *Miller* case appears distinguishable as that was the negotiated sale of an agreement fixing "the price paid for the loss of sterilisation of a capital asset".

In this case the agreements in question provided for services to be rendered by the appellant and the rate of payment for such services which would be income.

In the following cases the payment for the termination of an agency was held to be taxable income.

In *Kelsall Parsons & Co.* (*supra*), the appellants were commission agents of manufacturers and held between nine and eleven agencies. One agency for three years was cancelled in the second year by the payment of £1,500. In the last year preceding the cancellation the appellant received from the agency £2,000 and in the year of cancellation its receipts were £4,259. The sum received on cancellation was held to be income. The Lord President, at p. 618, said:

> . . . The sum which the Appellants received was, as the Commissioners have found, paid as compensation for the cancellation of the agency contract. That was a contract incidental to the normal course of the Appellants' business. Their business, indeed, was to obtain as many contracts of this kind as they could, and their profits were gained by rendering services in fulfilment of such contracts.

and at p. 620:

> It was a normal incident of a business such as that of the Appellants that the contracts might be modified, altered or discharged from time to time, and it was quite normal that the business carried on by the Appellants should be adjustable to variations in the number and importance of the agencies held by them, and to modifications of the agency agreements, including modifications of their duration, which might be made from time to time.

and at p. 621:

> Their findings of fact include a finding that the Appellants had to build up a considerable technical organisation which could neither be collected nor dispersed at short notice, but that is something which falls far short of what Lord Macmillan described in Van Den Berghs case as the "fixed framework" of the Appellants' business. In my opinion the agency agreements entered into by the Appellants, so far from being a fixed framework, are rather to be regarded as temporary and variable elements of the Appellants' profit-making enterprise.

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Lord Moncrieff said, at p. 623:

> There appears, however, to have been a general distinction drawn in the cases which may be helpful in solving any particular problem. That distinction may perhaps be formulated as follows: (1) a contract may be made by a trader which is merely directed to result in trading profits being made; (2) a contract may be made by a trader which is directed to regulate the conditions under which he is to carry on his trade.

The test applied by the Lord President would appear here applicable, namely "That was a contract incidental to the normal course of the Appellants' business."

Again the first test adopted by Lord Moncrieff appears applicable, namely that the agreement and services were "directed to result in trading profits".

In *C.I.R. v. Fleming* [8] the company, since before 1903, had been sole selling agents in Scotland for a manufacturer but in 1948 the agency was terminated and payment was made of a sum designated as compensation for loss of the agency. It was held to be a trading receipt and the Lord President said, at p. 61:

> The problem thus belongs to a type exemplified by a number of recent cases in which, broadly speaking, the line has been drawn in the light of varying circumstances between (a) the cancellation of a contract which affects the profit-making structure of the recipient of compensation and involves the loss by him of an enduring trading asset; and (b) the cancellation of a contract which does not affect the recipient's trading structure nor deprive him of any enduring trading asset, but leaves him free to devote his energies and organisation released by the cancellation of the contract to replacing the contract which has been lost by other like contracts. It is not possible briefly to formulate the distinction exhaustively or with complete accuracy, as the circumstances may vary infinitely; but a sufficient indication of the relevant consideration is found by contrasting such cases as Van Den Berghs, Ltd. (supra) and Barr, Crombie & Co. (supra), in which the payment was held to be of a capital nature, with Short Bros. (supra) and Kelsall Parson & Co. (supra), in which the payment was held to be of a revenue nature.
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> These and other cases cited to us are relatively easy cases once the governing principle has been established for on their facts they all fall more or less unmistakeably on either the one side or the other side of the line. In this instance the difficulty is created by the fact that "the substance of the transaction" cannot easily be equated with the formal deed by which the transaction received effect. Indeed I should almost be prepared to say that if attention is concentrated upon the business substance of this transaction the payment should be treated as a capital payment, whereas if attention is concentrated upon the form the payment should be treated as a revenue payment.

[8] (1951) 33 T.C. 57.

Prior to 1948 the agency in explosives for Imperial Chemical Industries Ltd., represented from 30 per cent to 45 per cent of the Company's total earnings in commissions. Their remaining activities arose from agencies for some eight machinery companies from which they derived from one-half to two-thirds of their receipts. No fixed period was attached to the agency for Imperial Chemical Industries, Ltd, which could presumably have been terminated at any time on reasonable notice.

Lord Russell said at p. 63:

> When the rights and advantages surrendered on cancellation are *such as to destroy or materially to cripple the whole structure of* the recipient's profit-making apparatus, involving the serious dislocation of the normal commercial organisation and resulting perhaps in the cutting down of the staff previously required, the recipient of the compensation may properly affirm that the compensation represents the price paid for the loss or sterilisation of a capital asset and is therefore a capital and not a revenue receipt. Illustration of such cases are to be found in Van Den Berghs, Ltd. (supra) and Barr, Crombie & Co Ltd. (supra). On the other hand when the benefit surrendered on cancellation does not represent the loss of an enduring asset in circumstances such as those above mentioned—where for example the structure of the recipient's business is so fashioned as to absorb the shock as one of the normal incidents to be looked for and where it appears that the compensation received is no more than a surrogatum for the future profits surrendered—the compensation received is in use to be treated as a revenue receipt and not a capital receipt. See e.g. Short Brothers, Ltd. (supra) and Kelsall Parsons & Co. (supra).

(italics supplied)

Lord Keith stated there was no apparent disruption or disorganization of the structure of the company's business.

The cancellation by Crown Life and by Burrard Mortgage cannot be said to have been "such as to destroy or materially to cripple the whole structure of the recipient's profit-making apparatus". The profits made in respective years as shown by Exhibit R(1) excludes that conclusion. The cancellation became effective in February, 1963. The profits for 1966 were the second largest and the profits increased for the years 1964, 1965 and 1966.

The appellant had only one department affected by the cancellation—but not "the whole structure" as the other departments remained.

Also the cancellation permitted the appellant "replacing the contract which has been lost by other like contracts", that is, by other services, and Exhibit R(1) indicates that was being done.

The appellant has contended that the mortgage representation is unique, but that does not mean that Crown Life

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or Burrard Mortgage exclusively lend on mortgage, but rather that companies lending on mortgage usually have their own department to obtain the mortgage and to make collections thereunder.

In *Sabine v. Lookers, Ltd.*[9], the respondent was a motor dealer and its sole trade was geared to the display, sale, service and repair of the products of one manufacturer under an agency agreement which contained a clause providing for renewal at the respondent's option on certain conditions. That agreement was terminated by a new agreement giving the dealer less security for renewal and a sum was paid in compensation for the loss of security. It was held that such sum was a taxable revenue.

In re *Morgan v. M.N.R. (T.A.B.)*[10]: In 1950 an agency contract was made with an insurance company and in 1952 was terminated by the insurance company paying $10,800 over three years. That payment was held to be income made pursuant to the termination clause, not as a re-purchase price for the agency contract.

In *Great Lakes Paper Co. v. M.N.R. (T.A.B.)*[11] a contract to purchase and supply for 20 years was cancelled after five years on payment of $250,000. That sum was held to be income.

In *Jones v. M.N.R. (T.A.B.)*[12] an agency contract with six months to run was terminated by payment of the sum of $7,500. That sum was held to be income.

In conclusion, the cancellation of the Crown Life and of the Burrard Mortgage agreements does not relate to the "whole structure" of this appellant's business within the *Van Den Berghs* case, nor cause a loss of the "entire business" as in the *Barr, Crombie* case, nor relate to a capital asset within the *Parsons-Steiner* case or the *Miller* case. On the contrary, the cancelled agreements were acquired in the course of the appellant's business and would have produced income had they continued and the sums paid were merely in lieu of future income. For that reason the appeal is dismissed with costs.

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[9] (1958) 38 T.C. 120.
[10] 61 DTC 14.
[11] 61 DTC 564.
[12] 63 DTC 964.