IT 175 - Depreciation : improvements and fixtures on leasehold property

TAXATION RULING NO. IT 175

DEPRECIATION : IMPROVEMENTS AND FIXTURES ON LEASEDHOLD PROPERTY

F.O.I. EMBARGO: May be released

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PREAMBLE The following advice was given concerning the taxation treatment of claims for depreciation on improvements and fixtures on leasehold property.

RULING 2. The practice of allowing depreciation to a lessee on the cost to him of structural improvements and fixtures on land used for agricultural or pastoral pursuits is, based on the ground that, in general, lessees of such land can, for the purposes of section 54 of the Income Tax Assessment Act, be reasonably regarded as the owners of those improvements. A lessee's claim to ownership may be a statutory proprietory right, as provided in section 28 of the (Victorian) Landlord and Tenant Act, or as implied in section 236 of the (Queensland) Land acts 1962-1965; or it may rest upon a statutory right to obtain compensation for the value of the improvements, as provided by section 4 of the (Queensland) Agricultural Holdings Act; or upon a right of removal during or at the termination of the lease.

3. In these circumstances, although the lessee may not have a full title to improvements installed by him he would have what has been variously described as an equitable or a real and valuable interest sufficient to regard the improvements as being "owned" by him for purposes of section 54. The position in relation to plant etc. being acquired under a hire purchase agreement is a further example of this view.

4. In ascertaining whether there is the necessary degree of "ownership" in respect of fixtures on land which is not used for agricultural or pastoral pursuits, it is convenient to consider the question under separate headings, as follows:-

(i) Where the lessee has a right to remove fixtures annexed by him, during or at the termination of the lease.

If there is no written lease, or if the lease does not provide a right of removal, then, prima facie, the

fixtures become part of the realty and will remain the property of the lessor. the lessee cannot be regarded as the owner, and unless he has some other right sufficient to constitute ownership for purposes of section 54, he is not entitled to depreciation on them.

However, an exception to this rule must be made in the case of trade, ornamental or domestic fixtures, in respect of which the Common Law recognizes that the tenant who has annexed them (but not a subsequent tenant) has a right of removal during the term of the lease.

. If the lease does provide for a right of removal, then it must be presumed that the fixtures, even if they are not trade, ornamental or domestic fixtures, fall into the class of removable tenant's fixtures and the tenant has a real and effective interest in them; an interest which may fairly be considered to constitute "ownership" for the purposes of section 54.

(ii) Where the lessee has a right to receive compensation.

The lessee may have no right to removal under the Common Law, by statute or under the terms of the lease but may have, under the lease, a specific right to compensation for the value of fixture annexed by him. The view is held that this would be sufficient to constitute "ownership" for the purposes of section 54 and would entitle the lessee to depreciation deductions, provided, of course, that the items are "plant or article" within the terms of the section. The compensation, when received, would be "consideration receivable" in terms of section 59. However, it should not be conceded that an arrangement by which the lessee would receive only a nominal amount for the fixtures, upon the disposal, surrender or termination of the lease, would represent a sufficient interest in the fixtures as to enable him to be regarded as the owner.

(iii) Where the lease purports to vest ownership of fixtures in the lessee, but he lease agreement indicates that the true intention of the parties is that the lessee should not remove or receive compensation for improvements effected by him.

In these circumstances, it is considered that the arrangement would not be effective in conferring ownership upon the lessee; the fixtures would be a permanent part of the realty, owned by the lessor, and the lessee would have no real interest in them.

5. The remarks in the preceding paragraph relate to items that may be described as "fixtures". Although "fixtures" is a term that has not always been used by the authorities in the same sense, it is generally agreed that it does not include items

that from part of the original building itself; it is confined to things which have been affixed to the freehold after the original structure has been completed. (Lewis and Cassidy, Tenancy law - N.S.W., cite three examples of things that were held to be part of the original structure, viz., plate-glass windows, a skylight, and an ornamental cornice.) It should not be conceded that an item which, on the above tests, is excluded form the definition of fixtures can be owned by a lessee, despite any purported agreement to the contrary. In this connection it does not seem to be relevant that the construction of the building.

6. On the other hand, the facts in a particular case may be sufficient to establish that the object is a removable tenant's fixture. Whether an object constitutes a fixture, and if so whether it is a fixture removable at the will of the tenant, are questions of fact to be decided in each case in the light of all the surrounding circumstances; a useful statement of the factors to be considered in determining whether a fixture is removable is in Spyer v. Phillipson (1930) All E.R. Rep. 457.

7. In addition to the legal question of "ownership" in terms of section 54, there is another practical reason for not conceding that lessees are in all cases entitled to depreciation on fixtures for which they have paid. A lessee who has a valuable interest in fixtures, an interest which he is able to enforce if necessary (such as a right of removal or of compensation) will presumably have been less incentive than one who has no such interest, to enter into arrangements designed to permit the writing off of the whole of the expenditure, as depreciation, in a short time. The kinds of arrangement envisaged are surrender or transfer of the lease with no consideration being received for the fixtures.

8. A further aspect raised in one instance that has come under notice is that, where the term of the lease is long (say 75 years) some assets whose life expectancy is short in comparison will need to be replaced a number of times and will never be surrendered to the owner of the freehold. The view is held that this factor would not affect the legal position as far as ownership is concerned, and would not, of itself, entitle the lessee to depreciation deductions that would not otherwise be allowable. It should be noted, however, that expenditure on replacement of such assets could in some circumstances be allowable to the lessee as repairs under section 53.

9. No undertaking can be given, in advance of a knowledge of all the relevant facts, that depreciation will be allowed to the lessee company on items such as lifts, air conditioning, fluorescent lighting etc., which are installed at the expense of the company and in which it will have tenant rights. the question will depend firstly upon the precise nature of the tenant rights, and secondly upon the nature of the items themselves and the circumstances of their annexation to the building; these are material factors in determining whether, for the purposes of the depreciation provisions, the items will be "owned" by the company. Items will be the property of the

freeholder either because they will form part of the original building itself, or because, assuming that they will be fixtures, the object and purpose of their annexation to the building will be such as to make them a permanent part of the realty. If this view is correct, and if it cannot be shown that a company will have property rights in the fixtures under specific legislation, the items of section 54 of the Income Tax Assessment Act and no depreciation will be allowable.

COMMISSIONER OF TAXATION