THE MINISTER OF NATIONAL REVENUE ..... APPELLANT; 1955 Nov. 23

AND

1956 *Jan. 10

RONALD GORDON McINTOSH ..... RESPONDENT.

Revenue—Income Tax—Land purchased and resold as building lots—Isolated transaction unrelated to taxpayer's usual business—Capital gain or taxable income—"Adventure in the nature of a trade"—The Income Tax Act, S. of C. 1948, c. 52, ss. 3, 4, 139 (1).

The respondent, a retired grocer, joined with one L in purchasing a parcel of land with the intention of dividing it into lots and building houses thereon. After the purchase and the division the respondent decided not to proceed with the scheme but to sell his share of the lots totalling 55. In 1952 he sold twenty on which he realised a profit of some $12,087. This amount was assessed by the appellant as income under ss. 3, 4 and 139 (1) of *The Income Tax Act*. The respondent, contending the profit was a capital accretion, appealed to the Income Tax Appeal Board and the assessment was set aside.

Held: That although the transaction was an isolated one and not in any way related to the respondent's usual or ordinary business, it was still a venture or speculation and not an investment in the ordinary sense. The sale was a venture of a trade or business and the profit a gain made through an operation of business in the course of carrying on a scheme for profit making and therefore properly taxable.

Atlantic Sugar Refineries Ltd. v. *Minister of National Revenue* [1949] S.C.R. 706, followed.

APPEAL from a decision of The Income Tax Appeal Board (1).

(1) (1955) 12 Tax A.B.C. 183.

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The appeal was heard before the Honourable Mr. Justice Hyndman, Deputy Judge of the Court, at Toronto.

K. E. Eaton and *J. D. C. Boland* for the appellant.

Keith Laird, Q.C. for the respondent.

HYNDMAN D.J. now (January 10, 1956) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board (1), in respect to the income of said respondent for the 1952 taxation year, involving ss. 3 and 4 and 139 (1) (*e*) of *The Income Tax Act* which read as follows:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

139. (1) In this Act,

(*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

The material facts may be stated as follows:—

Respondent, who lives in Sarnia, Ontario had been engaged in the business of grocer and meat merchant. In 1948 he sold his business and was without occupation. Shortly after one Clinton Laidlaw, a friend and related to respondent, who was interested in building for the purpose of sale, suggested to respondent that they purchase a vacant property known as Grandview Park Subdivision which adjoined the City of Sarnia, and was for sale under the *Veterans' Land Act*. The scheme was that the said property might be purchased and a number of houses erected thereon, a condition of the sale being that houses should be built on said land. The proposal was that they should each acquire a 50-50 interest. Of the two men only Laidlaw had had any experience in house building. Respondent hesitated about entering into the venture, but on repeated urging by Laidlaw, finally decided that he would purchase one-third

(1) (1955) 12 Tax A.B.C. 183.

of the lots, namely 55 out of the 165 lots, into which the property had been subdivided, respondent to pay Laidlaw $2,500 and to receive a deed on paying the further sum of $1,872 on or before the 1st of May, 1948. They were to be associated in the building scheme, but later on differences arose between them and Laidlaw offered to repay the respondent the $2,500 and to end their association in all respects. This offer was unacceptable to respondent who insisted on acquiring the lots. Laidlaw having refused to carry out the sale to McIntosh, the latter brought an action for specific performance in the Supreme Court of Ontario which was ultimately settled out of Court. Respondent then paid the balance due Laidlaw, and the lots were conveyed to him. This ended all dealings between the two men.

Respondent having no experience in building, as was the original intention, decided to sell the vacant lots. The cost to the respondent per lot for the 55 lots was about $112.

In 1952 (which is the year in question) respondent sold 20 of the said lots to one Alfred Sauvé for the sum of $14,545.40, being at the rate of $727 per lot or a profit of about $615 per lot, a total of $12,287.60, later adjusted to $12,087.60.

The question for decision is, therefore, whether said profit was capital accretion, or, income subject to tax.

It can be said at once that this was an isolated transaction, not in any way related to the respondent's usual or ordinary business.

It is equally true that when he entered into the arrangement with Laidlaw his intention was to make gain or profit. Also, after acquiring the 55 lots from Laidlaw, he had no intention of using them himself or developing them for revenue purposes.

From his notice of appeal to the Income Tax Appeal Board, dated the 27th of September, 1954, I quote the following:—

> The appellant's venture in purchasing the said lots was a speculation.

It was very strongly argued by Mr. Laird, Q.C., counsel for respondent, that the arrangement with Laidlaw having fallen through, an entirely new situation arose affecting or displacing his original intention.

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I have given this argument my best consideration, but I cannot escape the conclusion that the original idea, namely, to make gain or profit, continued. It was, as above stated, still a venture or speculation, and not an investment in the ordinary sense.

Having acquired the said property there was no intention in his mind to retain it as an investment, but to dispose of the lots, if and when suitable prices could be obtained.

It was said that the price received by him was one or two hundred dollars less than the real value, and that this fact in some way negatived an intention of entering into a scheme to make a profit on the venture. I am unable to see any force in this argument. In view of all the circumstances, his insistence in obtaining the property could unquestionably only have been with the object of making a gain or profit.

In a recent judgment in this Court, *Chutter* v. *Minister of National Revenue* (1) on December 9, 1955, Ritchie J. exhaustively reviewed or cited the numerous decisions applying to circumstances, in essence, similar or analogous to the salient facts in the case at bar. The contention in most of these cases was that the undertaking or venture was an isolated one, not in the course of the regular or ordinary business of the taxpayer, and consequently a capital gain, and not income subject to tax. This was the defence set up in *Chutter* v. *Minister of National Revenue* (*supra*) and was rejected by Ritchie J. in view of the authorities referred to by him, and held that it was a venture in the nature of a trade or business, and that the profit was a gain made through an operation of business in the course of carrying on a scheme for profit making.

I find it unnecessary to again review all the decisions as set out in said judgment.

Of the decisions mentioned in the judgment of Ritchie J. I think I need only refer to that of the President in *Atlantic Sugar Refineries Limited* v. *The Minister of National Revenue* (2) which was affirmed in the Supreme Court of Canada.

At page 630 the President said:

> There remains the contention that the appellant's gain was not taxable income because it was not income from any trade and because its venture

(1) [1956] Ex. C.R. 89.

(2) [1948] Ex. C.R. 622; [1949] S.C.R. 706.

was an isolated transaction outside its normal business operations and unconnected therewith. The appellant cannot escape liability merely by showing that its entry into the raw sugar futures market was an isolated transaction. While it is recognized that as a general rule an isolated transaction of purchase and sale outside the course of the taxpayer's ordinary business does not constitute the carrying on of a trade or business so as to render the profit therefrom liable to income tax—*vide Commissioners of Inland Revenue* v. *Livingston et al.* (1), per Lord Sands: *Leeming* v. *Jones* (2); it is also established that the fact that a transaction is an isolated one does not exclude it from the category of trading or business transactions of such a nature as to attract income tax to the profit therefrom. There are numerous expressions of opinion to that effect—*vide Californian Copper Syndicate* v. *Harris* (3); *T. Beynon and Co., Limited* v. *Ogg* (4); *McKinlay* v. *H. T. Jenkins and Son, Limited* (5); *Martin* v. *Lowry* (6); *The Cape Brandy Syndicate* v. *Commissioners of Inland Revenue* (7); *Commissioners of Inland Revenue* v. *Livingston* (8); *Balgownie Land Trust, Ltd.* v. *Commissioners of Inland Revenue* (9); and *Anderson Logging Co.* v. *The King* (10). Whether the gain or profit from a particular transaction is an item of taxable income cannot, therefore, be determined solely by whether the transaction was an isolated one or not.

And at page 633:

While it may not be possible to define the line between the class of cases of isolated transactions the profits from which are not assessable to income tax and that of those from which the profits are so assessable more precisely than in the tests referred to, it is clear that the decision cannot be made apart from the facts. The character or nature of the transaction must be viewed in the light of the circumstances under which it was embarked upon and the decision as to the side of the line on which it falls made after careful consideration of its surrounding facts.

I might also refer to the case of *Edwards and Bairstow* (11) in which Lord Radcliffe said:

There remains the fact which was avowedly the original ground of the commissioner's decision—"this was an isolated case". But, as we know, that circumstance does not prevent a transaction which bears the badges of trade from being in truth an adventure in the nature of trade. The true question in such cases is whether the operations constitute an adventure of that kind, not whether they by themselves, or they in conjunction with other operations, constitute the operator a person who carries on a trade. Dealing is, I think, essentially a trading adventure, and the respondent's operations were nothing but a deal or deals in plant and machinery.

(1) (1926) 11 T.C. 538 at 543.
(2) [1930] 1 K.B. 279; [1930] A.C. 415.
(3) (1904) 5 T.C. 159.
(4) (1918) 7 T.C. 125 at 133.
(5) (1926) 10 T.C. 372 at 404.
(6) (1925) 11 T.C. 297 at 308; [1926] 1 K.B. 550 at 554; [1927] A.C. 312.
(7) (1920) 12 T.C. 358.
(8) (1926) 11 T.C. 538.
(9) (1929) 14 T.C. 684 at 691.
(10) [1925] S.C.R. 45 at 56.
(11) [1955] 3 All E.R. 48.

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I can quite understand an inclination in such instances to regard the profit as an accretion to capital, and therefore not taxable. However, in view of the authorities, with much deference to the learned member of the Tax Appeal Board, I feel impelled to the conclusion that respondent was properly taxed, and that the decision of the Tax Appeal Board must be reversed and appeal allowed.

It was admitted by counsel for respondent that if the appeal is allowed the amount claimed by the Minister is correct.

The appeal of the Minister herein will therefore be allowed, the decision of the Income Tax Appeal Board set aside, and the assessment made by the Minister allowed. The appellant is entitled to costs taxed.

Judgment accordingly.