1960

Feb. 1

Dec. 7

BETWEEN:

HARVEY CLARKE SMITH .....APPELLANT;

AND

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

Revenue—Income tax—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e)—Capital or income—Sale of farm in bloc at substantial profit—Sale by farmer with prior dealings in real estate—Farming successfully carried on for five years—Profits held to be income—Appeal dismissed.

Appellant from 1943 to 1955 had been engaged in farming, first as a salaried employee and from 1949 onward on his own account. During the years from 1943 to 1949 this farming operation included the raising of beef and dairy cattle and hogs. His father was the owner of two tracts of land, one a 55-acre lot bought in 1941 and the other a 100-acre lot

[1] (1877) 1 S.C R. 395.

bought in 1943. Between 1946 and 1949 two portions of the latter lot were subdivided into a total of 75 lots and sold. The appellant assisted his father in making these sales. In 1949 the remaining portion of the 100-acre lot was transferred to appellant who subdivided it into 63 lots, of which 33 were sold by him in the same year.

In 1951 the 55-acre parcel was transferred to appellant in trust for his father. It was subdivided into lots of which a number were sold between 1951 and 1955. Appellant contributed one third of the expenses of this subdivision and received one-third of the profits for looking after it and for the sales of the lots.

In 1950 appellant and his father, who was a printer and not a farmer, jointly purchased a 125-acre farm about one mile away from this original farm, fronting on a major highway and near the City of Toronto, for which they paid $45,000. During the years 1951 to 1955 this property was farmed by appellant with farm help, about 100 acres being used to grow grain and hay. Livestock for personal use was kept and portions of farm buildings not needed by appellant were rented as stables for race horses. The appellant contributed $7,000 to the purchase of this farm and in 1952 the house on it together with one acre of land was sold for $12,000 and provided a further sum of $6,000 towards appellant's share of the purchase price, and the remaining $9,500 was paid by him to his mother after his father's death, his mother having become entitled to the father's property. The remainder of this farm was sold in one single transaction for $260,000 in 1955. Shortly after the sale of the farm, appellant sold his farm machinery and has not since been engaged in farming. The Minister assessed appellant for the profits from this sale for the years 1955, 1956 and 1957. From this assessment appellant now appeals to this Court. He contends that the farm was purchased in 1950 for farming and that it was used for that purpose until sold in 1955, no efforts having been made to sell it, the sale resulting from an absolutely unsolicited offer to purchase, and that he had realised an investment and was not engaged in the real estate business.

Held: That the appeal must be dismissed.

2. That the purchase of the property by appellant and his father was not an investment looking primarily to the maintenance of an annual return but was really a venture of capital in acquiring a property with a view to realising the profit that could be made from seizing upon a favorable opportunity that could be expected to come from selling it either in lots or as a whole.

3. That the profit from the sale of the farm is income from a business as defined in the Act and taxable.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Thurlow at Toronto.

W. D. Goodman for appellant.

W. W. Barrett and *J. D. C. Boland* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

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THURLOW J. now (December 7, 1960) delivered the following judgment:

This is an appeal from assessments of income tax for the years 1955, 1956 and 1957, the issue for each of these years being whether the profit arising from a sale made by the appellant in 1955 of certain real property was income or a capital gain.

The appellant at the time of the trial of the appeal was 35 years of age. After leaving school he had been employed for 14 months by the Canadian Bank of Commerce at Thornhill near Toronto, where he and his parents lived, and subsequently for eight months by the DeHaviland Aircraft Company, but from 1943 until the end of 1955 he had been engaged in farming at first as a salaried employee of his father and from 1949 onward on his own account. Between September, 1943 and May, 1944, the operation included the raising of a herd of some 18 head of beef cattle. In the fall of 1944, 16 head of dairy cattle were acquired, and a herd of this size was kept until 1948 or 1949. During these years from 1943 to 1949 the operation also included raising hogs. There is nothing in the evidence to indicate what the pecuniary results of these operations were.

The farm where the operations were carried on consisted of two lots in Vaughan Township on the west side of Yonge Street in Thornhill, one a lot 55 acres adjoining the house lot on which the appellant's father lived, and the other a 100-acre lot adjoining the 55-acre lot and extending from Yonge Street westerly to Bathurst Street. The appellant's father was president of a printing firm in Toronto and lived on the same residential property at Thornhill for many years until his death in 1953. He had purchased the 55-acre lot in 1941 for $8,000 and the 100-acre lot in 1943 for $11,000 or $12,000. In 1946 a portion of the 100-acre lot adjoining Yonge Street was subdivided into 25 lots which were later sold, the appellant assisting from time to time in making sales. In 1947 another portion of the 100-acre lot was transferred to Thornhill Estates Limited, a corporation controlled and wholly owned by the appellant's father. The land so transferred was subdivided into 50 lots and sold in that year and in 1948. The appellant was nominally

president of the company and had occasion to sign documents pertaining to the sales and to take part in selling some of the lots. When the lots had all been sold, the company was wound up. In 1949 the remaining portion of the 100-acre lot, consisting of about forty acres, was transferred to the appellant, who subdivided it into 63 lots, 33 of which were sold by him in 1949, 24 in 1950, and six in 1953. The appellant paid his father $8,000 for the property, expended a further $5,000 or $6,000 for roads, surveys, legal fees, and other expenses, and realized a profit of $30,000 from the sale of the lots. When arranging sales of lots from the two earlier subdivisions, the agreement of sale had in each case been prepared by a notary. For his own subdivision, however, the appellant drafted the agreements himself. In some cases, he took short-term mortgages to secure payment of the purchase price.

In 1951 the 55-acre parcel was transferred to the appellant in trust for his father, who was then in poor health, and it too was subdivided into lots, of which eight were sold in 1951, 33 in 1952, 17 in 1953, and 14 in 1955. The appellant contributed one-third of the expenses of this subdivision and was given one-third of the profits for looking after the subdivision and the sales of the lots.

In 1950, when the 55-acre lot was the only portion of the farm which had not been subdivided, the appellant and his father jointly purchased a 125-acre farm in Markham Township on the east side of Yonge Street, seven-tenths of a mile to the northward of the properties already mentioned. It lay some 4½ miles north of the point at which Highway 401 crosses Yonge Street and 14 miles from the City Hall at Toronto. For this property, which the appellant described as "a good farm, it had been run down but it was excellent land", $45,000 was paid, the title being taken in the name of the appellant's father. According to the appellant, the reason for taking the title in his father's name was that, "He was a business man and I was not and he looked after all the details in connection with the business". Of the money required to purchase the property the appellant contributed $7,000, the remainder being provided by his father. In 1952 the house on this property, together with one acre of the land, was sold for $12,000, which provided a further contribution of $6,000 towards the appellant's share of the

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purchase money, and the remaining $9,500 was paid by him to his mother after his father's death, his mother having become entitled to the father's property. The remainder of this farm was held until 1955 when, in a single transaction, it was sold by the appellant and his mother for $260,000 and thus gave rise to the profit in question in this appeal, a portion of this profit having been assessed in each of the three years to which the appeal relates.

Besides the house which has been mentioned, the property in question, when purchased by the appellant and his father, had on it two barns, a driving shed, a granary, and a hay barn, and during the years 1951 to 1955 the appellant rented portions of these buildings as stables for race horses and used other portions to stable four retired horses of his own, as well as to house some pigs kept for his own use. For a time he had one full-time farm hand, who worked for him as well as for some of the tenants, and at times he hired casual farm help as well. Of the 125 acres, 100 acres were cultivated land, and in each of the years 1950 to 1955 some 40 to 50 acres of this land were used to grow grain and the remainder to grow hay. For these years the appellant's income tax returns show farming receipts from rents and the sale of hay, straw, and grain and farming expenses, exclusive of capital cost allowances, as follows:

Year	*Rentals*	*Hay and Grain*	*Total*	*Expenses*	*Net*
1951	1,495.85	2,407.26	3,903.11	1,136.00	2,767.11
1952	1,300.00	4,248.50	5,548.50	2,160.76	5,387.74
1953	1,400.00	3,593.82	4,993.82	2,142.00	2,851.82
1954	925.00	2,135.78	3,060.78	1,717.00	1,343.78
1955	250.00	1,229.83	1,479.83	136.40	1,343.43

During these years, a minor improvement was made to the stables and some general repairs were made to make the buildings more suitable for rental.

The appellant gave evidence that the Markham farm was purchased for farming and that it was used for that purpose until the property was sold in 1955. No efforts were made at any time to sell it, but in June of that year an unsolicited offer of $260,000 was received for it. The appellant said he talked this over with his mother and they decided to accept it, she because she was in need of money and he because

the realty tax had tripled from 1950 to 1955 and the prices of cattle, hogs and grain were going down or not increasing in proportion to the cost of farm machinery and maintenance or operation of the farm. As to this explanation, it may be noted that the taxes claimed as an expense in 1951 were $636, in 1952, $704.26, in 1953 (after sale of the house) $602.00, and in 1954, $802. Nor had the appellant ever been engaged on his own account in raising cattle or hogs for marketing. It is plain, however, that his real and immediate reason for selling was the attractive price offered. Shortly after the sale of the farm, the appellant advertised and sold his farm machinery by public auction and has not since been engaged in farming.

That the property was in fact acquired at least in part for farming is borne out by the fact that farming operations were carried on on the property on a substantial scale for five years. At the same time, I am not satisfied that that was the only reason for buying it, and in the circumstances I would infer that the appellant and his father, when purchasing the property, did so with a view to the profit which they hoped and, I think, expected to realize sometime in the future on a sale of the property, whether in lots or in bloc. I also think that the latter was by far their more important motive for buying the farm, a conclusion which, to my mind, is indicated by the course which had been taken with respect to the other farm and the substantial profits realized in disposing of it and the speculative nature of the Markham property. The conclusion, in my view, is also borne out by the evidence of the appellant that, when buying the Markham farm, he gave no thought to what he could expect from it by way of farm income, for if farming the property were his main or only reason for buying it I do not think he would have bought it without having given very considerable thought to what it would produce for him in farm income.

The question of whether the profit from the sale of this farm was income or capital depends on whether or not the purchase and sale of the farm were transactions carried out in the course of a business of dealing in real estate, the term "business" for this purpose being wide enough to

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include an adventure or concern in the nature of trade. The test applicable is that stated in *Californian Copper Syndicate v. Harris*[1] as follows:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.
>
> What is the line which separates the two classes of cases may be difficult to define, and each case must be consideerd according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

The test is not always easy to apply, for there is no single criterion by which the question may be resolved, and cases frequently arise in which there are circumstances or facts pointing to both conclusions. It is well established, however, that the mere fact that property is held for a time during which use is enjoyed or revenue is received from it does not conclude the matter in favour of the profit realized on a subsequent sale being the result of mere realization, rather than the result of trading activity. Thus in *Rutledge v. Commissioners of Inland Revenue*[2] the Lord President (Clyde) said at p. 497:

> It is no doubt true that the question whether a particular adventure is "in the nature of trade" or not must depend on its character and circumstances, but if—as in the present case—the purchase is made for no purpose except that of re-sale at a profit, there seems little difficulty in arriving at the conclusion that the deal was "in the nature of trade", though it may be wholly insufficient to constitute by itself a trade. It is not difficult, on the other hand, to imagine circumstances in which the question might become very narrow; and in *Inland Revenue v. Livingston* I instanced such a case which it may be worth while to expound. Suppose the Appellant on the occasion of his visit to Berlin had seen a picture for sale which he admired and which he thought likely to appreciate in value in the course of years; he might buy it—and might be conclusively influenced to buy it—because of an anticipated rise in its value. After using it to embellish his

[1] 5 T.C. 159 at 165. [2] 14 T.C. 490.

own house for a time, he might sell it if the anticipated appreciation in value ultimately realised itself. In such a case, I pointed out that it *might* be impossible to affirm that the purchase and sale constituted an "adventure . . . in the nature of trade", although, again, the crisis of judgment might turn on the particular circumstances.

The element of use of the property or receipt of income from it for a time was present in *Campbell v. Minister of National Revenue*[1] and in *Noak v. Minister of National Revenue*[2], where in each case the taxpayer failed. In the *Campbell* case Locke J., delivering the judgment of the Court, said at p. 7:

> The learned members of the Income Tax Appeal Board having heard the evidence of the appellant did not accept his statement that he had caused to be built these various properties for the purposes of investment and concluded that in truth he was carrying on the business of constructing them for the purpose of re-sale at a profit.

And in *Noak v. Minister of National Revenue,* the trial judge, with whose opinion all the members of the Supreme Court agreed, had found that the appellant had followed a course or system which had in view not just investment but the intention to make profits by sale, and that in doing so she was engaged in the carrying on of a business.

Reference may also be made to *C. I. R. v. Toll Property Co. Ltd. (in Liquidation)*[3], where a dissenting commissioner had been of the opinion that the property was purchased with the intention of resale at a profit when a suitable opportunity arose and that, therefore, the purchase and sale of the property constituted an adventure in the nature of trade the profit on which was assessable, and the Court of Session, reversing the decision of the majority, held that this was the only reasonable conclusion on the facts, and this notwithstanding the fact that the property had been held from 1942 to 1949, during which period income had been derived from it. The Lord President (Cooper) said at p. 18:

> The majority of the Commissioners have given the reasons for their view in two propositions, first, that the Company was a distinct legal *persona,* and second, that the Company had derived an income from this isolated property transaction for a number of years, and from this they conclude that the transaction was an investment. For myself, I cannot see the necessary relevance of either of the factors founded upon, and I am certain that they are not conclusive in favour of the result which the majority of the Commissioners have reached.

[1] [1952] S.C.R. 3. [2] [1953] 2 S.C.R. 136.
[3] 34 T.C. 13.

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In *Minister of National Revenue v. James A. Taylor*[1], where the various criteria which have from time to time been referred to in determining whether or not a transaction is an adventure in the nature of trade are discussed, Thorson P., referring to the *Californian Copper Syndicate* case (*supra*) said at p. 202:

> The case is also of importance for the stress which the Lord Justice Clerk put on the element of speculation as a determining factor in the decision that the transaction was not the realization of an investment and its transfer into another form but the gaining of profit by the sale of the property and thus a transaction that was characteristic of what a trader would do. This stress on the speculative element is of particular importance when it is coupled with the finding that the sale of a property, which by itself is productive of income and might be regarded as an investment, can be a trade in the property rather than a realization of an investment.

But while the mere receipt of income for a time is not conclusive and may vary in importance depending on the circumstances, neither is an intention at the time of acquiring the property to make a profit by selling it by itself determinative of the question whether the transaction was one in the nature of trade. *Vide Leeming v. Jones*[2] and *Commissioner of Inland Revenue v. Reinhold*[3]. Such an intention is an important fact, but these cases indicate that it is not conclusive, and it may be outweighed by other considerations. The fact that the transaction is not in the way of the taxpayer's ordinary business, the fact that the transaction is an isolated one, and the fact that the property is of a kind in which investments are commonly made tend to offset the effect of such an intention and may, particularly when they are combined, but always having regard to all the circumstances, be sufficient to outweigh it. On the other hand, the fact that the transaction is one in the way of the taxpayer's business, the fact that the property is speculative in the sense that there is good reason to expect it will rise in value, and the fact that the transaction is not an isolated one but fits into a system or pattern of trading transactions in which the taxpayer engages all tend to support the inference from such an intention that the transaction is one in the nature of trade.

[1] [1956] C.T.C. 189. [2] 15 T.C. 333.
[3] 34 T.C. 389.

In the present case there are a number of features, notably the fact that the appellant was a farmer by occupation and required land to carry on his farming operations, the fact that the property acquired was a farm, the fact that farming operations were carried on on it over a considerable period of years, the fact that buildings not required for those purposes were let to tenants over a period of years, the fact that the property was never offered or advertised for sale, and the fact that it was not subdivided for the purpose of sale in lots, all of which, to my mind, weigh in favour of the purchase of these lands being an investment. When isolated from the rest of the circumstances, they may even be said to weigh heavily in favour of that conclusion. But I do not think that these facts are conclusive. They are consistent with the property having been an investment, but at the same time they are not inconsistent with the appellant's purchase and sale of it being regarded as an adventure in the nature of trade. Nor can they properly be isolated from the other circumstances which are present and which point to the latter conclusion. First, the purchase of this property was not a purchase by the appellant alone, but one in which his father was at least as much interested as the appellant. It was a joint venture for some joint purpose, not necessarily that of the appellant alone. The father had no intention of farming, no need of the property for farming, and derived nothing from the operations which the appellant afterwards carried on. And while the father may have been prepared to let the appellant have the use of the whole farm rent free, I would not infer in the circumstances that he became a part owner otherwise than for the purpose of ultimately making a profit for himself from the sale of the property. The appellant, I think, also had the same purpose in mind, and, as already mentioned, I think it was the main purpose of both of them, though it was one that required time to accomplish and thus afforded the appellant his opportunity to farm and derive revenue from it in the meantime. Next, it cannot be said that the appellant was engaged in farming and nothing else. Nor was his father a printer and nothing else. The appellant had for some years been closely associated with his father in the latter's real estate enterprises. And in the same year in which the Markham property was bought, the appellant was himself

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engaged in selling part of the land he had formerly farmed and which he had acquired from his father and subdivided. Moreover, during the period the Markham farm was held he was engaged on his own behalf, as well as on behalf first of his father and later on his mother, in arranging for the subdivision of the 55-acre lot and in selling lots therefrom. Next, it must have been obvious when the Markham property was purchased that, if it was worth $45,000 as a farm, being near to a large city and not far from the other properties which had already been subdivided and sold at a good profit by the appellant and his father, it also had substantial possibilities of use for purposes other than farming, in short that it was a speculative property as events subsequently proved. These considerations lead me to conclude that the purchase of the property by the appellant and his father was no mere investment looking, as Rand J. said in *Gairdner Securities Ltd. v. Minister of National Revenue*[1], "primarily to the maintenance of an annual return", but was in truth a venture of capital in acquiring a property with a view to realizing the profit that could be made from seizing upon a favourable opportunity that could be expected to come for selling it either in lots or as a whole. I also think that the purchase can not be completely dissociated from the other real estate activities in which the appellant and his father had been or were at the time engaged, the purchase of this farm being, in my opinion, but an extension of their activities undertaken to provide them with more land to sell when the sale of the other land was completed and to enable the appellant to continue his farming operations in the meantime. I am accordingly of the opinion that the purchase was not an ordinary investment but was one made in the course of a venture in the nature of trade. The fact that the appellant's father died before the scheme for profit-making was completed put an end to this venture insofar as it was a joint venture with him, but so far as the appellant and his share of the property are concerned I see no reason to think that his original purpose or the carrying out of it ever changed, and I think that for the purposes of this appeal the result, so far as he is concerned, is the same as it would have been had the sale in question been made

[1] [1954] C.T.C. 27.

during his father's lifetime. *Vide MacIntosh v. Minister of National Revenue*[1], where the termination of an association formed for a trading purpose did not affect the liability of the taxpayer for tax on the profit from the sale of his share of a trading asset acquired while the association was in existence.

I am accordingly of the opinion that the profit from the sale in question was income within the meaning of the statute.

The appeal therefore fails and it will be dismissed with costs.

Judgment accordingly.