1961
Jan. 31
Feb. 1, 2
1963
Feb. 27

BETWEEN:

RONALD K. FRASER .....APPELLANT;

AND

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

Revenue—Income—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4 and 139(e)—Capital gain or income—Income from a "business"—Land purchased and sold to a company for shares which were sold at a profit—Profit is income from a business—Dominant intention to develop properties not sole intention at any time—Abandonment of primary intention—Adoption of secondary intention—Alteration of nature of undertaking from a capital investment to venture in nature of trade—Appeal allowed in part.

Appellant and one Grisenthwaite, both having extensive knowledge of real estate developments in their area formed Grisenthwaite Investments Ltd. which corporation acquired a number of subsidiaries, some engaged in buying and selling real estate, some in construction work and others in owning and renting properties. In 1952 they jointly acquired two contiguous tracts of raw land with a total area of about 123 acres as a site for a shopping centre to include a Dominion Store and an adjoining apartment project. In 1953 two corporations were formed, Aldershot Investments Ltd. and Aldershot Realty Ltd. to the former of which appellant and Grisenthwaite sold the portion of land intended as a shopping centre, in return for shares and to the latter of which the portion of the land intended as an apartment site, also in return for shares. Later in 1953 Aldershot Investments Ltd. commenced the construction of a large supermarket building but nothing was done with the land acquired by Aldershot Realty Ltd. In April, 1954, Dominion Stores Ltd. purchased all the shares in Aldershot Investments Ltd. from appellant and Grisenthwaite. The building was almost completed and differences had arisen between appellant and Dominion Stores Ltd. In April, 1954, appellant and Grisenthwaite sold all their shares in Aldershot Realty Ltd. to another party. The Minister in assessing appellant for income tax for the year 1954 added to his income the profits from the sale of these shares. On appeal from such assessment appellant contends that it was the intention to develop the two properties and hold them as rental investments, the one as a shopping centre and the other as an apartment project, and that in any case the sale of his shares in the two corporations was not part of any business or venture in the nature of trade. No plans for financing the proposed projects were ever completed.

Held: That while it was probably the dominant intention of the appellant and Grisenthwaite to develop the properties and retain them it was not their sole intention at any time, and they also had in mind the intention to sell at least part of the property if they were unsuccessful in developing it as planned.

2. That the intention to build and operate a shopping centre was not brought to an end by any circumstances beyond the control of appellant and Grisenthwaite.

3. That the abandonment of the primary intention in favour of a secondary intention altered the nature of the undertaking from that of a capital investment to that of a venture in the nature of trade.

4. That the whole scheme was of a speculative nature in which the promoters envisaged the possibility that if they could not complete their plans to build and retain as investments a shopping centre and apartments a profitable sale would be made as soon as it could be arranged.

5. That the character of the profit was not altered because of the fact that the property was first transferred to a corporation and the shares therein sold by appellant rather than his interest in the property itself.

6. That the profits realized by the appellant from the sale of shares in Aldershot Investments Ltd. in 1954 were profits from a business or at least from an adventure or concern in the nature of trade; the profit realized from the sale of shares in Aldershot Realty Ltd. was not realized until the following year.

7. That the appeal be dismissed as far as the profits on Aldershot Investments Ltd. are concerned and be referred back to the Minister to re-assess the appellant by excluding the profits on the sale of Aldershot Realty Ltd. shares.

APPEAL under the *Income Tax Act.*

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

H. H. Stikeman, Q.C. and *P. N. Thorsteinsson* for appellant.

M. Bruce, Q.C. and *J. D. C. Boland* for respondent.

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

CAMERON J. now (February 27, 1963) delivered the following judgment:

This is an appeal from a re-assessment to income tax dated May 14, 1958 and made upon the appellant for the year 1954. In his return for that year, the appellant computed his net income at $17,099.96, but the Minister in his re-assessments added thereto the following items:

Profit from Business Venture of R. K. Fraser and Wm. H. Grisenthwaite re:

(a) Sale of Aldershot Investments Ltd. shares to Dominion Stores Ltd. $140,198.38

(b) Sale of Aldershot Realty Ltd. shares to Bayshore Realty Ltd. 23,498.88

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and assessed the appellant to tax of $105,565.05 plus interest.

It is not disputed that the appellant on the sale of the shares referred to realized a profit as so computed. In his Notice of Appeal, the appellant, after setting out certain facts on which he relied, alleged that the gain so realized was "a capital gain to the appellant, not taxable under any of the provisions of the *Income Tax Act*. The said sales were not part of any business or concern in the nature of trade engaged in by the appellant." In the Minister's reply thereto, it is submitted that the purchase by the appellant of the two parcels of land, the sale thereof to Aldershot Investments Ltd. and to Aldershot Realty Ltd. in consideration for shares and the subsequent sale of such shares at a profit is income from a business within the meaning of "business" as defined in the Act, the Minister relying on ss. 3, 4 and 139(*e*) of the Act.

The onus is on the appellant and he must establish the existence of facts or law showing error in relation to the tax imposed upon him (*Johnston v. Minister of National Revenue*[1]).

It becomes necessary at once to set out the circumstances of the acquisition and disposal of the shares and the facts which I shall now state are not disputed.

The appellant, who for many years was district mortgage supervisor for the London Life Assurance Company in the Hamilton and Niagara district, had acquired an intimate knowledge of land values, real estate operations and real estate development in that area. He was well acquainted with W. H. Grisenthwaite who since 1937 had been active in several corporations doing business in that area, particularly in the field of real estate and in the development thereof, and in construction. In 1950 they formed a new company, Grisenthwaite Investments Ltd., in which Grisenthwaite held 51 per cent. of the shares and the appellant the balance. That company had a number of wholly-owned subsidiaries, some of which were engaged in the buying and selling of real estate, others in construction work and others in owning and renting properties.

[1] [1948] S.C.R. 486.

Early in 1952, the appellant and Grisenthwaite were approached by officials of Dominion Stores Ltd.—with which company they had previously done business—who asked for their assistance in locating a suitable site for a large Dominion store in the vicinity of Hamilton. They found that two adjacent properties in the vicinity of Aldershot with a long frontage on Highway No. 2 were for sale, and they took steps in May, 1952 to purchase them. The property was raw land lying between Highway No. 2 and the Hamilton Harbour, containing about 123 acres in all. Part of it was low-lying and boggy and quite incapable of development. There were also two large gulleys running down to the water. In their opinion, the land adjacent to Highway No. 2 could be developed into a regional shopping centre and the balance into a garden apartment house project.

Their solicitor, Mr. E. D. Hickey of Hamilton, on their instructions acquired title to the property in trust, being parts of Lots 7 and 8 in the Broken Front Concession in the Township of East Flamboro, County of Wentworth. In July, his offer to purchase 10 acres from Scheer for $25,000 was accepted and title passed to him in trust on October 31, 1952, $12,000 being paid in cash and the balance being secured by a mortgage to the vendor. On June 6, 1952, his offers to purchase the balance of the property from the three Townsend interests were accepted and title thereto passed to him in trust on January 2, 1963. The total consideration for the Townsend purchases was $180,000, of which $77,000 was secured by mortgages to the vendors, the balance being paid in cash.

The total cost of all the lands was $205,000, of which $115,000 was paid in cash. Of the latter amount, $30,000 was advanced by Grisenthwaite and $25,000 by the appellant who had borrowed $10,500 from his father. The remaining $60,000 was advanced by G. W. Foster, a vice-president of Dominion Stores Ltd. It was intended that Foster should have a 50 per cent. interest in the project and the appellant and Grisenthwaite 25 per cent. each. Mr. Hickey's declarations of trust (Exhibits 22, 23 and 24) show that their respective interests were as stated. However, at some unspecified date in 1953, Mr. Foster dropped out of the

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project due, it is said, to a conflict of interest, but allowed his advance to remain as an unsecured loan. At the beginning, one Donolo of Montreal was also to have been associated with them, but he dropped out at the end of 1952 due to illness.

Mr. Hickey also took steps to secure the incorporation of two private companies under the *Ontario Companies Act* as instructed by the appellant and Grisenthwaite. On March 15, 1953, Aldershot Investments Ltd. was incorporated (Exhibit A), its authorized capital consisting of 3,500 5 per cent. non-cumulative redeemable preference shares of a par value of $100 each, and 40,000 common shares without nominal or par value. On June 1, 1953, that company accepted Mr. Hickey's offer to sell to it 36.17 acres, the consideration being the issue to him or to his nominees of 720 fully paid preference shares. The property was conveyed to the company which issued 360 preference shares to the appellant and a like number to Grisenthwaite, both of whom also acquired 20,000 common shares by purchase, paying approximately $3,800 each therefor. No other shares were issued at any relevant date.

In the spring of 1953, Aldershot Investments Ltd. applied to the Township of Flamboro for a building permit to erect "Dominion Stores Mammoth Market Building" and after some dispute and threatened legal proceedings due to a pending zoning by-law, the permit was issued on June 5, 1953 (Exhibit 31). The evidence indicates that construction of that building was commenced in September, 1953 by Barclay Construction Co. Ltd. (a company wholly-owned by the appellant and Grisenthwaite or by one of their companies), although the formal construction contract (Exhibit 32) was not signed until January 15, 1954. It is of some significance to note that the address of the owners in that contract (Aldershot Investments Ltd.) is given as 605 Rogers Road, Toronto, which is, in fact, the address of Dominion Stores Ltd.

On April 9, 1954, when the store was about 80 per cent. completed, an agreement was entered into by Dominion Stores Ltd. with the appellant and Grisenthwaite in the form of an offer and acceptance (Exhibit 35) by which the former agreed to purchase all the shares of the appellant

and Grisenthwaite in Aldershot Investments Ltd. for $360,000, payable in cash as therein provided. It was a term of the said offer that the outstanding liabilities under contracts of Aldershot Investments Ltd. should aggregate not more than $350,000 approximately (as stated on p. 4 thereof), that amount including about $297,000 due to the general contractor, Barclay Co. Ltd. (which up to that date had been paid nothing), the balance being made up of the cost of sewers, septic tanks, water mains, road and engineering services. The agreement was carried out and the purchase price divided equally between the appellant and Grisenthwaite. It is the profit on that transaction that appears as Item (a) in the re-assessment.

Mr. Hickey also secured the incorporation of Aldershot Realty Ltd. on behalf of the appellant and Grisenthwaite. It was incorporated on November 18, 1953, its authorized capital consisting of 20,000 5 per cent. non-cumulative redeemable preferred shares of a par value of $10 each, and 40,000 common shares without nominal or par value. On March 1, 1954, the balance of the property was conveyed to it by Mr. Hickey, the consideration being the issue of 10,800 preference shares and the assumption of two registered mortgages aggregating $25,000, 5,400 of such preference shares being issued to the appellant and a like number to Grisenthwaite. The company also issued 20,000 common shares to both the appellant and Grisenthwaite, each paying about $5,000 therefor. No other shares were ever issued by this company at any relevant date.

On April 29, 1954, J. F. Easterbrook, in trust on behalf of Jacob Cooke, offered to purchase from the appellant and Grisenthwaite all their shares in Aldershot Realty Ltd. for $165,000 (Exhibit 13) and that offer was accepted on May 1, 1954. The appellant and Grisenthwaite thereby agreed that the company on closing and out of the purchase price would pay off the existing mortgages of $25,000. The sum of $10,000 was paid as a deposit on the acceptance of the offer and the balance of $155,000 on closing the transaction on January 4, 1955, the date for closing being fixed at the request of the purchaser. On closing, the purchase price was divided equally between the appellant and Grisenthwaite. It is the profit on that transaction which is shown as Item (b) in the re-assessment (*supra*).

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It may be noted here that upon the completion of the sale of the shares in Aldershot Investments Ltd. to Dominion Stores Ltd., the loans by Foster and the appellant's father, as well as the mortgages on that property, were paid off; and that when the appellant and Grisenthwaite sold their shares in Aldershot Realty Ltd. to Cooke, the mortgages on that property aggregating $25,000 were paid off.

The main submission on behalf of the appellant is that the original intention of the appellant and Grisenthwaite—an intention which he says continued up to the time of the sale of the shares to Dominion Stores and to Cooke—was to acquire the lands, to develop one portion thereof into a shopping centre and the other into a garden court apartment project, and in each case to retain the ownership of the shares in the two companies that were formed and to derive revenue therefrom by leasing the stores and apartments. In other words, it is said that they were investing their money and not planning to make a profit by sale of the lands or shares.

While Grisenthwaite was not called as a witness, I think that the evidence of the appellant, supported as it is by other oral and documentary evidence, is sufficient to establish that when they acquired the property they did have the intention to try and develop the property for the purposes stated, namely, for rental. That such is the case is shown by the instructions to Mr. Hickey to acquire the lands and to incorporate the two companies (Exhibit 17); and also by the fact that some $5,000 was paid to Town Planning Consultants Ltd. for advice and for the preparation of plans. Other minor expenses were incurred for engineering services, for projected roads and other services. In addition, modest efforts were made to interest prospective commercial tenants for the shopping centre, and while a number appeared to be interested, no lease agreements were ever completed. The promoters also endeavoured over a period of some months to secure the passage of a suitable township bylaw which would permit the construction of the shopping centre and apartments.

Now while I am satisfied that the appellant and Grisenthwaite had that intention and that it was probably their dominant intention, I am far from being satisfied that it

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was their sole intention at any time. As I have said earlier, the appellant and Grisenthwaite were both experienced operators in the real estate field and fully aware of the demand for lands for commercial and other uses. Both they and their companies had bought and sold lands in substantial quantities. While their company, Grisenthwaite Investments Ltd., constructed a number of buildings which it then leased, it also constructed buildings for International Business Machines and for Singer Sewing Machine Co. and then sold them to those companies. The appellant and Grisenthwaite personally in December, 1952, bought some 32 acres of land near St. Catherines for $97,800 and in the same month sold 4.4 acres to Dominion Stores Ltd. for $50,000 cash; in the following June they sold the balance for preference stock shares having a face value of $163,450. At the same time, they personally bought and sold another 80 acres of land in Hamilton.

There seems no doubt whatever that the appellant and Grisenthwaite had in mind the intention to sell at least part of the property if they were unsuccessful in developing it as planned. Forming part of Exhibit 29 is a letter from Grisenthwaite Investments Ltd. (per the appellant as secretary) to Dominion Stores Ltd., dated August 14, 1952. It reads in part as follows:

> In reply to your letter of August 12th, as you no doubt realize there are quite a few problems in planning a property as large as Oaklands Park with such a broad potential. However, we are making progress and, as a matter of fact, we should appreciate being able to discuss with you our preliminary planning so that we may benefit from your experience and end up with a plan mutually satisfactory.
>
> At the moment, we are inclined to favour a rental agreement on a basis similar to the store in Westdale having in mind of course the probable higher cost of the store as well as the land. However, if we cannot reach an agreement on this type of deal, then we certainly would consider an outright sale.

Oaklands Park therein referred to was the name used at that time for the property in question. A further letter to Dominion Stores Ltd. (Exhibit 29) dated October 3, 1952, stated in part:

> (*d*) As mentioned above, if mortgage arrangements can be made on a similar basis to Westdale, we would certainly like to build the building on our own account and lease it to you for not less than 25 years and we should like you to consider a 30 year lease.

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(e) The question of financing a project such as this subdivision is one on which we have been putting considerable thought. We have mentioned before we believe the possibility of receiving payment in advance for the area which will be devoted to your store, but in view of the fact that we are very much interested in a lease arrangement and also the fact that there may be some inter-company deals before this subdivision is placed on the market, we have in mind requesting that you give us say, 2 years rent in advance to assist us in the development of the commercial area and in the construction of your store. Naturally, this would involve some discussion between our lawyers and your lawyers and some form of special agreement but I would like to have some indication from you if you would consider something of this kind.
(The underlining is mine)

It is clear, also, that no plans were ever completed for financing the proposed projects. Neither Aldershot Investments Ltd. nor Aldershot Realty Ltd. had any assets except the land, which was subject to large mortgages, and the small amount of cash received for the sale of the common shares. A few mortgage companies were approached, but no definite arrangements were ever made. The Dominion Stores building alone cost in excess of $300,000 and no part of that amount was paid until the shares in Aldershot Investments Ltd. were acquired by Dominion Stores. The proposed shopping centre could have cost at least one million dollars, but as no plans were ever prepared for construction of apartment houses and as the number of such apartments is not known, their cost cannot be accurately estimated, although doubtless it would have been substantial.

I turn now to the evidence relating to the circumstances which led up to the sale of the shares in Aldershot Investments Ltd. to Dominion Stores in April, 1954, the terms of which I have already stated. In the late fall of 1953, the appellant and Grisenthwaite and the two companies which they had formed owed on mortgages on the property about $90,000, and $60,000 was owed to Foster and $10,500 to the appellant's father. In addition, Aldershot Investments Ltd. had liabilities under construction and engineering contracts of about $350,000. Nothing definite had been done in the way of providing further capital for the payment of these obligations or for further developments.

The negotiations with Dominion Stores Ltd. which had been continuing for many months had never been finally settled by a formal agreement, although the store was near-

ing completion. No reason is given as to why this matter was not finally settled, although the appellant says there was an understanding of some sort and that the terms of a proposed lease based on a return of 9½ per cent. of the total cost of the building and land had been discussed. There is a strong inference that the appellant and Grisenthwaite were keeping the matter open so that they could either lease or sell as they thought best. In the late autumn of 1953, the appellant and Grisenthwaite heard that Loblaws, a large chain grocery store and a competitor of Dominion Stores Ltd., might be interested in renting part of the shopping centre. Because of their close business contacts with Dominion Stores, the appellant says that in fairness to it, he and Grisenthwaite decided to advise Dominion Stores that it might have a competitor in the immediate area. Dominion Stores took violent objection to any such scheme. Finally, the appellant and Grisenthwaite suggested that as the problem could not be resolved by mutual consent, "that the only way we could see that they could do it would be for them to take over the development of the shopping centre, in other words, take over Aldershot Investments Ltd." by a purchase of the shares. In the result, Dominion Stores Ltd. made the offer earlier referred to and it was at once accepted.

In these circumstances, I am quite unable to find that the intention to build and operate a shopping centre was brought to an end by any circumstances beyond the control of the appellant and Grisenthwaite. To keep the goodwill of Dominion Stores Ltd., with whom they had other contracts, the appellant and Grisenthwaite were prepared to abandon their original plan and to sell their shares—a purely voluntary act on their part. Understandably, it was advantageous for them to do so, for by this means they were able at once to make a very substantial profit, pay off their liabilities for mortgages and loans, as well as having the liabilities for building and engineering contracts taken over by Dominion Stores Ltd. Their own company, Barclay Construction Co. Ltd., would also receive payment in full for its building contract. It may be noted here that Dominion Stores Ltd. has not developed a shopping centre on the land, its own store being the only building now erected thereon.

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Finally, it is said that the other project—the development of a garden court apartment house area—was frustrated by a number of circumstances and had to be abandoned. As I have said earlier, no plans for such a building project were ever prepared and no financial arrangements made for its completion. It is said that difficulties were encountered with the township authorities in regard to zoning the property for such purposes, that the proposed location of a sewage disposal system was not satisfactory, that large parts of the area would have had to be set aside for a conservation area, that the supply of water was uncertain and that a number of school boards in the area would require parts of the land for school purposes if the apartments were proceeded with. For these reasons, it is said that the Easterbrook offer to purchase the shares in Aldershot Realty Company on behalf of Cooke, and also made in April, 1954, were at once accepted.

It is now settled law that even if the primary intention of the promoters of a scheme for buying land and developing it is for the construction of buildings to be leased by the promoters (i.e., an intention to create a revenue producing investment), there may in certain circumstances be also an alternative intention to sell at a profit if the promoters are unable to carry out their primary aim. If, in fact, the alternative intention is carried out, the profits arising on the sale may be of a revenue character as profits from a business or an adventure or concern in the nature of trade. Reference may be made to the judgment of the Supreme Court of Canada in *Regal Heights Ltd. v. Minister of National Revenue*[1], affirming the judgment of Dumoulin J. in this Court, as reported in [2]; and to *Bayridge Estates Ltd. v. Minister of National Revenue*[3].

While it is true that in this case Aldershot Investments Ltd. proceeded with the construction of a substantial building and amenities—and on that point the facts here differ from those in the *Regal Heights* and *Bayridge Estates* cases—I am unable to conclude that that fact compels me to conclude that the only intention of its promoters was that of constructing and operating a shopping centre. The construction of a store built to the specifications of Domin-

[1] [1960] S.C.R. 902. [2] [1960] Ex. C.R. 194.
[3] [1959] Ex. C.R. 248.

ion Stores Ltd. is, in the circumstances disclosed, equally consistent with an alternative intention to sell to that company if a lease suitable to the promoters could not be arranged. There is no evidence that any lease was prepared and it is to be doubted if astute businessmen—such as the appellant and Grisenthwaite were—would embark upon the construction of a special type of building to cost $360,000, unless they had an assurance from Dominion Stores Ltd. that it would either lease or purchase the property. As I have noted earlier, the correspondence clearly indicates that there were discussions with Dominion Stores as to a sale, and a clear statement that an outright sale would be considered if agreement on a lease could not be reached. Then, as I have said above, nothing of a substantial nature had been done to secure other tenants or to ensure that capital would be available to complete the full project, pay off the short term mortgages given to the vendors of the property, or pay off the other advances. It may be noted, also, that in the mortgages given to Scheer and to the Townsends, provision was made for partial discharges of the mortgages upon payment of an agreed amount per acre. This provision, it is true, may have been necessary because no decision had been reached as to the manner in which the property would be divided between the two companies to be formed; but it is also admitted that by that provision, sales of the property in blocks would be facilitated.

In my view, the whole scheme was of a speculative nature in which the promoters envisaged the possibility that if they could not complete their plans to build and retain as investments a shopping centre and apartments, a profitable sale would be made as soon as it could be arranged. That it was a valuable property is shown by the prices paid for the shares.

Counsel for the appellant stressed the fact that the profits made by the appellant were not made by the sale of the land but by the sale of shares received on the transfer of the land to the two companies. That profit, it is said, is a capital profit. I cannot agree with that submission. In my view, the appellant and Grisenthwaite, instead of selling the land as they might have done, adopted another method, namely, to cause two companies to be incorporated, sell the land for shares in these companies, and then sell the shares

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so received. That was the particular alternative method they chose to adopt in their real estate transactions.

In *Associated London Properties, Ltd. v. Henriksen, (H.M. Inspector of Taxes)*[1], the headnote reads as follows:

The Appellant Company managed, developed and dealt in real property, and the principal part of its profits was derived from rents. The results of its dealings in property had always been brought into the computation of its profits for Income Tax purposes, and it was conceded that this was correct.

In January, 1935, a private development company was formed with a capital of £100 in £1 ordinary shares subscribed equally by the Appellant Company and an individual, H. The two parties each advanced £32,000 to enable the development company to purchase a site from the Appellant Company, and jointly guaranteed a bank loan to the development company to enable it to erect a building on the site; they also jointly guaranteed the builders. It was also agreed between the parties that, when the building had been erected, either of the parties might acquire the shares of the other in the development company at a price satisfactory to both of them. In May, 1935, H accordingly offered the Appellant Company £25,500 for its 50 shares, together with repayment of its £32,000 advance and release from the two guarantees. The offer was accepted and the Appellant Company thereby made a profit of £25,450. In the Appellant Company's accounts this sum of £25,450 was included as part of the profits from "sales in connection with land". It was also included in the general profits out of which the Appellant Company paid dividends to its shareholders, and in a statement of its profits set out in a prospectus issued by it in 1938.

On appeal to the General Commissioners against an additional assessment to Income Tax made upon the Appellant Company under Case I of Schedule D in respect of the profit of £25,450, the Company contended that the sum in question arose not from the sale of the land but from the sale of its shares in the development company and was a capital profit. The General Commissioners held that the profit was made in the ordinary course of the Appellant Company's trade, and was therefore liable to Income Tax.

Held, that there was ample evidence to support the finding of the Commissioners.

Lord Greene, M.R., in giving judgment in the Court of Appeal affirming the judgment of Macnaghten, J., who had affirmed the finding of the General Commissioners, said at p. 53:

The Supplemental Case contains this finding: "Pursuant to the Order of the King's Bench Division herein dated 26th October, 1942 we, the Commissioners who heard the appeal, have duly reconsidered our finding in paragraph 8 of the Case Stated herein. After again considering all the facts and having regard to the inclusion of the profit in the accounts and the prospectus, we find that the profit was made in the ordinary course of the Company's trade and therefore liable to tax." In my opinion, that finding is one for which there was ample evidence. When that is said, it seems to

[1] [1942-45] 26 T.C. 46.

me all argument is at an end. In fact the Commissioners are finding, if I may expand the clear meaning of what they say, that, it being the business of the Appellants to deal in real estate, this was the particular method of dealing in real estate which they happened to adopt, and, therefore, must be treated as a method of exploiting its real estate assets just as though they had made a direct sale to a purchaser out and out. There is nothing in law which prevents the Commissioners from finding as a fact that a profit made in these circumstances is to be treated as a profit made in the ordinary course of the Appellants' business.

In my opinion, this is a pure question of fact. The finding of the Commissioners is binding upon this Court, and they have made no error in law. There was ample evidence to support their finding; therefore, the result is that the appeal must be dismissed with costs.

Reference may also be made to *Deceased Estate v. Commissioner of Taxes*[1], a decision in the High Court of Rhodesia.

For these reasons, I have come to the conclusion that the profits realized by the appellant on the sale of the shares in Aldershot Investments Ltd. were profits from a business, or at least from an adventure or concern in the nature of trade.

The profits realized from the sale of the shares in Aldershot Realty Ltd. were realized in 1954 and consequently the appeal in regard to Item (a) of the re-assessment (*supra*) will be dismissed.

Other considerations, however, apply to the profits realized in the sale of the shares in Aldershot Realty Ltd. It is the fact that the agreement to sell these shares was dated April 29, 1954, but it is not now in dispute that the sale was closed and the profits received in the following year, namely, on January 4, 1955, a taxation year with which I am not now concerned. At the opening of the case, counsel for the appellant asked leave to amend his Notice of Appeal by stating that the shares were sold on January 4, 1955, and were not in any event income for 1954. I refused to allow the amendment, but on further consideration, I think that that decision was wrong and that I should have allowed it. The amendment then asked for will now be allowed, *nunc pro tunc*. In any event, the evidence clearly establishes that the profit on this transaction was made in the year 1955 and consequently it should not and cannot now be found to be taxable income of the appellant for 1954. As to that part

[1] 16 S.A.T.C. 305.

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of the appeal, therefore, I have reached the conclusion that the appeal should be allowed.

Accordingly, the matter will be referred back to the Minister to re-assess the appellant by excluding from the re-assessment Item (b) referred to above.

While under ordinary circumstances the appellant, who has been partially successful in his appeal, would be entitled to costs, I propose to make no order as to costs so that each party will bear his own. I do so because of the delay on the part of the appellant in amending his pleadings. The facts were within his knowledge and had his original Notice of Appeal clearly set out all the facts, I have no doubt that Item (b) of the re-assessment would have been dropped from the re-assessment.

Judgment accordingly.