

1956  
 May 30, 31  
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THE MINISTER OF NATIONAL  
 REVENUE .....

APPELLANT;

AND

FRANKLIN W. TURNBULL .....RESPONDENT.

*Revenue—Income tax—Income War Tax Act, R.S.C. 1927, c. 97, s. 3—  
 Income or capital—“Profits from a trade or commercial or financial  
 or other business or calling . . . or from any trade, manufacture or  
 business . . . and . . . the annual profit or gain from any other source”  
 —Isolated transactions entered into with a view to profit-making  
 rather than investment—Profits from isolated transactions held to be  
 taxable income—Appeals from Income Tax Appeal Board allowed.*

The appeal is by the Minister of National Revenue from two decisions of the Income Tax Appeal Board which allowed respondent's appeal from his assessment for income tax under the circumstances outlined below.

Respondent with one Fell and three others purchased steel pipe from War Assets. Respondent and Fell also acquired the interest in the pipe of one of the original purchasers. The pipe was delivered to a company incorporated to supply gas to a town in the province of Saskatchewan which company delivered bonds to the four purchasers in payment therefor. The net result of this transaction was that respondent and Fell each received a profit of \$1,792.67. This amount was added to respondent's income.

Respondent assigned a prospecting permit held by him to a company referred to as Bata receiving in payment therefor 100,000 shares of Bata stock which the appellant valued at fifty cents per share and after deducting \$250, the sum paid by respondent for the permit, added \$49,750 to respondent's income.

Respondent on behalf of Fell applied for certain salt rights in the province of Saskatchewan which rights were later assigned to him by Fell and which rights he claimed were held in trust by him for himself and Fell and two others. They were finally disposed of to a company, respondent sharing in the price and royalties paid by it for such rights. The amount thus received by respondent was added to his income.

Appellant appealed from the decision of the Income Tax Appeal Board on the ground that such sums of money received by respondent were income and not capital gains.

*Held:* That the pipe was not purchased as an investment and was disposed of to the only one possible purchaser and shipped direct to it, the price agreed upon being more than double the cost to the purchasers. The profit thereon was properly assessed as income to the respondent.

2. That with regard to the salt rights the only reasonable interpretation of the evidence is that neither respondent nor Fell intended that the salt rights should be held or developed as an investment.
3. That respondent Turnbull and his associates formed a syndicate for the purpose of buying and selling the pipe and the right to prospect for salt and these are properly classified as operations of business: it is of little significance that the respondent and Fell had no experience in this type of business or that there was relatively little organization for the purpose of the transactions; they were sufficiently acquainted with business matters to deal with transactions of this sort in which, having purchases at hand, it was unnecessary to do more than they actually did to effect the sales; the profit realized from these two transactions constituted taxable income of the respondent.
4. That from the evidence as a whole the only reasonable inference to be drawn is that the permit to prospect for gas and oil was not received as a *bona fide* investment but with the intention of turning it over forthwith at a profit to Bata; respondent did nothing in exploiting or developing the property in any way and the only expenditure he made in regard thereto was to pay the permit fee of \$250 at the time he filed his application; respondent had signed a declaration of trust in favour of Bata a short time after his original application for the permit and before he had made a formal application therefor, the declaration containing no particulars to the number of shares of Bata to be issued to respondent; therefore the inference is that respondent in applying for the permit was acting on behalf of Bata or was confident that he could and would dispose of his permit at once to Bata, of which company he was then solicitor and a shareholder: the transaction was an operation of business in carrying out a scheme for profit-making the profits from which constitute taxable income.
5. That the fair value of the Bata shares is thirty cents per share or a total of \$30,000.

APPEAL from decisions of the Income Tax Appeal Board.

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

*J. D. Pickup, Q.C.* and *F. J. Cross* for appellant.

*J. M. Godfrey, Q.C.* for respondent.

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CAMERON J.:—This is an appeal by the Minister of National Revenue from two decisions of the Income Tax Appeal Board, both dated February 10, 1955, one of which allowed the respondent's appeal from assessment for the year 1946, the other allowing in part only his appeal in respect of the year 1947. In his assessment for the year 1946, the Minister had added to the respondent's declared income certain sums received by the latter in that year in respect of the sale of pipe and the sale of salt rights, as well as the Minister's valuation of certain shares of stock received by the respondent upon the transfer of a Permit to Prospect for oil and gas. Similarly, he had added to the respondent's declared income for the year 1947 a further amount received by him in respect of the sale of the salt rights. Other matters in respect of the year 1947 were before the Board, but as there is no appeal from its decisions on such matters, they need not be referred to further.

The Minister has also appealed from two further decisions of the Board, both dated February 10, 1955, allowing the appeals of Arthur James B. Fell from assessment made upon him for the years 1946 and 1947. The items there in question were of precisely the same nature as those relating to the sale of pipe and the sale of salt rights in the instant case and arose out of the same transactions. By consent of counsel for all parties, it was agreed that the two appeals should be heard at the same time and that all the evidence adduced, where relevant, should be applicable to both cases.

Mr. Fisher, from whose decisions the appeals are now taken, expressed his opinion on the matters in appeal in this case as follows:

As to the amounts received in the years 1946 and 1947 in respect of the gas lease, the pipe deal, and the salt lease, I have reached the conclusion that these were capital receipts arising out of isolated transactions which did not form part of the ordinary business of the appellant. This conclusion, however, has not been arrived at without considerable hesitancy.

Before me the respondent supports that conclusion. The Minister, however, submits that each item of profit so received was profit from a business and therefore taxable income by virtue of subsection (1) of section 3 of the *Income War Tax Act* which will be referred to later.

The respondent, Mr. Turnbull, is a solicitor who practiced his profession in Regina from 1910 to 1949; it appears, however, that during the years in question he had retired from general practice. In October, 1943, he incorporated Bata Petroleum Limited (hereinafter to be called "Bata"), a company formed for the purpose of exploring for oil and natural gas in Saskatchewan. He was solicitor for the company from its incorporation until 1951; its secretary from May 1946, to 1949, and a director from July 1948, to the end of 1949. The evidence does not disclose when he first became a shareholder but in 1944 he acquired 40,000 shares from Fell, said to be in payment of a bill for legal services performed on Fell's behalf. For services performed in reorganizing the company, Fell, in 1944, received 800,000 shares of Bata; he was never a director but was appointed business manager in December 1945. He says: "I was recognized as such all the way through".

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In August 1944, Turnbull incorporated Unity Gas Supply Company, Ltd. (hereinafter to be called "Unity"), a company formed for the purpose of holding the franchise from the town of Unity, Saskatchewan, for the transmission and distribution of natural gas in that town. Both Turnbull and Fell were shareholders and directors of Unity from its inception until at least 1951; and Turnbull was its solicitor at all relevant times.

On February 15, 1945, the respondent incorporated Associated Development Company—hereinafter to be called "Associated". It was an engineering company and was formed also for the purpose of being the sales agent for Bata for the sale of natural gas. Both Turnbull and Fell were shareholders from its inception and Turnbull was a director and solicitor for the company at all relevant times.

The first matter relates to an item of \$1,792.68 received by Turnbull in 1946 under the following circumstances. In the spring of 1945 Unity was preparing to proceed with the construction of its gas mains and for that purpose had placed an order for the required amount of pipe. It was necessary, however, to first secure governmental authority for the use of steel and in July 1945, such permission was refused; as a result the pipe which had been ordered was released and sold elsewhere. Shortly thereafter Fell, and

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another shareholder of Unity—one Beare—advised Turnbull that they had purchased pipe from War Assets and he was invited to contribute a portion of the purchase price. The purchase was made by five parties, including the respondent and Fell, four of whom were directors of Unity and three of whom were directors of Associated, which by contract with Unity was to install the pipes. Subsequently, one of the purchasers who was in need of funds sold his interest to Fell and Turnbull, each of whom as a result had a thirty per cent. interest in the pipe, the other two having each a twenty per cent. interest. The pipe was delivered to Unity in 1945 and after permission was received to use steel for that purpose, the pipe was placed in the ground. In 1946, the four purchasers were given \$12,000 in bonds of Unity in payment for the pipe and it is agreed that the bonds were then valued at \$11,880. The price was fixed by the company engineers at the market price which the engineers estimated would have been paid for suitable pipe in 1945. After deducting the amount paid to War Assets and shipping and welding charges to a total of \$5,102.75, the respondent and Fell each received a profit of \$1,792.67. That is one of the items added to the declared income of the respondent herein and of Fell.

The second item in dispute relates to the assignment by the respondent to Bata of his rights in a permit to prospect for petroleum and natural gas over a large area in the province of Saskatchewan. On December 14, 1945, he wrote to the Supervisor of Mines of the province (Exhibit 2), applying for a reservation under an agreement in order to prospect for petroleum and natural gas in the area named. In the reply to that letter (Exhibit 3) it was pointed out that the applicant would have to comply with certain new regulations, a copy of which would be supplied to him; and he was also informed that a portion of the area in question was then covered by an outstanding reservation and that the owner thereof would be given the first right to apply for that area under the new regulations, but that upon his failure to do so, that area would also become available. On March 4, 1946—some seven weeks before the respondent made a formal application for his permit—the respondent entered into an agreement with Bata called a Declaration of Trust (Exhibit 4). That

document recited that the respondent had applied for a permit to prospect for petroleum and natural gas, that the department was willing to grant such a permit with the exception of certain parts upon which a reservation had already been made, and contained the following recital:

Whereas Bata Petroleums Limited wishes to acquire the beneficial interest of me, the said Franklin W. Turnbull, in the said lands, and has in consideration therefor agreed to issue certain shares of treasury stock of Bata Petroleums Limited to me or to my order.

Then, by the agreement, the respondent covenanted that in consideration of the premises and of one dollar

I hereby agree that I shall from this date forward hold the beneficial interest above referred to in trust for Bata Petroleums Limited so that they may receive through me all benefits which might otherwise be derived by me from the said lands and the said reservation or permit upon the following conditions:

Bata, by the terms thereof, agreed forthwith to issue to Turnbull or his order "the shares above referred to" (the number of which was not specified in the agreement) and to assume all the obligations for which Turnbull might be liable under the permit or reservation.

On the following day the respondent again wrote to the Supervisor of Mines requesting a prospecting permit, and forwarded the fee of \$250. In the reply thereto, dated March 8, 1946 (Exhibit A) the Supervisor of Mines pointed out that under the regulations he had given the holder of the prior reservation thirty days within which to make the new application for permit or have the reservation cancelled. Turnbull was also advised that it would be necessary for him to complete the enclosed application form. On April 17, he was advised that the outstanding reservation had been cancelled as of April 15 and he was again requested to complete and forward his application form. Exhibit C is a copy of such application dated April 24, 1946, "for a permit to conduct geological and/or geophysical surveys, examinations and investigations of the sub-surface geology"—in the lands stated. The "Performance" bond of \$500 was paid to the province by Bata. The permit was issued to Turnbull in May 1946, and he received 100,000 shares of Bata stock pursuant to the agreement of March 4. In assessing the respondent for that year, the Minister added to his declared income the sum of \$74,750, said to be the profit or gain received from the sale of the prospecting

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rights. In so assessing the respondent, the Minister had valued the shares at seventy-five cents each and allowed as a deduction therefrom the sum of \$250 paid by the respondent for the permit. Following the notice of objection by the taxpayer, the Minister by his notification dated August 25, 1952, agreed to amend the assessment by reducing the said item of profit from \$74,750 to \$49,750, or a value of fifty cents per share. Through an oversight, however, the Minister in his notice of appeal to this Court failed to give effect to that deduction, but at the hearing it was amended accordingly.

The third transaction in which both the respondent and Fell were interested was as follows: On May 8, 1946, the respondent, *on behalf of Fell*, wrote to the Supervisor of Mines of the province of Saskatchewan (Exhibit 5) applying for a salt lease covering twelve sections of land (some weeks previously Bata had applied for such rights but the application was refused). He was advised by letter dated May 14 (Exhibit 6) that the new regulations regarding the issue of salt rights were being prepared and that in the meantime the area would be held for Fell and that a formal application could be made later. On June 10 Turnbull applied on behalf of Fell to have the area extended by the inclusion of several additional townships and he was advised by letter dated June 11 (Exhibit 8) that the additional area was so reserved. By assignment dated July 15, 1946 (Exhibit 9), Fell assigned all his interest in the salt rights to Turnbull for the express consideration of \$1,000, the receipt of that sum being formally acknowledged. Turnbull states, however, that he then received nothing from Fell and that he is not sure why such a consideration was inserted. Then by letter dated July 23, 1946 (Exhibit 10), Turnbull agreed to sell to Associated Development Co. Ltd. all his interest in the salt rights

for whatever sum your company may be able to secure for the said salt rights from Dominion Tar and Chemical Company at Montreal, Canada, or any subsidiary of the said Company which may be set up to acquire such salt rights from Associated Development Company Limited. Such monies shall be paid to me or my nominee or nominees as and when received by you, or such monies may be assigned to me or my nominee or nominees, and paid to me direct.

Prior to the date of that assignment, Dominion Tar and Chemical Co. Ltd. had approached Denton, president of

Associated, with reference to the salt rights. In some way or other the right to prospect for salt was transferred to Prairie Salt Company Limited (a subsidiary of Dominion Tar and Chemical Company) which, on November 22, 1946, received a license from the province of Saskatchewan (Exhibit 13) to explore for and remove salt in precisely the same area as that originally reserved for Fell. No license for such rights had issued at any time to Fell, Turnbull, or to any of their companies.

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By an agreement dated November 20, 1946, between Associated and Prairie Salt Company, Ltd., arrangements were made for the supply of natural gas by the former to the latter's plant to be located near Unity. In addition, Prairie Salt Company was to pay to Associated \$25,000 upon the execution of its salt license with the province of Saskatchewan, and a further \$25,000 upon locating salt in the area, sufficient to warrant the opening of a second salt well. The consideration is expressed as follows:

(1) In consideration for *exploratory and development work already carried out by Associated resulting in the discovery of substantial salt bodies in the Unity area* and for the geological and other information relating thereto in the possession of Associated which are to be made available to the company (*i.e.*, Prairie Salt Company, Ltd.), the company hereby agrees to pay Associated the following sums of money—

It was further provided in the said agreement that Prairie Salt should pay to Associated a royalty of twenty cents on each ton of salt produced in any year up to thirty thousand tons, such royalty to be reduced to fifteen cents per ton for annual production in excess thereof.

That agreement was executed on behalf of Associated by its officers Denton and Turnbull. Dominion Tar and Chemical Company joined in the said agreement to guarantee performance of the said covenants by Prairie Salt Company and undertook to provide up to one million dollars to the latter company for the purpose of drilling salt wells and the construction of a salt plant.

Then on November 29, 1946, Associated wrote to Prairie Salt (Exhibit 14) as follows:

We hereby authorize you to pay to Mr. F. W. Turnbull the sums of money otherwise payable to or under contract between your company and ourselves and for such a payment this will be your good and sufficient authority.

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That letter was signed by Turnbull on behalf of Associated. Prairie Salt carried out its agreement and in 1946 Turnbull received \$25,000 and in 1947 a further payment of a like amount.

The respondent states that he received these amounts in trust for himself and his three associates, Fell, Denton, and Whelehan; that his only interest therein was 15 per cent. and Fell's 35 per cent. Out of the first payment the respondent paid expenses totalling \$2,251.90 for drilling a water well, aeroplane surveys, printing, testing, analyzing and auditing. After deducting these expenses, Turnbull received \$3,412.21 in 1946 for his interest therein and in 1947 received his full share of the second payment amounting to \$3,750. In the same way, Fell in 1946 received \$7,961.84 and in 1947 \$8,750.

The appellant in each of the years 1946 and 1947 added to the respondent's declared income \$4,300 in respect of these transactions. It was agreed at the hearing, however, that these amounts were incorrect and that the net amounts received in those years by the respondent were as stated above.

Royalties in respect of the salt transaction were received in 1948 and thereafter. Turnbull states that half of the royalty of twenty cents per ton was given to Bata (although there was no legal obligation to do so) because the salt was discovered on land held by it. The remaining ten cents per ton has been divided between the four members of the Turnbull Trust, namely, Turnbull, Fell, Denton and Whelehan, the first two receiving 15 per cent. and 35 per cent. thereof respectively.

I shall first consider the purchase and disposition of the pipe and the salt rights as both Turnbull and Fell were concerned in these transactions. It is of importance to note the manner in which these purchases and sales were brought about. The financing was done through the "Turnbull Trust". I gather from the evidence that a bank account was opened in the name of Mr. Turnbull, in trust, and that all parties interested in the particular transactions contributed to the account in proportion to their interest in the transactions as needed, but that the account was operated by Turnbull alone. There was no written agreement between the individuals, Mr. Fell observing in his evidence

that "We live out West where you know we can trust people". He described the Turnbull Trust as one "to look after the affairs of the group as attorney". The whole arrangement he described as follows: "As the things were done and as money was or must be acquired for any expenses whatever, he would notify or tell us and we would put our money up to the Turnbull Trust. That is why, and when the money came in, like for myself as it happened, that distribution was made from the Turnbull Trust of the individuals' interests."

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It is very clear from the evidence that the groups involved in these transactions operated as an informal syndicate for their mutual advantage and with the purpose of realizing a profit in proportion to their interest in the two transactions. Both Turnbull and Fell insist that at the time of the purchase of the pipe they had in mind only the purpose of assuring a supply of pipe so that the town of Unity would not lack gas in the approaching winter. It was also said that the Unity Gas Supply Company, Ltd., did not have funds to purchase pipe, but it is also clear that but a short time previously pipe had been ordered for Unity and there is nothing to indicate that at that time there was any problem of financing the purchase price or that Turnbull or Fell had then been called upon to assist in the purchase. It is clear that the pipe was not purchased as an investment for the purchasers had no use for it themselves and could derive no return from it as such. There was only one possible purchaser, namely, Unity, and after welding in suitable lengths, the pipe was shipped direct to that company. It is interesting to note, also, that at the time the pipe was sold by the syndicate to Unity, there was no discussion as to the sale price, the parties being content to let that matter stand, doubtless because of their close relationship to Unity and Associated. Later, the fair value was worked out by the engineers and accepted by the members of the syndicate. The price agreed upon was more than double the total cost to the syndicate. If the latter had no thought of profit in their minds, they could have accomplished their declared purpose of assuring a supply of pipe to Unity by re-selling the pipe at cost or by loaning the required amount to Unity. On this point,

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reference may usefully be made to the decision of Fournier J. in *Honeyman v. M.N.R.* (1)—a case similar in many respects to the instant one.

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In regard to the purchase and sale of the salt rights, it is necessary to refer to other matters in evidence. Within a fortnight prior to Turnbull's application on behalf of Fell, Bata had applied verbally for the same salt rights and had been refused a permit (it would seem that Bata already had the right to explore for petroleum and natural gas in the same area). I find the respondent's evidence confusing and conflicting. He states that at the time of the original application he had no personal interest in it. Then he says that while the assignment by Fell to him dated July 15, 1946, is in form an absolute assignment, the consideration of \$1,000 was never paid and he did not know why it was inserted. Later he says that while it was an outright assignment, there was no consideration and it was done as a matter of convenience. He states also that when he secured it from Fell, he held it in trust for Fell but found out later it was in trust for Denton, Fell, Whelehan and himself. On another occasion he says that from the time he got it, he held it in trust for these four. He states that in February 1947, after the first payment of \$25,000 was received from Prairie, these four met together and made an agreement as to their respective interests, his own being 15 per cent. and that of Fell 35 per cent. That, he says, was the first date on which he actually knew what interest he personally had in the transaction. Fell, Whelehan and Turnbull were shareholders in Associated and the latter two were directors, Turnbull also being its solicitor. The four named parties never received their reservation or lease for the salt rights and paid out nothing to the province in respect of the application. While certain work was done by aeroplane surveys and in searching for suitable water supply and the like, none of such expenses appear to have been paid until after the receipt of the first payment from Prairie. It is significant to note, also, that in the agreement between Associated and Prairie (Exhibit 14) and signed on behalf of Associated by Denton and Turnbull, the consideration is said to be for "exploration and development

(1) [1955] Ex. C.R. 200.

work *already carried out by Associated* resulting in the discovery of substantial salt bodies". Fell states his intention in acquiring the salt rights as follows:

When I got it I intended to, firstly, find out about the water—the water conditions—in order to properly locate near the rail and transportation—that part of the lease, and with a view to development of it—to *get something good for the company.*

He did not specify which company was to "get something good", but in the result both Associated and Bata benefited, the former by securing a contract for the supply of gas to Prairie Salt and Bata by the receipt of half the royalty reserved.

It is quite apparent that the whole story was not told. If Fell intended to develop the salt rights himself, why did he assign them to Turnbull for a consideration which was never paid? Why was he looking for "something good for the company"? If Turnbull intended to develop the rights himself, why was he unaware of the nature and extent of his interest therein until after they had been sold? At page 59 of the evidence, Turnbull stated that whatever personal but undefined interest he had in the salt rights came into existence when he acquired the assignment from Fell on July 15, 1946; he disposed of all interest therein whether his own or that of his associates, eight days later for whatever sum Associated might secure from Dominion Tar and Chemical Company or its subsidiary. The conclusion is inescapable that prior to or immediately after he acquired any interest he had knowledge of the proposed arrangements between Associated and Dominion Tar and was prepared to dispose of the syndicate's interest forthwith.

The question to be determined is whether these profits from the sale of pipe and the disposition of the salt rights fall within the words "profits from a trade or commercial or financial or other business or calling . . . or from any trade, manufacture or business . . . and . . . the annual profit or gain from any other source" in section 3 of the *Income War Tax Act*.

Counsel for the respondent rightly agrees that the purchase of the pipe cannot be considered as an investment. He submits, however, that the acquisition of the salt rights was in the nature of an investment and that the profit

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realized therefrom was a capital gain. As to both transactions, he submits that they were isolated transactions not amounting to a business, and in their nature foreign to the type of business normally carried on by either Turnbull or Fell. I have already stated my opinion that in each case the transactions were entered into by the members of the syndicate for the purpose of profit-making; that, I think, was the real purpose of the formation of the Turnbull Trust. Moreover, it is well settled that even if they were isolated transactions, that fact by itself does not dispose of the matter. In that connection, reference may be made to *Edwards (Inspector of Taxes) v. Bairstow* (1); *Atlantic Sugar Refineries Ltd. v. M.N.R.* (2); and to *M.N.R. v. J. A. Taylor* (3). The only reasonable interpretation of the evidence is that neither Turnbull nor Fell intended that the salt rights should be held or developed as an investment. On Turnbull's own evidence he did not know at any time prior to realization what interest, if any, he had in the salt rights. The one agreement actually arrived at was as to the distribution of *profits* after they were realized by the sale. I think that Fell in his evidence correctly stated the purpose of the acquisition of the salt rights when he said that it was his intention "to get something good for the company".

In the *Atlantic Sugar Refineries case (supra)*, Kerwin J. (now C.J.C.) at p. 709 stated the test to be applied—

In *Ducker v. Rees Roturbo Development Syndicate*, [1926] A.C. 140, the House of Lords unanimously stated (and adopted) the test in the *California Copper Syndicate* case as being whether the amount in dispute was "a gain made in an operation of business in carrying out a scheme for profit-making".

In my view, the gains made from the transactions regarding the pipe and the salt rights fulfill this test. I have already stated my opinion that in both cases there was a scheme for profit-making. The syndicate of four members, called the Turnbull Trust, was formed for the purpose of buying and selling the pipe and the right to prospect for salt, and in my view these are properly classified in the circumstances of this case as operations of business. It is a matter of relatively little significance that the respondent and Fell had no experience in this type of business or that

(1) [1955] 3 All E.R. 48.

(2) [1949] S.C.R. 706 at 708.

(3) [1956] C.T.C. 189.

there was relatively little organization for the purposes of the transactions. They were sufficiently acquainted with business matters to deal with transactions of this sort in which, having purchases at hand, it was unnecessary to do more than they actually did to effect the sales. (*Vide Edwards v. Bairstow—supra*).

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For these reasons, I am of the opinion that the profit realized from these two transactions constituted taxable income of the respondent.

I must now consider the other transaction in which the respondent alone was interested, namely, the acquisition and sale to Bata of the right to prospect for gas and oil. As I have said, he received 100,000 shares of Bata stock in 1946. Counsel for the Minister endeavoured to establish that the respondent received these shares from Bata in payment of legal services rendered by him to Bata. On the evidence, however, I am satisfied that such was not the case, but that the shares were received in payment for the assignment of such rights as the respondent may have had in the permit to prospect for oil and gas. The question, therefore, is whether the value of these shares (less the sum of \$250 paid by the respondent for the permit) is within the test which I have set out above when considering the other transactions. The submissions made on this matter were much the same as in regard to the salt transaction.

On the evidence as a whole, the only reasonable inference to be drawn is that the permit was not secured as a *bona fide* investment but with the intention of turning it over forthwith at a profit to Bata. The only evidence relating to this matter is that of the respondent himself. He says that he intended to have a physical survey of the area carried out and if it proved to be valuable, to attempt to develop it, to try to secure a continuing income from it after his retirement from the practice of law which he then contemplated. His evidence I find to be somewhat confusing and conflicting. He stated that Bata approached him regarding the acquisition of the permit after it was assured that the province was prepared to issue it to him, and that previously Bata had not shown any interest in that land. He admits, however, that while Bata had made no application for such rights, he, the respondent, "had felt out the

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department" at one time as to whether it would grant a permit to Bata and had been told that it would not do so, the department being of the opinion that Bata had all the land it could explore. The respondent did nothing whatever in exploring or developing the property in any way and the only expenditure he made in regard thereto was to pay the permit fee of \$250 at the time he filed his application, some seven weeks after he had signed the declaration of trust (Exhibit 4) in favour of Bata. In the light of these facts and in the absence of any evidence other than that of the respondent, and particularly when it is seen that the declaration of trust was signed but a short time after the respondent's original application for the permit and before he had made a formal application therefore, and that the declaration of trust contained no particulars as to the number of shares of Bata to be issued to the respondent, there seems to be an inescapable inference that Turnbull in applying for the permit was acting on behalf of Bata or was confident that he could and would dispose of his permit at once to Bata, of which company he was then solicitor, and a shareholder. It is of some significance that while Fell (who had reorganized Bata, supplied funds for its development and was its manager for many years) gave evidence on other matters, he was not asked to corroborate the respondent's evidence as to when or why Bata became interested in securing the permit. Had it been an ordinary transaction at arm's length, it seems very doubtful that Turnbull, who drew the document, would have omitted the all-important question as to the number of shares which he was to receive in payment. In my opinion, this transaction was an operation of business in carrying out a scheme for profit-making, the profits from which constitute taxable income.

It therefore becomes necessary to determine a fair value for the 100,000 shares of Bata stock in the year 1946 when they were received by the respondent. As noted above, the Minister in assessing the respondent valued them at 75 cents per share, but subsequently and following the Notice of Objection, agreed to reduce the value to 50 cents per share. On the respondent lies the burden of establishing that that valuation is incorrect.

The shares of Bata were not listed on any exchange until 1951. Considerable evidence was therefore introduced as to actual sales made, the circumstances under which they were made, the assets and financial position of Bata. In endeavouring to place a value on the shares, I must keep in mind the statement by Viscount Simon in *Humphrey v. Gold Coast Selection Trust Ltd.* (1):

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If the asset takes the form of fully paid shares, the valuation will take into account . . . a number of . . . factors, such as prospective yield, marketability, the general outlook for the type of business of the company which has allotted the shares, the result of a contemporary prospectus offering similar shares for subscription, the capital position of the company, and so forth. There may also be an element of value in the fact that the holding of the shares gives control of the company. If the asset is difficult to value, but is none the less of a money value, the best valuation possible must be made. Valuation is an art, not an exact science. Mathematical certainty is not demanded, nor indeed is it possible.

The respondent received 30,000 of the shares in 1946 and the balance in May in that year. He states that at the time he negotiated the contract with Bata there was some informal discussion and that a value of 20 cents per share was mentioned, but no value was fixed. At the same time, he verbally agreed not to put the stock on the market, although there was no actual escrow agreement in writing. Up to the time of the hearing, he had not disposed of any of these shares, although he had bought and sold a very large number of Bata shares in the intervening years.

The company had been organized in October 1943, and shortly thereafter it was found to be in financial difficulties. As a result, Fell was brought in to assist in the financing of the company's operations and to reorganize its financial structure.

It had insufficient funds to finance its operations in prospecting for and developing oil and gas wells. It was therefore necessary to sell treasury shares, but in 1944 only 10,000 to 20,000 shares were disposed of. Early in 1945, the Toronto General Trusts Corporation at Regina was appointed as the company's transfer agent. A fiscal agent was appointed to sell shares and to supervise a number of salesmen who sold shares by making personal calls on prospective purchasers throughout the province. The salesmen received a commission of 25 per cent. on such sales. Four of the larger shareholders (including Fell) deposited

(1) (1948) 30 T.C. 209 at 240.

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150,000 of their own shares with the transfer agent under the terms set forth in a letter from Turnbull, as solicitor for the company, dated February 5, 1945 (Exhibit D). Therein it was provided that for each 5,000 treasury shares sold, 1,500 shares of the deposited stock were to be transferred to Fell (named as the sales representative) upon payment of 17½ cents for each share of the deposited stock so delivered. That agreement was to remain in effect until December 15, 1945, but the four depositors until April 30, 1945, were entitled to withdraw from the deposit one-half of the shares then remaining upon payment of 20 cents per share. In addition, five shareholders agreed without payment to deliver to Fell a total of 50,000 shares to be used in creating a fund to finance the sale of treasury stock, and the proceeds were used to supplement the commission paid to the salesmen engaged in selling treasury stock.

In 1945, authority was secured from the registrar under the Securities Frauds Prevention Act to sell the treasury shares for not more than 50 cents each. Some sales were made at that price, but in insufficient quantity to provide the needed working capital. Both Turnbull and Fell state that in order to "boost" sales, the company decided to apply for a further consent to sell stock at 70 cents per share and later at \$1 per share, and these were secured. They said that advance notice of such proposed increase in the sale value was given to the salesmen so that they could advise prospective purchasers to buy at once rather than later when the sale prices would be increased. It was, in their opinion, purely a sales promotion scheme. Later in 1946, the company resolved to increase the sale price to \$2 per share but it is not shown that the registrar's consent for sales at that price was ever obtained or that any sales were made under that resolution.

The financial books of the company were not produced and there is therefore no clear evidence as to what Bata received from the sales of treasury stock after payment of commission and expenses. Both Turnbull and Fell were uncertain as to the number of shares sold and the prices received in 1945 and 1946 as they had no adequate records at the hearing and were speaking from memory only of events which occurred some ten years earlier.

Exhibit J introduced by the appellant is a list of the number of shares of Bata transferred in 1946 and of transfer tax paid thereon according to the records of the transfer agent. The transfer tax properly chargeable was at the rate of one-tenth of 1 per cent. at the price or value on sales at less than \$1 per share, and at one-quarter of 1 per cent. on sales of \$1 to \$5 per share. In practically every instance, the tax paid thereon was at the rate of one-tenth of 1 per cent. of the number of shares transferred which by itself might suggest a value or price of \$1 per share, and I was asked by counsel for the appellant to find that such was the case. In the absence of any evidence by the official who computed the tax in the office of the transfer agent as to the information on which he acted, I am unable to draw any conclusion from the mere production of Exhibit J as to the sale prices. It may be that he was guided only by the last authorization from the registrar under the Securities Frauds Prevention Act permitting sales at one dollar. In fact, however, if the price or value had been \$1 per share, the tax should have been at the rate of one-quarter of 1 per cent., or two and one-half times that actually paid. From time to time, the transfer agent claimed from Turnbull certain small amounts of tax on shares sold by him in amounts which might indicate that at a tax rate of one-tenth of 1 per cent. the shares were sold at one dollar. While he paid the amounts requested, I do not consider that that evidence alone constitutes proof that such sales were made by him at \$1 per share, particularly as the sums demanded were very small and as many of the transfers so recorded represented resales by others to whom Turnbull had sold his shares.

Taken as a whole, the evidence indicates wide variations in the price at which the stock was sold. In December, 1945, Turnbull purchased 15,000 of the optioned shares at 17½ cents each. In 1946 he sold a few shares at a rate of 25 cents to 50 cents per share. In 1945 and 1946 some treasury shares were sold at 50 cents and a few at \$1, but there is no clear evidence as to the number of shares so sold or as to the net amount received after payment of commission and bonus. An effort was made to sell 400,000 shares to a group in Montreal at 70 cents, but none were sold. Taking the evidence as a whole, it seems to me that the

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“target” for the company was to sell at 50 cents and that, while efforts were made to sell at higher prices, such attempts proved in the main unsuccessful, although a few shares were sold at a somewhat higher figure.

The financial position of the company in 1946 was not good. It lacked working capital and while a number of gas wells had been brought into production, there was but a limited outlet for the gas, namely, to the town of Unity. Its gross income in that year was \$2,700 and the year's operations resulted in a substantial loss. In 1955, by which time the company had acquired additional outlets for the gas and had purchased the assets of several other corporations, Bata's income had increased to \$138,000 and its shares were quoted at less than 20 cents.

Taking all the relevant facts into consideration, I have reached the conclusion that a price of 50 cents per share is substantially in excess of the fair value of the stock in 1946. Doing the best I can with the evidence before me and taking into consideration the important fact that the salesmen received a commission of 25 per cent. of the sale price plus a substantial bonus in an undetermined amount, I have come to the conclusion that a fair value to be put upon the respondent's 100,000 shares of Bata stock, as of 1946, is 30 cents per share, or a total of \$30,000.

For the reasons which I have stated, the Minister's appeals for the years 1946 and 1947 will be allowed and the assessments made upon the respondent will be affirmed, subject to the following variations (for which purpose the appeals will be referred back to the Minister for re-assessment):

- (a) For the year 1946, by reducing the amount received from the sale of salt rights from \$4,300 to \$3,412.21 and by reducing the value of the 100,000 shares of Bata stock from \$49,750 to \$29,750;
- (b) For the year 1947, by reducing the amount received from the sale of the salt rights from \$4,300 to \$3,750.

The appellant is entitled to his costs after taxation.

*Judgment accordingly.*