BETWEEN:

DONALD QUON ..... APPELLANT;

AND

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

AND BETWEEN:

LEE K. YUEN ..... APPELLANT;

AND

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

1961
Oct. 2

1962
May 28

Revenue—Income—Income tax—Income or capital gain—Land bought for market garden resold—Other land sales—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).

The appellant with two others in July 1955 purchased from B for $18,500 forty acres of farm land on the outskirts of Edmonton for the purpose of a market garden. In December one of the purchasers was asked by a real estate agent if he would be willing to sell the land at $2,000 per acre. As a result of this conversation the purchasers decided not to proceed with the garden scheme but simply to hold the land. In October 1956 one of the purchasers died and the following December the survivors accepted an offer of $80,000 for it. In the period between the purchase and sale both appellants with other associates had engaged in several speculative ventures in the purchase and sale of real estate in and about Edmonton. The Minister treated the profit realized on the sale of the B property as income from a business, and, on the appellants' appeal from the assessment, contended that the purpose for which the land was acquired changed after the purchase

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and that, as the sale was made when the appellants were actively trading in land, the profit from the sale should be regarded as made in the course of trading.

Held: That at the time of purchase the appellants had no other purpose in mind than to establish a market garden. When they realized that the land's value made it impractical to operate it as such they made no attempt to sell and it was only after the death of their associate that they accepted the $80,000. In these circumstances there was nothing to characterize their action as trading in land and the profit realized simply represented an enhancement in value on the realization of a capital asset.

2. That it did not follow from the mere fact that the appellants had engaged in transactions of a trading nature in real estate while holding the property in question that the sale thereof must be regarded as a trading transaction rather than a mere realization of value on sale of an investment.

Appeals allowed and assessments varied accordingly.

APPEALS under the *Income Tax Act*.

The appeals were heard before the Honourable Mr. Justice Thurlow at Edmonton.

Gordon S. D. Wright for appellants.

A. J. Irving for respondent.

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

THURLOW J. now (May 28, 1962) delivered the following judgment:

These are appeals from judgments of the Tax Appeal Board[1], dismissing appeals by the appellants from assessments of income tax for the years 1956 and 1957. As the same problem is involved in both cases, the appeals were heard together. The question for determination is whether a profit realized on the sale of certain real estate which I shall refer to as the Buffel property was income for the purposes of the *Income Tax Act* or a capital gain.

The appellant Donald Quon is a chemical engineer and a professor at the University of Alberta. The appellant Lee K. Yuen is a restaurateur. Both appellants live in Edmonton, and prior to the events to be related neither of them had engaged in dealing in real property or been involved in any speculative venture in real estate. Yuen had been brought up in Calgary, where his father operated a market garden, and he had assisted his father and was

[1] (1960) 25 Tax A.B.C. 415, 417; 61 D.T.C. 41, 42.

familiar with that kind of operation. He was acquainted with one Leong Jung, who had operated a market garden in Edmonton for many years prior to 1942, then sold out and gone to China for several years and subsequently returned to Edmonton, where he worked for Yuen as a dish-washer. In 1953 or 1954, Yuen began looking for a suitable parcel of land to establish a market garden, the plan being to acquire the land and have Jung operate the garden initially in a small way on a share basis and later to build and operate greenhouses. With these plans in mind Yuen made a number of inquiries and looked at different parcels of land. It was desirable to establish the operation as near to the market as possible but though there were market gardens within the city of Edmonton, he soon found that it would not be possible or practicable to obtain land for the purpose within the city limits. He contemplated the possibility that the operation might not succeed or might turn out to be impractical and, with that in mind, was looking for a piece of land which, while suitable for a market garden, would also be one from which, if necessary, he could recover his investment. He also arranged for Dr. Quon, the latter's brother, Harry Quon, and Norman Kwong, a professional football player, to take shares in the enterprise. Ultimately, in July, 1955, the four through a real estate agent purchased from one Buffel for $18,500, 40 acres of his farm outside, but adjacent to, the south-western boundary of the city of Edmonton. This land appeared to be suitable for their purpose, and at the time it was well beyond the limits of urban development. In fact, it is still half a mile beyond the nearest area of urban development and beyond a natural obstacle, as well as a University farm, both of which would ordinarily be regarded as likely to retard urban expansion in that direction. The evidence satisfies me that the area was one in which speculators were not interested at that time, though very shortly afterwards, and probably as a result of the holding of public hearings by a Royal Commission enquiring into the problems of metropolitan development of the cities of Edmonton and Calgary, it became an area in which land speculators were very much interested. I am also satisfied that, at the time of the purchase, the four had no purpose in mind for the property other than to establish a market garden and that it was their intention to go ahead with that plan the next year.

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To start this scheme would entail no very large expenditure or risk but would involve drilling a well at a cost of about $600 and acquiring a truck and some gardening equipment in addition to supplies to be used in the operation. In December, 1955, however, Norman Kwong was asked by a real estate agent if he would be willing to sell the land at $2,000 per acre, and soon afterwards, on hearing that Buffel had sold the remainder of his farm for $760 per acre, the four came to the conclusion that the yield to be expected from market gardening would not be commensurate with the value of the land and decided to postpone commencement of their scheme. They were not committed to Jung to use this particular piece of land for the purpose, and it is not surprising that, on hearing of the increased value, they would be reluctant to go ahead and make any such commitment. Yuen continued his search for a suitable piece of land for several years but ultimately gave it up, as Jung was getting on in years and his son, who had been brought from China to help him, was no longer likely to be available.

During 1956, the four received a number of enquiries about the land but made no attempt to sell it. They arranged to have a crop grown on it by Buffel so that the land would not deteriorate but apparently did nothing else with it. In October 1956 Harry Quon died, and in the following December the surviving members of the group accepted an offer of $80,000 for the land and sold it. In making the assessments under appeal the Minister treated the profit realized on the sale as income and the question for determination in these appeals is whether he was right in so doing.

By s. 3 of the *Income Tax Act* the income of a taxpayer for the purposes of Part 1 of the Act is declared to be his income from all sources inside and outside Canada and to include income for the year from *inter alia* all businesses. By s. 4 income from a business is declared to be, subject to the other provisions of Part 1, the profit therefrom for the year and by s. 139(1)(*e*) business is defined as including a profession, calling, trade, manufacture or undertaking of any kind whatsoever and as including an adventure or concern in the nature of trade but not an office or employment.

The Minister's case for including the profit realized on the sale of the land in question in the computation of the appellants' income is that the purchase and sale of the land

constituted a business within the meaning of the statutory definition and that the profit realized on the sale of the land was income from such business.

The test for resolving such an issue is that stated in *Californian Copper Syndicate (Limited and Reduced) v. Harris*[1] where after explaining the distinction between a gain which is assessable to tax as income from a trade and a gain which is not assessable the Lord Justice Clerk said at page 166:

> What is the line which separates the two classes of cases may be difficult to define, and each case must be considered 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 realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

At the trial of the appeals, no question was raised as to the credibility of either appellant, and their evidence, along with that of Norman Kwong, satisfies me that this land was purchased for the particular purpose indicated and not in pursuance of a scheme for making profit by selling it. On the facts related, I do not think it could fairly be said that when buying the property the four were engaged in a business of trading in real estate within the ordinary meaning of the word "business", nor do I think the purchase should be regarded as having been made in the course of carrying on a calling, trade or undertaking of any kind or a venture or concern in the nature of trade within the meaning of "business" as extended by the statutory definition.

It was, however, submitted that the purpose for which the land was acquired changed after the purchase had been made, that the sale was made at a time when the appellants were actively trading in land, and that it should, therefore, be regarded as a sale made in the course of such trading and the profit therefrom treated as having arisen from such trading. In order to deal with this submission, it is necessary to relate the further facts brought out in the evidence upon which the contention was based.

In 1954 the appellants with two other associates had purchased certain premises in Edmonton known as the Radio Supply Building for $55,000 paying $25,000 down and financing the balance on a mortgage. This property was leased to a tenant for a term of which some 4½ years remained unexpired and the rental was sufficient to make

[1] (1904) 5 T.C. 159.

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the mortgage payments and afford a reasonable return on their investment. The group held the property until the lease expired in 1958, endeavoured to get the tenant to renew it, held it for some months thereafter while searching for a tenant or purchaser and ultimately sold it late in 1958 for $75,000. It was not suggested that the purchase of this property was anything but an investment.

In the summer of 1956 the appellant Quon was invited to participate with several others in the purchase of a parcel of vacant land known as the McEachern property situated on the outskirts of the city of Edmonton some 2½ miles from the Buffel property. Quon arranged to have the appellant Yuen participate as well and in all 8 persons including the appellants and Harry Quon made the purchase at $52,000, the share of each of the appellants being 10 per cent. while that of the person who had promoted the scheme was 35 per cent. By this time it had become known that values of land on the outskirts of the city were increasing rapidly and the appellants readily conceded that this property was bought as a speculation with a view to making profit by re-selling it. The property was held by the syndicate until 1959 when it was sold for $189,000.

Late in 1956 or early in 1957 the appellants with 5 others also participated in the purchase of 2 lots in Edmonton known as the Barry-Reid property upon which they hoped to erect a building to be leased. Plans for the building were drawn up but the syndicate had difficulty in raising the money to build it and the property was later sold at a small profit. In the meantime it had been used as a parking lot and part of it had ben let to a seed merchant.

In December, 1956, or January, 1957, after receiving the offer of $2,000 per acre for the Buffel property but before it was accepted, the appellant Quon learned that a farm known as the Eastland property consisted of 31 acres situate immediately west of the Buffel farm was for sale at $1,000 per acre and shortly after the sale of the land here in question, he and 9 others including the appellant Yuen proceeded to buy the Eastland property at that price as a speculation looking to re-sale. They had not however disposed of it up to the time of the trial of these appeals.

The appellant Quon also subsequently participated with others in the purchase of what was referred to as the

Berraby (?) property about which no further details were given in evidence but which was also a speculation looking to re-sale.

It is I think apparent from the foregoing that from the time of the purchase of the McEachern property in the summer of 1956, though not before, both of the appellants were engaged in a venture or ventures in trading in real estate. Indeed though Dr. Quon thought it questionable whether the transactions with respect to the Barry-Reid property were in the same category neither of the appellants had any hesitation in conceding that in purchasing and selling the McEachern property and in purchasing the Eastland property they were trading in land. In my opinion however it does not follow from the fact that prior to the sale of the Buffel property the appellants had been involved with different associates in the purchase of the McEachern and Barry-Reid properties in the course of one or more ventures in trading in real estate and the fact that shortly after the sale along with other associates they were involved in another such venture and that Dr. Quon was engaged in still another later on that the profit realized on the sale of the Buffel property must or should be regarded as profit from a business as defined in the statute. The evidence which I have mentioned and which was neither contradicted nor challenged indicates that the appellants were neither engaged in trading nor in a venture in the nature of trade when in 1955 they bought the Buffel property for the purposes of a market gardening operation. Nor were they engaged in trading or in any venture in the nature of trade when they learned of the sale by Buffel of the remainder of his farm at $750 per acre or when in December, 1955 Norman Kwong was asked if he would be willing to sell the land at $2,000 per acre. Accordingly as I view the matter it is only if, because of events which occurred afterwards, the subsequent sale which they made of the property should somehow be regarded as a trading transaction and the profit in question somehow regarded as having arisen therefrom that the profit can be said to be profit from a business within the meaning of the statutory definition. Situations can of course arise wherein a profit realized on a sale of property will be a trading profit notwithstanding the fact that the property has been acquired otherwise than

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in the course of a trading transaction. Thus Croom-Johnston J. said in *Cooksey and Bibbey v. Rednall*[1] at page 519:

> I have no doubt that if there had been evidence here that at some time after the original purchases of a lot of this property these two gentlemen together had gone in for a system of land development with regard to that or part of it, it would have been open to the Commissioners to find that they had turned what had been an investment into the subject-matter of a trading in land. It does not follow necessarily that they would so find, because it may be that the Commissioners would come to the conclusion that the partnership had not traded but was merely realising a capital asset. Everything must depend on the exact circumstances.

In the present case, however, I do not think that anything that occurred had the effect of turning the property into the subject matter of a trading in land. Having learned that the property was more valuable than they had realized when they bought it and having decided that it would be impractical to proceed with the plan to operate a market garden on it, the owners simply held the property, hoping no doubt that it would increase still further in value and without making any final decision as to what they would do about it, but at the same time without putting it on the market or offering it for sale, until the day came when one of the four owners died and thereafter because of the high price that had been suggested and to some extent also because of the fact that it would be necessary to wind up the affairs of the deceased member of the syndicate, they decided to sell and accepted an offer of $80,000 for it. In these circumstances, I see nothing to characterize their action in selling the property as a trading in land and I am satisfied that the profit in question did not arise from any such trading or from a venture in the nature of trade but simply represents an enhancement of value on realization of a capital investment. The profit was therefore not income within the meaning of the statute and should not have been included in the computation of the appellants' income for income tax purposes.

The appeals will therefore be allowed with costs and the assessments varied accordingly.

Judgment accordingly.

[1] (1949) 30 T.C. 514.