ZF *v* Comptroller of Income Tax
[2010] SGHC 14

Case Number : Income Tax Appeal No 1 of 2008

Decision Date : 13 January 2010

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Leung Yew Kwong and Tan Shao Tong (WongPartnership LLP)for the appellant; Quek Hui Ling and Foo Hui Min(Inland Revenue Authority of Singapore) for the respondent.

Parties : ZF — Comptroller of Income Tax

Revenue Law – Income taxation – Appeals – Whether prefabricated dormitories were "plant" within the meaning of ss 19 and 19A of the Income Tax Act (Cap 134, 2008 Rev Ed)

13 January 2010 Judgment reserved.

Andrew Ang J:

Introduction

1 This is an appeal by [ZF] ("the appellant") against the decision of the Income Tax Board of Review ("the Board") which held that certain prefabricated dormitories were not "plant" within the meaning of ss 19 and 19A of the Income Tax Act (Cap 134, 2008 Rev Ed) ("the Act") in the context of the appellant's trade. The Board's decision was premised, *inter alia*, on the following findings:

(a) The appellant did not, for the purposes of its trade, which is the provision of accommodation to workers, require the use of the dormitories to be portable or demountable. The fact that the appellant had assembled the dormitories using prefabricated structures was for its own convenience in the event it was required to vacate the land at short notice. The appellant could have carried on its business of providing accommodation without using prefabricated structures. In other words, it was not a commercial necessity to employ prefabricated structures *vis-à-vis* the dormitories.

(b) The dormitories were primarily used as workers' accommodation and remain as buildings or premises used for the conduct of the appellant's trade or business.

2 On appeal, the appellant reiterated its case that given:

(a) the nature of its business (*ie*, the provision of dormitory accommodation); and

(b) the commercial necessity for the easy dismantling of the dormitories for relocation to another site,

the portable and demountable dormitories qualified as "plant" for the purposes of ss 19 and 19A of the Act.

The facts

3 On 1 June 2001, [Z] Pte Ltd ("[Z]") was awarded a contract to design, build and operate workers' dormitories ("the dormitories") at [XXX] Road ("the site") by [C] Pte Ltd ("[C]"), a subsidiary of [XXX]. The site was owned by the Government of the Republic of Singapore and leased to the Building and Construction Authority ("BCA"). BCA in turn sub-leased the site to [C] for a term of three years from 1 December 2001 ("the sub-lease"). Under cl 7.2.2 of the sub-lease, BCA is entitled to terminate the sub-lease without cause at any time by giving [C] not less than 90 days' written notice. Upon termination, [C] is required forthwith to peacefully vacate and deliver up the site to BCA. BCA may also, at its absolute discretion, grant a fresh tenancy on such terms as it deems fit. In turn, cl 12 of [C]'s agreement with [Z] provides that the term of operation of the dormitories would be for the period as set out under the sub-lease agreement between [C] and BCA plus any extensions thereto. According to the appellant, the reason for the short notice period was that the site situated at Jurong Industrial Estate was intended for industrial use and the dormitories were intended to be situated on the site temporarily.

4 Although [Z] was awarded the contract to design, build and operate the dormitories by [C], the dormitories were not built by [Z] as it wanted to put in place a professionally competent team to operate and manage the dormitories. To this intent, [Z] entered into a joint-venture with [F] Pte Ltd ("F"), and the appellant was incorporated. The appellant subsequently engaged its own contractor, [XXX] Pte Ltd, to build the dormitories.

5 It was not disputed that the appellant used prefabricated material to build the dormitories. Each three-storey dormitory structure (of which there are six at the site) had a concrete foundation base, wooden floors and steel sheet sides and roof. The appellant contended that as a result of the short-term lease and the short notice period to vacate the site, the dormitories had to be installed and dismantled quickly. In addition, the modular nature of the dormitories allows the appellant to re-use such units of prefabricated structures to fit into the size of the next site available for use. It was explained that if the appellant had built the dormitories with brick and mortar, it would lose its considerable investment if the dormitories were to be demolished upon receipt of notice of termination. Given the limited period of the lease and the possibility of termination upon 90 days' notice, it was commercially necessary (and not merely desirable) that the dormitories possessed those features. On the other hand, the respondent took the position that it was not commercially necessary to adopt prefabricated structures in building the dormitories and that the dormitories were not a "plant" for the purposes of the Act.

The law

6 The only question before the court is whether, in the circumstances, the dormitories fall within the definition of "plant" in ss 19 and 19A of the Act so as to qualify for initial and annual allowances available thereunder for machinery and plant.

7 Lindley LJ's classic exposition in *Yarmouth v France* (1887) 19 QBD 647 on the characteristics of a "plant" almost invariably prefaces any discussion on the subject. At 658, the learned judge said:

> There is no definition of plant in the Act: but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business,—not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business …

As to the statement's continuing validity, Lord Lowry observed in *Inland Revenue Commissioners v Scottish & Newcastle Breweries Ltd* [1982] STC 296 ("*Scottish & Newcastle Breweries*") (at 301):

> … The fact that the learned Lord Justice was classifying vice in a horse as a defect in the condition of plant within the meaning of the Employers' Liability Act 1880 did not rob this judicial definition of its felicity and general usefulness or its authority, now of nearly a hundred years' standing. …

Similarly, in this case, the Board accepted this formulation of "plant" as does the respondent.

"Plant" is not an ordinary English word

8 It is also important to note from the outset that the courts have consistently held that the word "plant", in the context of capital allowances, should *not* be accorded its ordinary dictionary meaning but should be read in light of the decided authorities.

9 In *Munby v Furlong (Inspector of Taxes)* [1977] 2 All ER 953, Lord Denning stated (at 956):

> … the courts do not apply the meaning to the word 'plant' as the ordinary Englishman understands it. It has acquired by the course of decisions a special meaning in tax cases. It has acquired a special meaning; it seems to me, in the interests of fairness, that 'plant' extends virtually to a man's tools of trade …

10 There is little doubt that the word "plant", in the context of capital allowances, is a technical word, the meaning of which has been judicially developed over time. Thus, as Lord Wilberforce observed in *Scottish & Newcastle Breweries* (at 298):

> The word 'plant' has frequently been used in fiscal and other legislation. It is one of a fairly large category of words as to which no statutory definition is provided ('trade'), 'office', even 'income' are others), so that it is left to the court to interpret them. It naturally happens that as case follows case, and one extension leads to another, the meaning of the word gradually diverges from its natural or dictionary meaning. This is certainly true of 'plant'. No ordinary man, literate or semi-literate, would think that a horse, a swimming pool, moveable partitions, or even a dry dock was plant—yet each of these has been held to be so: so why not such equally improbable items as murals, or tapestries, or chanderliers?

11 The proper determination as to whether something is "plant", however, depends upon the application of various tests. For our purposes, the relevant ones are the "functional" or "business use" test *and* the "premises" test.

The "functional" test

12 The "functional" or "business use" test was firmly established by the House of Lords, in *Commissioner of Inland Revenue v Barclay, Curle & Co Ltd* [1969] 45 STC 221 ("*Barclay, Curle*") which involved the question whether a dry dock was a plant, where Lord Guest said (at 244):

> The question, therefore, is whether, notwithstanding that it may be also a structure, the dry dock is 'plant' within the terms of s. 279. The conjunction of 'machinery' and 'plant' suggests to me that they both must perform some active function. *In order to decide whether a particular subject is an 'apparatus' it seems obvious that an inquiry has to be made as to what operation it performs*. *The functional test is therefore essential, at any rate as a preliminary*. The function which the dry dock performs is that of a hydraulic lift taking ships from the water onto dry land, raising them and holding them in such a position that inspection and repairs can conveniently be effected to their bottoms and sides. It is unrealistic, in my view, to consider the concrete work in

isolation from the rest of the dry dock. It is the level of the bottom of the basin in conjunction with the river level which enables the function of dry docking to be performed by the use of dock gates, valves and pumps. To effect this purpose excavation and concrete work were necessary. [emphasis added]

In the same decision, Lord Reid added that a building or structure, depending on its function, could also be a plant (at 238):

> As the Commissioners observed, buildings or structures and machinery and plant are not mutually exclusive, and that was recognised in [*Jarrold (HM Inspector of Taxes) v John Good & Sons, Ltd* (1962) 40 TC 681 ('*John Good*')]. Undoubtedly this concrete dry dock is a structure but is it also a plant? The only reason why a structure should also be plant which has been suggested or which has occurred to me is that *it fulfils the function of plant in the trader's operations*. And, if that is so, no test has been suggested to distinguish one structure which fulfils such a function from another. I do not say that every structure which fulfils the function of plant must be regarded as plant, but I think that one would have to find some good reason for excluding such a structure. And I do not think that mere size is sufficient.
>
> Here it is apparent that there are two stages in the Respondents' operations. First the ship must be isolated from the water and then the inspection and necessary repairs must be carried out. If one looks only at the second stage it would not be difficult to say that the dry dock is merely the setting in which it takes place. But I think that the first stage is equally important, and it is obvious that it requires massive and complicated equipment. No doubt a small vessel could be got out of the water by the use of comparatively simple plant and machinery but clearly that is impossible with a very large vessel. It seems to me that every part of this dry dock plays an essential part in getting large vessels into a position where work on the outside of the hull can begin, and that *it is wrong to regard either the concrete or any other part of the dock as a mere setting or part of the premises in which this operation takes place. The whole dock is, I think, the means by which, or plant with which, the operation is performed*.
>
> [emphasis added]

13 The "functional" test entails an examination of the function of the apparatus in question in the context of the business of the taxpayer. This can be seen from the House of Lords case of *Scottish & Newcastle Breweries* ([7] *supra*). In that case, Lord Wilberforce said (at 299):

> In the end each case must be resolved, in my opinion, by *considering carefully the nature of the particular trade being carried on, and the relation of the expenditure to the promotion of the trade*. … [emphasis added]

The words of Lord Wilberforce echoed those of Lord Cameron in the same case in the court below at the Court of Session. Lord Cameron's *dicta* (as were conveniently cited by Lord Lowry in the House of Lords) were as follows (at 302):

> … the question of what is properly to be regarded as 'plant' can only be answered in the context of the particular industry concerned and, possibly, in light also of the particular circumstances of the individual taxpayers' own trade. … I think that much difficulty is caused by seeking to place *limitative interpretations* on the simple word 'plant': I do not think that the classic definition propounded in *Yarmouth v France* suggests that it is a word which is other than of comprehensive meaning—'whatever apparatus is used by a businessman for carrying on his business"—whatever the business may be. … [emphasis added]

In other words, whether an asset functions as plant for a taxpayer has to be determined by consideration of that particular taxpayer's trade and examining the function of the asset in that particular taxpayer's trade. What is "plant" for one trade, may not be "plant" for another trade.

14 In this regard, Lord Denning MR in *Bridge House (Reigate Hill) Ltd v Hinder (H M Inspector of Taxes)* [1971] 47 TC 182, in deciding that sewage pipes laid to carry away effluent from a restaurant were not "plant" observed as follows (at 192):

> *Vis-à-vis* the sewerage authority the pipes may be part of their 'plant', but *vis-à-vis* the restaurant proprietor they are not.

15 In *Schofield (HM Inspector of Taxes) v R & H Hall Ltd* [1974] 49 TC 538 ("*Schofield*"), the question was whether silos for storage and distribution of grain were "plant" in the taxpayer's trade of grain importing. The taxpayer company contended that the silos as a whole (and not merely the machinery within) qualified for capital allowances as plant used in its trade. For the Crown, it was contended that the silos were part of the setting in which the trade was carried on and were not plant. The Special Commissioners found, *inter alia*, that the silos formed an essential part of the overall trade activity, their separate function being to hold grain in a position from which it could be conveniently discharged in varying quantities to customers. Applying *Barclay, Curle*, they held that the silos were plant eligible for capital allowances. This was upheld by the Court of Appeal of Northern Ireland. Apart from applying *Barclay, Curle*, Lowry CJ also made reference to a passage in the judgment of Kitto J in *Broken Hill Proprietary Company Limited v Commissioner of Taxation for The Commonwealth* [1967–68] 41 ALJR 377 where the learned judge said (at 381 and 387):

> … [the word 'plant'] includes every chattel or fixture which is kept for use in the carrying on of the mining operations, not being (in the case of a building) merely in the nature of a general setting in which a part of those operations are carried on.
>
> …
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> … I am of opinion that most of the structures that the appellant has erected on sites set free by demolitions are in the nature of plant. I do not exclude buildings simply because they are places where operations are carried on. I do exclude those which merely provide shelter for persons as they work and for their equipment, e.g., offices; the prefabricated rigid-frame building which houses the new pipe shop, the construction store, the blacksmith's store, and the painter's and lubrication engineers' workshop; the change houses and the works canteen; but I regard as plant the buildings which are more than convenient housing for working equipment and (considered as a whole, i.e., without treating as separate subjects for consideration the iron roofing and cladding of buildings where the main structural members are specially adapted to the needs of the processes to be carried on inside) play a part themselves in the manufacturing processes, e.g., the holding bay for the basic oxygen steelmaking installation as well as the very specialized building which because of its in-built equipment forms part of that installation, and also the casting pit (but not the slag pit).

16 Applying the reasoning therein, Lowry CJ held that the external walls of the silos were not merely in the nature of a general setting in which a part of the operations was carried on, nor did they merely provide shelter for persons as they work and for the equipment. Rather, the buildings as a whole played a part in the distributive processes of reception, distribution and discharge of the grain. It is significant to note the learned judge's conclusions, *inter alia* (at 554):

> … plant does not require to be mechanically active in its operation (although, to the extent that

it is so, the distinction from a mere structure is easier to appreciate) and ... that the question for decision must be considered in relation to the trading activities as a whole, in the same way as the Courts in the *Barclay, Curle* case looked at the concrete sides and bed of the dry dock in the light of the mechanical plant with which they were combined.

17 In *John Good* ([12] *supra*) some special internal partitions in a shipping agent's premises were held to be "plant" even though it could also be said that they provided a "setting" for the conduct of the taxpayer company's business. The partitions were special in that whilst they were secured to the building structure by screws at the floor and ceiling, they could be easily moved from one position to another as the floor space was re-configured to meet the changing needs of the company. It was common ground that the partitions were not part of the structure of the building although the Crown's contention was that the partitions were nevertheless part of the building. (This was interpreted by Donovan LJ to mean that, although they were not part of the permanent walls, the partitions when erected were at least a temporary part of the internal walls.)

18 The Crown's main contention was that the partitions were simply part of the setting in which the work was carried on, and not something which was used in the operations of the company's business as shipping agents. In the court below, Pennycuick J had held as follows (at 688):

> … but it seems to be that the setting in which a business is carried on, and the apparatus used for carrying on a business, are not always necessarily mutually exclusive. Certain fixtures or chattels in certain trades may well represent the setting in which the business is carried on, from one point of view, and apparatus used for carrying on the business, from another point of view. … In the present case the trade is that of a shipping agent carried on in an office building … In relation to that trade, as so carried on, it seems to me that these partitions are from one point of view the setting in which the business is carried on, but from another point of view apparatus used for carrying on the business. If one considers the staff engaged in the respective rooms formed by the partitions at any given moment, the partitions, like the floor and ceiling, are the setting in which the staff carry out their duties. But if one considers the Company's policy of office organisation as set out in the Case Stated, then the partitions are fixtures specially designed to enable an appropriate and varying number of employees to perform their duties in an appropriate and varying number of sections, according to the state of the Company's business at the time. It seems to me to be impossible to deny to fixtures possessing this character the title of apparatus used by the Company for carrying on its business. Once this is accepted, the partitions clearly qualify for allowances as plant, notwithstanding that, from another point of view, they may be part of the setting.

Donovan LJ, in the English Court of Appeal, held (at 694):

> … I agree with Pennycuick, J., that 'setting' and 'plant' are not mutually exclusive conceptions. The same thing may be both. …
>
> Nor, in my opinion, can these partitions be properly excluded from the category of plant on the ground that they are not used in the carrying out of the Respondent's trade or business. The truth is that they are. They are used to enable the trade to cope with the varying vicissitudes of the business, as it now increases and now diminishes; and the Commissioners find the flexibility of accommodation which the partitions provide is a commercial necessity for the Respondent. 'Be it so', reply the Crown, 'but these partitions play a purely passive role and that is not enough'. I do not understand this division of assets into passive and active, *vis-à-vis* the accomplishment of the trading purpose, followed by the argument that there can be no 'plant' among the passive assets. The heating installation of a building may be passive in the sense that it involves no

moving machinery, but few would deny it the name of 'plant'. The same thing could no doubt be said of many air conditioning and water softening installations.

Pearson LJ further said (at 696):

> There can be no doubt, therefore, as to the main principles to be applied, and the short question in this case is whether the partitioning is part of the premises in which the business is carried on, or part of the plant with which the business is carried on. Either view could have been taken. It could have been said that the so-called partitioning, when erected, constitutes the internal walls of the building, which have the advantage of being movable, but until they are moved will stand firm and solid, fully performing the functions of internal walls. So regarded, the partitioning would be part of the premises and not plant. The other possible view is that the Respondent Company, instead of having internal walls in its office building, needs to have, and does have, for special requirements of its business, movable partitioning, by means of which it can, in response to changing volumes of business in its departments or to the cessation of departments or the emergence of new departments, rapidly and cheaply and without much interruption of business alter the sub-divisions of its office building. On that view of the facts, the partitioning undoubtedly can be regarded as 'plant'. I think the Commissioners have, in effect, preferred the second view, and it cannot be said that there was no evidence to support it, or that any error of principle was involved.

It is noteworthy that both Ormerod LJ and Pearson LJ regarded the case as near the borderline but found no reason to fault the Commissioners' decision which Pennycuick J had upheld.

19 In *St John's School v Ward (HM Inspector of Taxes)* [1974] 49 TC 524 ("*St John's School*"), the taxpayers who ran a school erected two structures on the school grounds using prefabricated panels bolted together on site for use as a laboratory and gymnasium. However, unlike the dormitories in our present case, neither structure was affixed to the ground or to the concrete base on which it stood. The layout of either of them could be changed by re-arrangement of the panels; for example, the laboratory could be divided into two separate laboratories. The General Commissioners rejected the taxpayer's contention that the component prefabricated parts of the structures were plant and found, *inter alia*, that the structures were buildings. This was upheld by the High Court where Templeman LJ (whose judgment was unanimously approved by the Court of Appeal) said (at 530–531):

> Mr. Jone's next point was that the structures could be erected in a variety of ways, as appears from the evidence before the Commissioners. I think the answer to that is, So what? The fact that a building can be taken down by inexperienced workmen and put up in a different way; or that the interior can be changed from two small rooms to one large one, or something of that kind, does not seem to me to alter the basic question of what is the structure, and if the structure is a building or premises it remains a building or premises. Then, falling back from the structure to the elements which comprise it, Mr. Jone's next submission was that the component parts of each structure consist of apparatus which can be used in different settings. This seems to me to be much the same argument as the first – namely, you can set up the structure in a variety of ways for different purposes – but reduced to the component parts, by which expression Mr. Jones meant the panels and the various articles which had to be bolted together to make up the gymnasium and the laboratory. In considering whether a structure is plant or premises *one must look at the finished product and not at the bits and pieces as they arrive from the factory*. Mr. Jones says, Look at the bits: Mr. Rees says, *Look at the whole*. In my judgment, one *looks at the whole*, though of course it may happen that within the whole, if it be premises or a building, you may find that there are one or more items of plant. [emphasis added]

20 In *Benson (HM Inspector of Taxes) v Yard Arm Club Ltd* [1979] 53 TC 67 ("*Benson v Yard Arm Club*"), the taxpayer company bought a second-hand ship and converted her into a floating restaurant. The converted hulk had no means of propulsion or steering. She was attached to a barge (which provided services to it) and together with the barge was moored at a permanent site on the Victoria Embankment. The Revenue disallowed capital allowances for the ship on the basis that the ship was not plant. After several rounds of appeal, the case was heard by the Court of Appeal. It held, dismissing the company's appeal, that the ship and the barge, although chattels, were the premises where the business was carried on and not the apparatus employed in the company's business activities. Templeman LJ explained (at 88):

> The authorities disclose a distinction between premises in which a business is carried on and the plant with which a business is carried on. There are borderline cases in which a structure forming part of business premises has been held to be plant because it does not merely consist of premises providing accommodation for the business but also performs a function in the actual carrying on of the business. Premises, or structures forming part of premises, which have the characteristics and perform the function of plant, merit the claim for capital allowances. In my judgment, it follows that if a chattel, such as a ship or a hulk, only provides accommodation for a business and has the characteristic, and only performs the function, of premises, that chattel does not qualify as plant for the purpose of capital allowances. The fact that a ship or hulk could be used as plant in many businesses does not enable a taxpayer to claim capital allowances for a ship or hulk which performs no function in the business actually carried on by the taxpayer Company, other than the function of premises providing accommodation for that business.

(As was later explained by Oliver LJ in *Cole Brothers Ltd v Phillips (H M Inspector of Taxes)* [1982] 55 TC 188 ("*Cole Brothers Ltd*") at 212, if the ship had been engined and used as a vehicle for gastronomic cruises on the river, it would have served an additional function in a composite business of restauranteurs and carriers.)

21 Templeman LJ went on to review the authorities and, in particular, *John Good* ([12] *supra*) and *Barclay, Curle* ([12] *supra*), *St John's School* ([19] *supra*) and *Schofield* ([15] *supra*). His Lordship said (at 89):

> In [*John Good*] moveable partitions in a building were held to be plant, because the nature of the business required the operator of the business to be able rapidly and cheaply and without much interruption of business to alter the subdivisions of their office building. 'The short question', said Pearson L.J., at page 696, '… is whether the partitioning is part of the premises on which the business is carried on or part of the plant with which the business is carried on.' In the present case the hulks are the premises occupied by the restaurant business, and perform no other function. In [*Barclay, Curle*] a dry dock was held to be plant because the dry dock was not merely part of the premises where ships were inspected and repaired. 'The dry dock', said Lord Guest, at page 244, performs the function of 'a hydraulic lift taking ships from the water on to dry land, raising them and holding them in such a position that inspection and repairs can conveniently be effected to their bottoms and sides.' Lord Reid said, at page 239: 'The whole dock is, I think, the means by which, or plant with which, the operation is performed.' The operation to which he there referred was the operation of inspecting and repairing ships. The [*Barclay, Curle*] case was a classic case of a structure forming part of premises but also performing the function of plant and therefore qualifying for capital allowances as plant.

And at 90:

> … In [*St. John's School*], on the other hand, structures which were constructed and used as

gymnasiums and chemical laboratories were not plant, because they were merely part of the premises upon which the business of providing education was carried on. *The structures performed no function other than the provision of accommodation for the business of a school*. They could equally well have provided accommodation for a different business. Also in 1974, in [*Schofield*], a silo, which was necessary to hold grain in a position in which it could be discharged, was equally held to be plant. At page 549 Lowry C.J. said this:

> '… I have no difficulty in comparing the silo with a series of mechanically operated hoppers so placed and constructed as to facilitate with the aid of gravity the rapid reception, distribution and discharge of grain. The silos, with their operating crews, in fact take the place of very large numbers of men equipped with sacks, shovels and bogeys and occupied in transferring grain from the holds of ships to the holds of other ships and to lorries.'

That again was a case in which the structure performed a function other than that of merely accommodation for the carrying on of a business. … [emphasis added]

22 Templeman LJ concluded his analysis of the decided cases by saying (at 90):

> It plainly appears, therefore, that if, and only if, land, premises or structures in addition to their primary purpose perform the function of plant, in that they are the means by which a trading operation is carried out, then for the purposes of income tax and corporation tax the land, premises or structures are treated as plant. …

23 The appellant in the present appeal sought to rely on *John Good* ([12] *supra*) drawing parallels between the two cases. Firstly, it was contended that although the dormitories might seemingly be the setting in *which* the business of the appellant is carried on, they ought to be regarded as plant since they are apparatus *with which* the business is carried on. Secondly, a parallel was also drawn between the movable internal partitions in *John Good* and the portable and demountable dormitories. It was argued that just as the partitions could be moved about to divide the office space in different configurations, similarly, the dormitories could be moved from place to place and demounted to form different-sized dormitories in different locations. Finally, the appellant also argued that, in the same way that the flexibility of the partitions was a commercial necessity, likewise the portability and demountability of the dormitories.

24 It should be noted that whereas it was common ground that the partitions were not part of the building structure in *John Good*, the same cannot be said of the dormitories. Clearly, the dormitories are the very premises in question. In this connection, it is pertinent to mention that, whereas before the Board the appellant had framed the issue as being "whether the *pre-fabricated structural elements* which have been installed by the appellant to form dormitory accommodation constitutes 'plant' within the meaning of ss 19 and 19A of the Income Tax Act", in the appeal before me, the subject matter of the appeal is the dormitories. The issue is set out in para 9 of the appellant's case as follows:

> The issue in this case concerns whether *the portable and demountable dormitories* which have been installed by the Appellant at the Soon Lee Road site, constitute 'plant' within the meaning of sections 19 and 19A of the Income Tax Act, in the context of the Appellant's trade. [emphasis added]

It is right that the shift was made. That a pre-fabricated building should be viewed as one entity as opposed to its component parts was endorsed by Templeman J in *St John's School* ([19] *supra*).

25 Although superficially the analogy between the partitions in *John Good* and the portable and demountable dormitories in the present appeal appears plausible, in truth it is untenable. A similar (unsuccessful) attempt at such analogy was made in *St John's School*. There it was contended by the appellant that the layout of the laboratory and gymnasium could be changed by re-arrangement of the pre-fabricated panels. Thus, for example, the laboratory could be divided into two separate laboratories. The appellant drew an analogy between the partitions in *John Good* on the one hand and the component parts of the laboratory and gymnasium on the other. This was disposed of by Templeman J in the following passage (at 532):

> Mr. Jones's next case is [*John Good*]. The taxpayers carried on the business of shipping agents, and had permanent premises. They also owned special partitioning which, to satisfy the fluctuating accommodation requirements of the business, was used to subdivide the floor space available. The partitions were secured by screws only at the floor and ceiling, and it was a relatively simple operation to move them from one position to another. It was common ground that the partitioning did not form part of the structure of the building. The Crown contended that the partitions were not plant since they were merely the setting in which the company's business was carried on, that they were not apparatus used in carrying out the actual operations of the business and that they were not subject to wear and tear. The General Commissioners decided that the partitioning was plant, and the Court held that the Commissioners' decision was correct. Mr. Jones seeks to use that by saying that the partitioning was something which could be moved easily and which could provide different settings for the business of the shipping agent. Similarly, in the present case, the gymnasium and the laboratory consist of component parts which, like partitions, can be taken down and put up and altered. But, in my judgment, in *Goods*' case there were two entities, the premises and the collection of partitions, which, on the facts, were a separate entity conceded not to be part of the premises and, having regard to the fact that they were required for the fluctuating accommodation demands of the business, were held to be plant. Mr. Jones says *a fortiori* where the premises themselves are mobile in the same way as the partitions, but in my judgment that is to confuse the subject-matter of the inquiry. In *Goods*' case the subject-matter of the inquiry was partitions, and in the present case the subject-matter of the inquiry is a structure which, however it may be altered, remains a building.

In the same way, in the present case, the subject matter of the inquiry is the dormitories, howsoever it may be re-configured.

26 On the question of commercial necessity, I think it can fairly be said that the use of portable and demountable dormitories was in the view of the taxpayer a commercial necessity. The lease, at three years, was a short one. Although it was renewable, it could also be terminated upon 90 days' notice. In those circumstances, it was commercially sensible, if not essential, to use portable and demountable structures. The evidence of the appellant's witness, Yang Tse Pin, supporting this view was not challenged. It was therefore not open to the Board to find otherwise. Nevertheless, that the dormitories are portable and demountable does not alter the fact that the subject matter of the inquiry is the dormitories standing as they are on site in each instance. The portability and demountability are the *properties* of the dormitories and not the *function* of the dormitories.

27 I move on to the appellant's submission that the dormitories are the apparatus *with which* the appellant carries on business rather than merely the setting *in which* the business is carried on. This distinction, borrowed from Lord Reid's judgment in *Barclay, Curle* [quoted at the end of [12] above], is apt in the present case. It cannot be gainsaid that the dormitories afford the accommodation which it is in the business of the appellant to provide. Although in *Barclay, Curle* the dock (which the court held to be plant) did have a mechanical function in getting ships into position and Lord Guest suggested that a plant must serve an active function, I am of the view that it is not a requirement

that to qualify as a plant, the dormitories actively perform a function. This was endorsed by Lowry CJ in *Schofield* (see [16] above).

28 As was noted earlier, whether an asset functions as plant has to be determined by an examination of the function of that asset in the context of the business of the taxpayer. On that basis, I am of the view that the dormitories satisfy the function test. However, to qualify as plant for the purpose of capital allowances, the dormitories will also need to pass the "premises" test.

29 Before I turn my attention to the premises issue, I should first address the case of *Quarries Ltd v Federal Commissioner of Taxation* (1961) 106 CLR 310 ("*Quarries*"), which, according to counsel for the appellant, stood for the proposition that:

> … if sleeping units are intended to be moved from place to place by virtue of the nature of the trade, they constituted the 'tools of trade' or 'plant' of the taxpayer.

The brief facts in *Quarries* are as follow. The taxpayer was a company in the business of quarrying and crushing stone. The nature of its business required it to operate at various and frequently remote places. The taxpayer's equipment was transported from site to site and includes, *inter alia*, the crushing plant, a mobile crane and portable sleeping units. The duration of operations at each site appears to vary from three months to twelve months (with the average being six months). The sleeping units were provided for the accommodation of the taxpayer's employees whilst they were engaged in the operations of the concern. Taylor J, sitting in the High Court of Australia, decided that the portable sleeping units were plant. Pertinently, Taylor J expressed the view that the portable sleeping units formed merely part of the "train of equipment" and were not buildings (at 313–316):

> The sleeping units appear as small enclosed sheds or cubicles about eight feet wide and seven feet deep. They are constructed of galvanized iron and timber and in such a manner as to be readily and conveniently moved by a crane. Four or five of the units may conveniently be placed upon a trailer attached to a prime-mover. A mobile kitchen and 'diner', together with a mobile crane, completes the taxpayer's 'train' of equipment. Upon arrival at any selected site the crushing plant is set up and assembled and a camp is established. The sleeping units are placed on the ground either on the roadside or, with the permission of the owner of the land where the taxpayer's operations are to take place, upon his land.
>
> Consideration of the evidence including the photographs leaves me with the distinct impression that it is by no means unreasonable to regard the entirety of the 'train', together with the equipment which it transports from place to place, as a comprehensive unit designed especially to enable the taxpayer to carry on the major part of its business. …
>
> …
>
> *However the sleeping units, are not structures in the nature of buildings in any ordinary sense of that expression*; they were, as appears, designed and constructed as portable or movable equipment for use in connexion with the nomadic type of business which the taxpayer carries on. …
>
> [emphasis added]

30 In other words, the portable sleeping units in *Quarries* did not form part of the premises in which the taxpayer's business was carried out, but rather as part of the taxpayer's "train of equipment". On those facts and, unlike the case at hand, the "premises" issue did not arise in

Quarries.

The "premises" test

31 This test was enunciated by Hoffmann J in *Wimpy International Ltd v Warland (Inspector of Taxes)* [1988] STC 149 which was affirmed on appeal where he said (at 172):

> I take Lord Lowry [in *Scottish & Newcastle Breweries*] to be saying that even if an embellishment for the purposes of trade passes the 'business use' test, it still has to pass the 'premises' test and *something which 'becomes part of the premises' fails that test unless the premises are themselves plant*. [emphasis added]

The two taxpayer companies in that case operated a chain of "fast food" restaurants. To reverse their declining fortunes caused by stiff competition, they decided to make major changes to the premises and incurred expenditure on the installation of, *inter alia*, shop fronts, light fittings and wiring, raised floors, floor and wall tiles, wall panels and mirrors, suspended ceilings, decorative brickwork and built-in storage units and dispensers. Revenue rejected the taxpayers' claim that the items were "plant" for the purpose of capital allowance. This was upheld by the Special Commissioners. The taxpayers' further appeal to the High Court was similarly dismissed. Hoffman J analysed the famous *dictum* of Lindley LJ in *Yarmouth v France* ([7] *supra*) and gave a highly illuminating review of the cases. I can do no better than to cite relevant passages from his judgment as follows (at 170–172):

> The celebrated pioneer cartographer was Lindley LJ, who gave the following description of the territory in *Yarmouth v France* (1887) 19 QBD 647 at 658:
>
> > '… in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business,—not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business. …'
>
> It is important to notice the various discriminations which are stated or implied in this description. First, it excludes anything which is not used for carrying on the business. Secondly, it excludes stock-in-trade both expressly and because, although used for the purposes of the business, its use lacks permanence. Thirdly, it excludes things which are not 'apparatus ... goods and chattels, fixed or moveable, live or dead' or not employed *in* the business. This excludes the premises or place in or upon which the business is conducted.
>
> Before going any further I must say something about the third distinction and the way in which the courts in subsequent cases have refined the boundary between plant and premises. The words 'apparatus … goods and chattels, fixed or moveable, live or dead' might suggest that the distinction turns upon whether the item is a chattel or fixture on the one hand or a building or structure on the other. This was the view of the minority in the House of Lords in *IRC v Barclay, Curle & Co Ltd* [1969] 1 WLR 675, 45 TC 221. But the majority held that even a building or a structure (in that case a dry dock) could be plant if it was more appropriate to describe it as apparatus for carrying on the business or employed in the business than as the premises or place in or upon which the business was conducted. By this test a swimming pool used in connection with the operation of a caravan park has been held to be plant, in *Cooke (Inspector of Taxes) v Beach Station Caravans Ltd* [1974] STC 402, [1974] 1 WLR 1398, while conversely, in *Benson (Inspector of Taxes) v Yard Arm Club Ltd* [1979] STC 266, [1979] 1 WLR 347, a ship used as a floating restaurant, although a chattel, was held not to be plant because it was the place in

which the business was conducted: see Lord Lowry in *IRC v Scottish & Newcastle Breweries Ltd* [1982] STC 296 at 306, [1982] 1 WLR 322 at 333.

It will be seen, therefore, that although the three distinctions in *Yarmouth v France* (1887) 19 QBD 647 each involves a test which can be called functional, they are subtly different from each other. If the item is neither stock-in-trade nor the premises upon which the business is conducted, the only question is whether it is used for carrying on the business. I shall call this the 'business use' test. However, under the second distinction, an article which passes the 'business use' test is excluded if such use is as stock-in-trade. And under the third distinction, an item used in carrying on the business is excluded if such use is as the premises or place upon which the business is conducted. The fact that an item may pass the 'business use' test but fail what I may call the 'premises' test is central to this case.

…

This is mainly about the application of what I have called the 'premises' test to additions and improvements to restaurants for the purpose of making them more attractive to customers. In that respect it is unlike the *Scottish & Newcastle Breweries* case which was mainly about the application of the 'business use' test to items which were plainly not part of the premises. The items in dispute in that case were wall décor, plaques, tapestries, murals (which were in fact detachable), pictures and metal sculptures used to decorate hotels. All of these were held to be chattels or trade fixtures and not integral parts of the premises. The Crown refused them capital allowances as plant on the ground that they formed part of the 'setting', which in one sense, and probably the most obvious sense, they certainly did. But the House of Lords held that they nevertheless passed the 'business use' test because they were used to please and attract customers, and therefore were for the promotion of the trade.

I shall return in more detail to the items in dispute in this appeal, but they consist principally of improvements such as tiling on floors and walls, glass shop fronts, raised and mezzanine floors, staircases and false ceilings. Counsel for the taxpayer companies says that all these items were installed to improve the ambience of the restaurants and to attract customers. Their function is the same as that of the items found to be in plant in the *Scottish & Newcastle Breweries* case. Therefore, they are plant.

In general terms I accept counsel's premises but his conclusion is, in my judgment, fallacious. It assumes that the 'business use' test is the sole criterion for deciding what is plant and ignores the 'premises' test altogether. In the *Scottish & Newcastle Breweries* case, however, Lord Lowry made it clear that the 'premises' test also applies. In response to a submission that the House was giving too liberal an interpretation to the 'business use' test, he said ([1982] STC 296 at 304, [1982] 1 WLR 322 at 332):

> 'Moreover, the test accepted in this case by the commissioners and affirmed by the Inner House draws a line which can be held without trouble: something which becomes part of the premises, instead of merely embellishing them, is not plant, except in the rare case where the premises are themselves plant, like the dry dock in *Barclay Curle* or the grain silo in *Schofield (Inspector of Taxes) v R & H Hall*.'

See also the distinction ([1982] STC 296 at 304, [1982] 1 WLR 322 at 331) between wallpaper and mural paintings and the decorations and ornaments which were in issue in the case.

I take Lord Lowry [in *Scottish & Newcastle Breweries*] to be saying that even if an embellishment

> for the purposes of trade passes the 'business use' test, it still has to pass the 'premises' test and something which 'becomes part of the premises' fails that test unless the premises are themselves plant. Counsel for the taxpayer companies submitted that this passage was a *dictum* contrary to previous authority. In my respectful opinion, it correctly reflects an essential feature of the concept of 'plant' as it has been understood since *Yarmouth v France* (1887) 19 QBD 647. In another passage Lord Lowry distinguished, in the context of an hotel, between 'a beautiful or unusual or historic building, attractive views, gardens, shrubberies and waterfalls' on the one hand and 'ornaments, the equipment used by the staff and the glasses, china, cutlery, table linen, and the tables and chairs used by the customers' on the other. Both categories of items could be used, he said, for 'the creation of the right atmosphere' but the former category is excluded as plant by the 'premises' test.

32 Hoffmann J further rejected an argument by the taxpayers that if the improvement served a business purpose such as attracting customers, it was plant. He said (at 174):

> I accept that the test for whether a whole building or structure is premises depends upon its function … It is not simply whether the structure is used for a business purpose but whether it is used as plant rather than as premises.

The taxpayers' appeal to the Court of Appeal was dismissed. Fox LJ, in the leading judgment in *Wimpy International Ltd v Warland (Inspector of Taxes)* [1989] STC 273, rejected an argument of the taxpayers, albeit, based on an observation of Oliver LJ in *Cole Brothers Ltd* ([20] *supra*), that the question was whether the subject matter performs simply and solely the function of housing the business or whether as an additional function it performs some other purpose. As to this, Fox LJ said (at 280):

> I do not think that what Oliver LJ was saying in *Cole Bros* is at variance with Lord Lowry's approach. It is proper to consider the function of the item in dispute. But the question is what does it function as? If it functions as part of the premises it is not plant. The fact that the building in which a business is carried on is, by its construction particularly well-suited to the business, or indeed was specially built for that business, does not make it plant. Its suitability is simply the reason why the business is carried on there. But it remains the place in which the business is carried on and is not something with which the business is carried on.

33 This same approach can be seen in *Carr (H M Inspector of Taxes) v Sayer* [1992] 65 TC 15 ("*Carr v Sayer*") where the question, *inter alia*, was whether certain expenditure on the construction of permanent kennels by a company in the business of providing quarantine services for dogs and cats brought into the United Kingdom qualified for capital allowance. Sir Donald Nicholls VC held that the permanent kennels were not plant; they were purpose built permanent buildings or structures, used as such, and were the premises in which the business was conducted. At 23, he said:

> … buildings, which I have already noted would not normally be regarded as plant, do not cease to be buildings and become plant simply because they are purpose-built for a particular trading activity. Such a distinction would make no sense. Thus the stables of a racehorse trainer are properly to be regarded as buildings and not plant. A hotel building remains a building even when constructed to a luxury specification. I say nothing about particular fixtures within the building. Similarly with a hospital for infectious diseases. This might require special lay-out and other features, but this does not convert the building into plant. A purpose-built building, as much as one which is not purpose-built, *prima facie* is no more than the premises on which the business is conducted.

> Fifthly, one of the functions of a building is to provide shelter and security for people using it and for goods inside it. That is a normal function of a building. A building used for those purposes is being used as a building. Thus a building does not partake of the character of plant simply, for example, because it is used for storage by a trader carrying on a storage business. This remains so even if the building has been built as a specially secure building for use in a safe-deposit business. Or, one might add, as a prison. …

34 The premises test was again applied by the UK Court of Appeal in *Attwood (Inspector of Taxes) v Anduff Car Wash Ltd* [1997] STC 1167. In that case the taxpayer carried on the trade of operating automatic car wash sites and sought to claim capital allowance on the entirety of a wash hall which was a special system housed within a building incorporating washing machinery and control equipment, and surrounded by a tarmac area used for circulation, queuing and parking. The Inspector of Taxes accepted that some of the car wash facilities were plant but not each entire site. Peter Gibson LJ in the Court of Appeal applied the business use test and the premises test and held that the only reasonable conclusion was that neither an entire site nor an entire wash hall (*ie*, the building housing the car wash machinery) could be regarded as a plant. As both the entire site and the wash hall functioned as premises, they could not be held as plant. What is interesting for our purposes are Peter Gibson LJ's remarks regarding *Carr v Sayer* in the following terms (at 1176):

> The question in each case is, as Fox LJ said (in *Wimpy* [1989] STC 273 at 280): does the item function as premises or plant? To answer this may involve deciding whether it is more appropriate to describe the item as apparatus for carrying on the business or as the premises in or upon which the business is conducted. Thus in *Carr v Sayer* there can be no doubt but that the kennels were an essential part of the business of providing quarantine kennels for dogs and cats brought into the United Kingdom and thus were part of the means by which the trading operation was carried out. Yet the premises test was not satisfied because the kennels performed a typical premises function, providing shelter.

35 Applying the above to the facts of our case although the dormitories were built to enable the taxpayer to carry out its business activity of providing accommodation, it is also true that the provision of shelter is a typical function of premises. The dormitories are not essentially different from hotel premises where travellers are accommodated. The same reasoning was applied in *St John's School* ([19] *supra*). As explained by Templeman LJ in *Benson v Yard Arm Club* ([20] *supra*) at 90, although the gymnasiums and chemical laboratories were constructed and used as such, they were held not to be plant because they were merely part of the premises upon which the business of providing education was carried on. The structures performed no function other than their primary purpose of providing the accommodation for the business of a school. This was to be contrasted with the exceptional cases of *Barclay, Curle* ([12] *supra*) and *Schofield* ([15] *supra*).

36 In *Barclay, Curle*, the dry dock performed the function of a hydraulic lift, raising the ships and holding them in such a position that inspection and repairs could be done to the bottoms and sides of the ships. In *Schofield*, the silos did not merely serve as storage for grain but held grain in a position from which it could be discharged in varying quantities to customers. In each of those two cases, the structure performed a function other than that of merely providing accommodation for the carrying on of a business.

37 Although the appellant sought to argue that the portability and demountability of the dormitories was an additional function, in my view that contention was untenable. The portability and demountability of the dormitories were merely the properties of the dormitories and not a function (see [26] and [32] above). In the present case, the dormitories serve only to provide accommodation to workers, this being the typical function of premises. This remains so even if it be said that the

dormitories are the structures with which the business is carried on.

38 Accordingly, although the dormitories, in my view, pass the "business use" or "functional" test, I agree with the Board that they fail the "premises" test. The appeal is therefore dismissed with costs to be taxed.