

MONAHAN

THE HIGH COURT

1986 No.2317R

PATRICK MONAHAN (DROGHEDA) LIMITED

APPELLANT

and

INSPECTOR OF TAXES (D. C. O'CONNELL)

RESPONDENT

J U D G M E N T

DELIVERED BY THE HONOURABLE MR JUSTICE FRANCIS MURPHY

ON 15TH MAY 1987

This matter comes before me by way of Case Stated by the learned President of the Circuit Court pursuant to section 429 of the Income Tax Act 1967 and section 146 of the Corporation Tax Act 1976.

In paragraph 2 of the Case Stated the learned President sets out the question which was originally posed for determination by him and which he in turn has submitted for consideration by this Court. That question is whether capital expenditure in certain amounts incurred during defined periods in respect of the erection of transit sheds at Steampacket Quay, Drogheda, was capital expenditure incurred in the provision of buildings or structures which were in use for the purpose of a dock undertaking within the meaning of section 255 of the Income Tax Act 1967.

In paragraph 3 of the Case Stated the learned President sets out the facts which were proved or admitted at the hearing before him. In subparagraph (a) of paragraph 3 there is set out the business of the taxpayer under a variety of titles or descriptions which include shipping agents, stevedores, customs clearance agents, forwarding agents and coal importers.

Subparagraph (c) sets out the material fact that between the years 197 and 1982 the Appellant taxpayer erected three transit sheds at Steampacket Quay, Drogheda, but it is in subparagraphs (d) to (g) inclusive that the actual activities of the taxpayer are set out in detail. I propose to refer to all the facts contained in subparagraph (d), (e), (f) and (g). These facts are as follows:

"(d) The Appellant is responsible for the physical discharge of cargo when a ship docks at the Port of Drogheda. The Appellant is the owner of a crane, and cargo from a ship is unloaded either over the side of a ship with a crane by dockers employed by the Appellant, who place the cargo on a crane hook by means of which it is lifted from the hold of a ship and put on the Quay. The Appellant pays the dockers and the pilotage. When the goods are unloaded onto the Quay, a forklift truck is used by the Appellant to place them in one of the transit sheds which are situate on the far side of the Quay. In the case of certain more modern shi the sides of which can be lowered, the cargo is unloaded directly from the ship by means of forklift trucks which are driven onto the ship and remove the cargo to the said transit shed. It is in this latter way that much of the newsprint imported by the

Appellant on behalf of customers is unloaded and the percentage of goods carried in such side loading and unloading vessels is increasing all the time. A large percentage of the goods at any time in the transit sheds is newsprint. All persons engaged in unloading ships are dockers employed by the Appellant and the forklift truck is its property."

"(e) The transit sheds in question are bonded - they have dual locks, the Appellant holding one key and an officer of the Customs and Excise, the other. No goods can be taken out of the transit sheds unless an official of the Appellant and a customs officer are present with their respective keys."

"(f) The transit sheds are used to store goods only until they are cleared through customs. If the Appellant did not have bonded transit sheds, it would not be able to discharge ships until all the cargo thereon was cleared by customs officers. Value Added Tax is payable on all imported goods and accordingly the customs officers have to clear all these goods. The customers of the Appellant have to prove the necessary documentation in order to obtain such clearance and part of this documentation includes the shipping documents which the customers obtain from the banks. If there were not transit sheds then there would be long delays before ships could discharge as no goods could be discharged until the customers obtained the necessary documents and the goods on board had been cleared through Customs while still on board. Demurrage, payable at rates of or in excess of £1,000 per day for each day's delay of a ship would be incurred."

"(g) Goods entering the transit sheds usually remain there for only two or three days until they are cleared. The Appellant in fact allows fourteen days free storage in the transit sheds, though that period of time is rarely used. If a customer requires goods to be stored for a longer period they are cleared from the transit sheds so as to enable other goods to be placed in the transit sheds. The transit sheds are not used for storage but merely as a clearing house for goods unloaded from ships."

I quote the first sentence from paragraph (h) as follows:

"Sheds situate elsewhere other than in the immediate area of the docks and Quays would not have been bonded by the Customs."

I attach the utmost importance to the sentence quoted above from subparagraph (g), namely: "The transit sheds are not used for storage but merely as a clearing house for goods unloaded from ships." I will return to that finding later.

The material statutory provisions applicable to this case are to be found in Part XV, Chapter II, of the Income Tax Act 1967. Section 254

of that Act provides for capital allowances in respect of expenditure on the construction of industrial buildings and structures and section 255 defines such buildings or structures. In so far as it is material, section 255(1)(b) provides as follows:

"In this Chapter, 'industrial building or structure' means a building or structure in use for the purposes of a dock undertaking, ..."

Accordingly, it follows that if a building or structure is in use for the purpose of a dock undertaking it qualifies as an industrial building or structure, whatever else may occur.

Reference was made in the course of the argument before me to a number of English cases in which the words "dock undertaking" were considered but only in the context of a special definition of those words given to them for the purposes of the Rating and Valuation Apportionment Act 1928. It seems to me that a consideration of those cases is of little assistance in the present circumstances, having regard to the special nature of the definition which was under consideration there.

However, section 255 itself does give some assistance in the interpretation of the crucial words "dock undertaking". Section 255(2) provides as follows:

"In this section, 'dock' includes any harbour, wharf, pier or jetty or other works in or at which vessels can ship or unship merchandise or passengers, not being a pier or jetty primarily used for recreation, and 'dock undertaking' shall be construed accordingly."

In relation to that definition I may say that it was contended that the transit sheds which were erected by the taxpayer in the present case between the years 1978 and 1982 constituted "other works" within the meaning of that definition. I would be slow to accept that submission nor do I think that it is material to the present case.

It is clear that the nature of the taxpayer's business includes, at the very least, the use of facilities which by any definition include or consist of a dock within the meaning of subsection (2). The vessels

unloaded by the taxpayer are unloaded at the Steampacket Quay from vessels which have, as the learned President said, docked there. There can be no doubt in my view that the area and facilities used by the taxpayer include a dock.

Perhaps the greater problem in the present case is to appreciate the significance of the word "undertaking", which is to be construed in conjunction with the word "dock" as defined by the subsection.

The word "undertaking" was considered in the very famous case *In re Panama, New Zealand and Australian Royal Mail Company*, 5 Ch. Appeals, 318, in the context of meaning an effect of a charge on an undertaking, and in the course of his decision Giffard L.J. commented at page 322:

"I have no hesitation in saying that in this particular case, and having regard to the state of this particular company, the word "undertaking" had reference to all the property of the company, not only which existed at the date of the debenture, but which might afterwards become the property of the company."

It seems to me that this well accepted description of an undertaking indicates, at the very least, the wide import of the word "undertaking"

However, in the present case it was expressly argued before the learned President, as recorded in the Case Stated at paragraph 4(f), that the expression "undertaking" implied an enterprise or something undertaken, and to my mind that contention is fully supported by the decision of Plowman J. in England in the case of *Baytrust Holdings Ltd v. Inland Revenue Commissioners* [1971] 1 W.L.R. 1333. The court there was considering section 55 of the Finance Act 1927, which would be similar to Section 31 of the Irish Finance Act 1965, and in a very brief sentence Mr Justice Plowman, whilst rejecting an argument put forward by Mr Monroe, at the end of page 1353 said: "I am unable to accept that argument. The word "undertaking", in my judgment, denotes the business or enterprise undertaken by a company...". Then he goes on to deal with the facts of the particular case.

It seems to me that they are the very words which were rightly contended on behalf of the Appellant in the argument before the learned President: that an undertaking implies an enterprise and something

undertaken and something which is to be given a wide connotation. Indeed, I think it may be said that it is common case between the parties, and it is conceded by the Inspector, that the Appellant Taxpayer does carry on a dock undertaking, or that he is a dock undertaker, and that the issue between the parties in this court is not whether this business was carried on by the taxpayer but whether this business ceased at the point at which the goods were landed on the Quay. The contention was made on behalf of the Inspector that the dock undertaking or enterprise ceased when the goods were landed or, at any rate, ceased when they were placed in the transit sheds.

In my view that contention is not well founded and cannot be sustained on the general facts as found by the learned President and on the particular fact as found by the learned President, which I have already emphasised, namely, that the transit sheds are not used for storage but merely as a clearinghouse for goods unloaded from the ships

The facts generally and the nature of the business carried on by the Appellant and the circumstances in which goods are retained in the transit sheds for a brief period and in the special circumstances that they require customs clearance to ensure that VAT is paid and that it is rare that a three-day period is exceeded, that there is no charge unless 14 days is exceeded and that once the goods have been cleared they are removed and stored elsewhere, indicates beyond doubt to me that the taxpayer is not carrying on the business of storekeeper or warehouseman and that the retention of goods in the transit sheds for this brief period of two or three days free of charge is not a separate business but merely ancillary to the admitted business of dock undertaking carried on by the taxpayer.

In those circumstances I find myself,, with some reluctance, in disagreement with the conclusion reached by the learned President as to the correct interpretation of the expression "dock undertaking", but I in no way depart from his findings of fact; indeed, I rely wholly

upon them for my conclusions. It is presumably on the legal interpretation or difference of interpretation that we disagree. The learned President's reason for his conclusions as opposed to his findings of fact have not been set out in the Case Stated, but I accept, and I am bound to accept and am happy to accept, all his findings of fact. However, on those findings I reach a different conclusion in law, and in the circumstances it seems to me that the question posed in the Case Stated must be answered in the negative.

*affirmed
In view of dissent
20th May 87*

A. Kenny
Official Stenographer
19th May 1987