

BETWEEN:

THE MINISTER OF NATIONAL REVENUE } APPELLANT;

1961
Sept. 28
1962
May 30

AND

WILLIAM HEDLEY MACINNESRESPONDENT.

Revenue—Income tax—Income War Tax Act, R.S.C. 1927, c. 97, s. 3—Income Tax Act 1948, S. of C. 1948, c. 52, ss. 3, 4, 127(1)(e)—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e)—Profits from mortgages purchased at a discount—Capital gain or income.

The respondent taxpayer who for some years had been engaged in a soap manufacturing operation and in earlier years had had a wide experience in different fields of business activity and in managing estates as official administrator, in 1943 or 1944 was offered at a discount some mortgages and agreements of sale of private homes in Vancouver. He bought a few of these and having found after a time that they were a satisfactory way to invest his money he converted his other investments into cash and invested the proceeds as well as current savings in mortgages and agreements of this kind. Between 1944 and 1954 he purchased a total of 309 mortgages and agreements from those offered to him by various real estate agents without solicitation on his part all at a discount. One hundred and thirteen of these mortgages and agreements of sale were paid off during the years in question and the sums realized from them were treated by the Minister of National Revenue as income in the hands of the respondent and assessed accordingly. The respondent contended that such discounts should be treated as capital increments. An appeal to the Tax Appeal Board was allowed on the ground that the reassessment made for the years 1946 to 1951 were invalid because they were made beyond the time limit prescribed by the statutes and that the discounts received in all the years 1946 to 1954 were accretions of capital. The Minister appealed to this Court and on the hearing of the appeal counsel for the respondent admitted the right of the Minister to make the reassessments when they were made. The securities purchased were not of the kind in which mortgage companies were interested since, though constituting a first charge the principal amount in each case represented up to two-thirds of the value of the property and the companies were unwilling to invest beyond 45 to 50 per cent of the value and also because the mortgage companies were more interested in larger mortgages which met their requirements. The taxpayer was not the lender in any of these transactions and never sold or disposed of any of the mortgages except on very rare occasions for special reasons.

Held: That the discounts realized by the respondent in the years in question were simply enhancements of value on the realization of investments and not gains made in an operation of business in carrying out a scheme for profit making.

2. That the gains realized on the discounts in the years 1946, 1947 and 1948 were not profits from a trade or business within the meaning of the definition of income in s. 3 of the Income War Tax Act R.S.C.

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1927, c. 97 nor were the gains realized on discounts in the years 1949-1954 inclusive income within the meaning of the *Income Tax Acts* 1948, S. of C. 1948, c. 52 and R.S.C. 1952, c. 148.

APPEAL under the *Income Tax Act*.

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

Harvey J. Grey and *T. E. Jackson* for appellant.

W. M. Carlyle and *John Fraser* for respondent.

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

THURLLOW J. now (May 30, 1962) delivered the following judgment:

This is an appeal from a judgment of the Tax Appeal Board¹ allowing the appeal of the respondent from re-assessments of income tax for the years 1946 to 1954 inclusive. By its judgment the Board held that certain discounts realized by the respondent on mortgages and agreements of sale which had been included in the Minister's computation of the respondent's income for the years in question were not income and it also held that the re-assessments for the years 1946 to 1951 inclusive were invalid and void by reason of their having been made later than the time permitted therefor by the statute. In this court counsel for the respondent admitted the right of the Minister to make the re-assessments when they were made and the only issue raised was that of whether the respondent is liable to tax in respect of the discounts. The amounts of such discounts have been agreed between the parties as follows, these amounts being for each of the years except 1946 and 1949 somewhat less than the amount which the Minister included in his computations of the respondent's income:

1946	\$ 750.00
1947	968.23
1948	1,523.17
1949	711.73
1950	1,397.00
1951	5,798.11
1952	8,212.72
1953	8,703.35
1954	10,667.67
	<u>\$ 38,731.98</u>

¹22 Tax A.B.C. 120.

For the years 1946, 1947 and 1948 the applicable statute was *The Income War Tax Act* R.S.C. 1927, c. 97, by section 3 of which income was defined as meaning "the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Canada or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source including, etc.". The words "trade" and "business" were not defined in the statute and it will be noted that the definition of "income" particularly included the interest received from money at interest "upon any security" or from any other "investment". It is not contended that the discounts in question for the years to which *The Income War Tax Act* applies were "interest" within the meaning of this provision and the liability of the respondent to tax in respect of the discounts realized by him in those years must stand or fall on the issue of whether or not they were profits or gains from any "trade" or "business" within the meaning of s. 3 of the Act.

For the years 1949, 1950, 1951 and 1952 the applicable statute was the *Income Tax Act*, S. of C. 1948, c. 52 and for the years 1953 and 1954 the *Income Tax Act*, R.S.C., 1952, c. 148. The relevant provisions of these statutes were ss. 3 and 4 which were the same in both statutes and s. 127(1)(e) of the 1948 Act which was merely renumbered as s. 139(1)(e) in the 1952 Act. These provisions were as follows:

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

(a) businesses,

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(b) property, and
 (c) offices and employments.

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

127(1)(e)—later 139(1)(e). In this Act,

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

For each of the years 1949 to 1954 the issue turns on whether or not the discounts were income from a business within the meaning of these provisions. This issue is the same as that which arose on the same statutory provisions in a number of cases in this Court having facts somewhat similar to those of the present case including *Cohen v. M.N.R.*¹; *M.N.R. v. Spencer*²; *Scott v. M.N.R.*³ and *M.N.R. v. Minden*⁴; but while principles for resolving such an issue are discussed in these cases in the end each of them in my opinion is simply a judgment on its particular facts, for as the President of this Court observed in the *Spencer* case at p. 125:

Indeed there is no rule of general application in cases of the kind referred to except that in every case the question whether the profits realized by a person who has purchased mortgages at a discount or acquired them with a bonus are enhancements of the value of investments or gains made "in an operation of business in a scheme for profit making" or profits from an adventure or adventures in the nature of trade and therefore income within the meaning of ss. 3 and 4 of the *Income Tax Act* is a question of fact and its determination must depend on the facts and surrounding circumstances of the case and the true nature of the transactions from which the profits were realized.

In *Californian Copper Syndicate (Limited and Reduced) v. Harris*⁵, the Lord Justice Clerk in a passage which has been referred to and quoted with approval in many subsequent cases explained the distinction between gains that are assessable to income tax and those that are not and posed the test to be applied in determining on which side of the line particular gains may fall as follows at p. 165:

It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally

¹ [1957] Ex. C.R. 236.

² [1961] C.T.C. 107.

³ [1961] C.T.C. 451.

⁴ [1962] C.T.C. 79.

⁵ (1904) 5 T.C. 159.

well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.

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

I turn now to the facts as given in evidence by the respondent who was the only witness called at the hearing of the appeal. At that time he was in his 83rd year and he impressed me as being a man of extraordinary intelligence and alertness, who expressed himself in a ready and accurate flow of language. Despite his interest in the result of the proceedings, I think he was perfectly frank and honest in his answers and I neither discount nor doubt any of his testimony.

In the course of his lifetime the respondent has had experience in a number of fields. Following his graduation from high school in 1895, he worked first for a Montreal firm buying hay, then for the Canadian Pacific Railway for several years and later came to Vancouver where he became the manager of a firm dealing in securities and a member of the Vancouver Stock Exchange. In the period between 1900 and the commencement of the Great War he also bought and sold real estate consisting of building lots in Vancouver. During the war he and an associate had an agency for a tire company and operated a retail tire business. From 1918 to 1925 he was Civil Service Commissioner for the Province of British Columbia and later was Official Administrator of the County of Vancouver. He lost his position following a change of government and thereafter joined a firm engaged in the wholesale grocery business. This business, however, did not succeed and in the mid-thirties it was closed. In 1937 he began doing business as a soap manufacturer under the trade name of Western Soap Company and he continued to operate this business as his own until the end of 1954 when he had reached 75. It was then taken

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over by a corporation of which he was the chief shareholder and president. Since then the share control of the company and most of the responsibility for its operations have passed to his son but he remains president and still takes an active part in the business. The respondent began this business after others had failed in it and he managed to make it a successful enterprise by dint of much work on his own part and the reduction of overhead to the barest minimum. He regularly or frequently worked from 9:30 a.m. to 1:30 a.m. the following day, attending personally to the buying and selling and the invoicing, bookkeeping and correspondence as well as the supervising of the manufacturing operation. He employed from 10 to 15 men in the plant including a foreman but had no buyer, salesman, bookkeeper, stenographer or clerk and no office at the plant. The office work was done at his home until the take-over by the company when a small office was built at the plant and a stenographer employed on a part time basis. Having thus eliminated excessive overhead and having concentrated on selling his product to institutions and other users of soap in large quantities who were not attracted by expensive packaging—which he also avoided—he was able to compete successfully with the largest producers of soap and to earn substantial profits but at the cost of prodigious personal effort.

While prior to the incorporation the soap business and its profits belonged entirely to him, for accounting purposes he always treated the business as a separate entity, charging a salary for himself and accumulating in it a reserve against the time when it might be needed for change or expansion of the business. By 1954 the amount which he had accumulated and earmarked as such reserve was approximately \$80,000 and this reserve was transferred to the company as part of the assets of the undertaking. At that time the reserve was invested in mortgages and agreements of sale as was the rest of the respondent's savings.

The respondent is a man of simple and frugal personal habits. He neither drinks nor smokes nor gambles, he has lived in the same home since the early thirties and despite his means he drives a 1948 Plymouth car. He has an unusual and favourable arrangement with his banks in respect to exchange charges. He has always managed to live within his income and save something. It is not surprising that such a man would have from time to time moneys which he

would want to put to work and he had not the slightest hesitation in saying so and that he wanted the utmost return from them that he could get without undue risk of loss.

In his early years he liked power stocks and invested money in them and later after coming to Vancouver he also invested in building lots until the beginning of the Great War when the market for them collapsed. He said he both made and lost money in real estate during that period. At the time when he ceased to be Official Administrator of the County of Vancouver there were 2 or 3 estates the administration of which had not been completed and the heirs arranged for him to continue as administrator. Some of these people wanted money earlier than it was available and at their request he purchased assets of the estates consisting of several properties which had been quit claimed by the mortgagor or purchaser and about 10 long term mortgages and agreements of sale. In the case of a number of the mortgages and agreements of sale, the land was ultimately quit claimed to him. He later sold these properties taking agreements of sale or mortgages to secure the unpaid balance of the selling price and the proceeds provided some of the funds with which he later bought other mortgages and agreements of sale but none of the discounts in question arose from transactions in which he sold property which he himself had owned.

These arose in a different way. In the course of his experience as official administrator of the County of Vancouver, he had been surprised to find how well a certain type of what were regarded as substandard mortgages had been paid and that these had a better record than some kinds of mortgages which the mortgage companies regarded as superior. He observed that where a working couple had bought a home at a price that was commensurate with their income, which gave them the accommodation they needed, and had paid a substantial down payment, barring marital trouble, they would pay for it. With this knowledge he was of a mixed mind when in 1943 or 1944 some such mortgages and agreements of sale were offered to him by a friend of his who was in the real estate business. He regarded them as "pretty risky". In his experience buoyant conditions were usually followed by depressions and he did not expect the boom conditions which were generated by the war to last

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as they did. But he was interested in finding investments that would yield more than the 3 or 4 per cent. obtainable on government and other securities and when reminded of his experience he decided to try some of these mortgages. Later when they turned out well he decided to put more money into similar mortgages and agreements. By buying them at a suitable discount these securities though carrying a rate of 6 per cent. would yield 7 per cent. or higher on his investment over their term and the risk of loss on particular mortgages or agreements would be protected and spread by the discounts. Ultimately he disposed of the whole of his other investments and invested the proceeds together with all his current savings and the soap business reserve into mortgages and agreements of sale of this type. From the time of his first purchase in 1943 or 1944 to the end of 1954 he purchased 309 of these securities of which in the meantime 113 had been paid off giving rise to the receipt of the sums in question which have been referred to as discounts.

These mortgages and agreements of sale (which I shall refer to simply as mortgages) were regarded as substandard for two reasons. They all constituted first charges on property, but the principal amount represented up to two-thirds of the value of the property rather than 45 to 50 per cent. which mortgage companies were prepared to advance. To the extent that the amount exceeded 45 to 50 per cent. of the value, the risk was, therefore, similar to that attaching to a second mortgage. The other feature was that they were all small mortgages ranging for the most part between \$1,500 and \$3,000 and the mortgage companies preferred larger loans which entailed proportionately less bookkeeping and expense. All but 2 of the mortgages which were paid off during the years in question carried an interest rate of 6 per cent. and they were all repayable in monthly payments ranging from \$22 to \$75 consisting in part of accrued interest and the remainder on account of principal. As the respondent purchased all of these mortgages at a discount the effective return of interest on the amount which he paid was in each case higher than 6 per cent. In 55 cases it was 7 per cent., in 22 cases more than 7 per cent. and in 23 cases between 6 and 7 per cent. In no case did it reach 8 per cent. He also enjoyed the advantage of having his interest paid monthly and, therefore, available for investment earlier than if it

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had been payable quarterly or half yearly. Throughout the years in question, economic conditions were buoyant and the mortgages were all paid at maturity or earlier and he continued to invest and reinvest the proceeds in mortgages of this kind. By the time of the trial, however, a number of them had gone into default. He had sustained some losses and could foresee others and had commenced to invest in some other kinds of securities as well.

The evidence indicates that in general the size of the principal amounts of the mortgages acquired by the respondent increased as time went by, the earlier ones being for the most part less than \$2,000 and the later ones higher than that amount, the largest being \$4,900. The principal of 13 of the mortgages was less than \$1,500 and of 21 of them was over \$3,000. The discounts at which they were acquired ranged from 6 to 22 per cent. but in 52 of the 113 mortgages which were paid off during the years in question it was exactly 15 per cent. The terms of these mortgages were as follows:

3 years and under 4 years	11
4 years and under 5 years	11
5 years and under 6 years	24
6 years and under 7 years	19
7 years and under 8 years	17
8 years and over	26

One was as short as 2 years and it was the lone case wherein the discount was as low as 6 per cent. The longest term was 13 years. In general the shorter terms were in the mortgages purchased in the earlier years and longer in those acquired in the later years. A rough calculation indicates that in mortgages carrying 6 per cent. interest with a 5 year repayment term a discount of 15 per cent. is only slightly less in amount than the total interest payable over the term. In the case of some of the respondent's purchases the amount of the discount must have been greater than the total interest to be paid over the term while in others it was obviously much less.

The mortgages in question were all selected by the respondent from those offered to him by real estate agents. He never solicited them nor had he any arrangements with the agents to find them for him. During the same period he was offered second mortgages at much higher discounts

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and higher rates of interest, but he turned them down as he also did the numerous offerings of other kinds of securities which arrived in his mail and were committed to his waste basket. He knew precisely the kind of security that he was interested in and was too busy with his soap business to study and consider others. As the number of these mortgages grew, the work of keeping track of the payments increased, and from 1948 to 1952 a real estate agent in whom he had particular confidence, collected the payments for him pursuant to an arrangement under which the agent was to receive 50 cents for each payment collected. Ultimately the agent found this arrangement unprofitable and it was discontinued. Thereafter the respondent attended to the work himself. Most of the payments were received by post and he said that it took him as much as a half hour some days to make the entries, compute the interest, write the receipts and put them in the mail.

The respondent was not the lender in any of these transactions. Without exception what he agreed to do was to purchase from the person entitled thereto the obligation of a borrower together with the security therefor which the holder of the obligation had. In some cases where the transaction occurred as part of the arrangements on the sale of a property, the agent would, in order to save conveyancing costs, arrange to have the mortgage made directly to him rather than to the vendor and then assigned, but this was a mere convenience. The respondent never agreed to lend money to the borrower and in these transactions never dealt with anyone but the agent acting on behalf of the vendor or mortgagee. Throughout the years in question he never sold or disposed of any of the mortgages and has not sold any of them held since then except when it became necessary for him to realize some of them in 1957 or thereabouts to pay income tax assessments and some which he transferred as gifts to charitable institutions. All the rest were not however held to maturity for it frequently happened that a mortgage was paid off ahead of time either on a sale of the property being made or for other reasons. In a very few such instances and for special reasons the respondent acceded to the request of the mortgagee and allowed a small discount but in the great majority of cases the principal and interest were paid in full.

The following summary shows the number and amount of the respondent's purchases of mortgages from 1944 to the end of 1954 together with the discounts recovered.

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Year	Purchases	Amount	Principal of mortgages purchased	No. paid off	Discount realized
1944	3	\$ 4,144.50	\$ 4,860.00		\$
1945	1	914.00	975.00		
1946	23	46,577.66	51,592.02	4	750.00
1947	25	50,169.83	62,529.97	6	968.23
1948	22	49,063.70	60,743.57	8	1,523.17
1949	30	72,096.06	85,423.63	3	711.73
1950	31	78,922.09	96,787.38	5	1,397.00
1951	36	89,790.68	115,802.80	17	5,798.11
1952	60	170,068.41	212,590.07	23	8,212.72
1953	34	115,835.07	148,365.76	18	8,703.35
1954	44	148,394.86	212,714.51	29	10,667.67
	309	\$ 825,976.86	\$ 1,052,384.71	113	\$ 38,731.98

At the end of 1954 he had on hand 196 mortgages with un-realized discounts amounting to \$187,675.87 most of which has since been realized and he has also continued to buy additional mortgages at a discount.

I have no hesitation in reaching the conclusion that the discounts totalling \$750.00 realized by the respondent in 1946 were not profits from a trade or business within the meaning of s. 3 of the *Income War Tax Act*. As I see it these discounts resulted simply from the investments in mortgages which the respondent had made in earlier years and I do not think it would have occurred to anyone to think at that time that in buying and holding them to maturity he was engaged in a trade or business rather than merely investing his money and holding the investments. Nor can what he did in 1946 and later in buying more mortgages of the same type change the nature of what he had done earlier for even if his subsequent purchases and conduct were considered to amount to a business within the meaning of the statute that, in my opinion, would at most be evidence from which an inference might be drawn that the earlier transactions were also transactions in the course of the same trade or business, an inference which in my view should not be drawn in view of the respondent's evidence as to how he came to make his first purchases of

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the mortgages. For 1946 I am accordingly of the opinion that the judgment appealed from insofar as it holds the discounts not subject to tax is correct and should be affirmed.

With respect to the sums of \$968.23 and \$1,523.17 in discounts realized in 1947 and 1948 the result is perhaps not quite so plain but I have little difficulty in reaching the conclusion that these sums as well were not income from a trade or business within the meaning of s. 3 of the *Income War Tax Act*. Granting that in 1946 the respondent had begun changing his other investments into mortgages of this kind and had bought 23 mortgages at a cost of \$46,577.66, and in 1947 a further 25 mortgages at a cost of \$50,169.83 from the payment of which the sums of \$968.23 and \$1,523.17 were probably for the most part realized and also taking into account that in 1948 as well he had bought another 22 mortgages at a cost of \$49,063.70 and that he continued to buy mortgages on a substantial scale in later years, I am unable to see what there was about the respondent's purchases, holding and receiving of the amounts accruing on these mortgages to characterize what he did as a trade or business rather than as a mere investing of his funds in mortgages and the holding of such investments. The case for characterizing what he did as a trade or business appears to me to be weaker than that in *Argue v. M.N.R.*¹ where the taxpayer besides acting as manager of a loan company which brought him in close contact with mortgage transactions and gave him a special knowledge of that field invested his own money in mortgages and agreements of sale of an average principal of \$1,300—to a total extent of \$102,379.24, also loaned some money on the security of promissory notes and combined with these activities that of a fire insurance agent—a business capable of being carried on as an incident or side line of a business in mortgages yet the Supreme Court held that the taxpayer's income from the mortgages was not profit from "carrying on one or more businesses, as defined in s. 3 of the *Income War Tax Act*" within the meaning of s. 2 (1)(g) of the *Excess Profits Tax Act, 1940*; S. of C. 1940, c. 32.

¹[1948] S.C.R. 469.

The Minister's case with respect to the discounts realized in 1947 and 1948 accordingly fails as well though as will appear what I shall have to say with respect to the discounts realized in the years 1949-1954 applies with equal effect with respect to 1947 and 1948 for while the definition in s. 127 (1)(e) of the *Income Tax Act* expanded the ordinary meaning of the word "business" so as to include "an adventure or concern in the nature of trade", it appears to me that this has little effect in this particular case because in view of the number of transactions involved it would seem to me that if the case is not one falling within the ordinary meaning of the word "trade" it is outside the scope of the expression "adventure or concern in the nature of trade" as well.

After lengthy consideration of the facts I am of the opinion that the discounts realized in the years 1949 to 1954 were not profits from a business within the meaning of that term as defined in the applicable statutes. In my view there is nothing in the case which characterizes what the respondent did as anything but mere investment of funds which he had available for investment. What the respondent did in the years in question was simply to buy mortgages, hold them to maturity and receive the payments when made. He undoubtedly had a more than ordinary ability to appraise the several factors entering into a judgment of when to buy and when to refuse what was offered and he knew how to select with a minimum of effort the mortgages he would buy. But any investor who proposes to obtain a revenue from his means while at the same time protecting his capital must have some knowledge of what he is about or he is not likely to be an investor for long. Nor was there in my view anything about the way in which he acquired them which is not as consistent with mere investment of funds as with the carrying on of a business. Moreover, he did not buy the mortgages to sell and did not sell them. No doubt he held them to get from them all that he could including the discounts but it would I think be unrealistic to look upon what he did as a course of conduct or scheme directed primarily to the making of profit by realizing such discounts. The interest return was of greater importance and the most that could be said on this score is that his object was to get both.

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But that is the same object which anyone has who buys a bond at a discount intending to hold it to maturity. And in any case the matter is not governed by the intention to make a gain or profit. Intention to make a profit in a particular way is no doubt an important fact to be considered in cases of this kind but like many of the other features which are from time to time referred to in such cases as pointing to one conclusion or another its importance depends on the context of the particular case. In the present case I do not regard it as having much significance. Nor does the fact that he kept records of the mortgages and wrote receipts for the payments and that this in later years took some of his time each day in my opinion make any difference.

Secondly, investment in first mortgages of real estate is a well known and recognized way of investing money to obtain an income return. Here the mortgages were sub-standard—in the sense that mortgage companies were not interested in them—but the matter is not dependent on the standards of mortgage companies which may be as high or low as they see fit to adopt within such restrictions as the law imposes upon them. That these mortgages as a class were in fact good securities is demonstrated by the result and though each involved some risk and at that possibly a somewhat greater risk than the types in which the mortgage companies were interested, I see nothing so unusual about them as to suggest that the respondent chose them in the course of a gamble or adventure looking to the realization of a speculative profit. In no case was he subjecting the whole amount invested to risk of the sort assumed by a second mortgagee who may lose his whole investment if the value of the property declines below the amount of the prior incumbrance. Moreover when buying at a discount of 15 per cent. a mortgage with a principal amount equal to two-thirds of the value of the property he was investing in it only to the extent of 56 $\frac{2}{3}$ per cent. of the value of the property and under the repayment terms that would be reduced as each month went by. What he paid for these mortgages was no doubt as much as anyone would pay and represented what they were worth to any prudent investor seeking a high income return who knew their characteristics and took into account such risk as attached to them. Moreover except in a few cases, they

were not short term mortgages nor is there any occasion to infer that they were acquired in the expectation that they would be paid before maturity.

To my mind the only features about this case which tend to suggest that what the respondent did amounted to a business are the multiplicity of the transactions and the systematic course of conduct which the respondent pursued in investing and reinvesting in these mortgages. As I see it nothing about the acquiring, holding or realization of any one of the mortgages indicates a business and it is only if the number of transactions and the system pursued make a difference—when viewed with the other facts—that there is any basis for the suggestion that this was a business within the meaning of the definition. On this question I have a good deal of doubt because of the large total number of transactions but it appears to me that in a case of this kind, that is to say a case of purchases of mortgages by a person whose principal activity is not dealing in mortgages or other securities but soap manufacturing, the number of transactions is so largely a matter of how much money the particular individual has available to invest that I am unable to attribute much weight or effect to it, and the same applies with respect to the system for given the fact of a desire to invest his system indicates nothing but a repetition of the event as often as is necessary to accomplish the object of keeping his money invested and no more. To my mind in the circumstances of this case, these features do not indicate that the respondent was engaged in a commercial enterprise or trade. Over the six-year period 1949-1954 the purchases averaged 3.4 transactions per month. In 1949 the average was 2.5 per month. In 1952 the average was 5 per month, and in 1954 3.6 per month. A person who in transactions similarly numerous and whenever he happened to have money available bought government and corporation bonds at a discount from several dealers intending to hold them to maturity would not in my opinion be regarded as engaged in a trade or business merely because of the number of purchases involved or the fact that he pursued a policy of buying as often as he had money available to do so but only at a discount. The conclusion can I think also be tested by putting a converse case. Suppose the purchaser of bonds

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in the case suggested or the respondent in buying mortgages instead of buying at a discount in each case paid a premium. In neither case can I conceive of his being regarded as engaged in a business so as to enable him to deduct the premiums from interest for the purpose of computing his profit.

The Minister's submission with respect to the years 1949 to 1954 accordingly fails as well. In the result I am of the opinion that the discounts realized by the respondent in these years as well as in the earlier years were mere enhancements of value on the realization of investments and not gains made in an operation of business in carrying out a scheme for profit making.

The judgment appealed from will be varied by setting aside the Board's declaration that the re-assessments for the years 1946-1951 inclusive were void *ab initio* and restoring the re-assessments but subject to variation in accordance with these reasons by omitting from the computation of income the discounts realized by the respondent in those years. Subject to this the judgment of the Tax Appeal Board with respect to all the years under appeal will be affirmed and this appeal will be dismissed with costs.

Judgment accordingly.