1967
Vancouver
Jan. 17-19
Feb. 2

BETWEEN:

BRONZE MEMORIALS LIMITED ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Income—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 14(2), 85B(1) and 139(1)(e)—Whether capital gain or income—Purchase of land from affiliated cemetery company—Profit on resale—Alleged oral term in favour of appellant—Conduct of parties inconsistent with the alleged terms—Appeal dismissed.

Having the exclusive right to supply statuary to a group of companies with which it was affiliated, the appellant company was carrying on business connected with cemeteries. By purchasing some land in 1949, the appellant company then sold said land at cost to an affiliated company for use as a cemetery. Owing to grievances raised by the Municipality about such cemetery in the territory of which such use of land was perpetrated, both parties arrived at a mutual agreement as follows: the appellant bought back that part of land at the original sale price because that land could not be used as a cemetery Then in 1958, the appellant resold that land to a subdivision syndicate and made a substantial profit. The profit was taxable as income from an adventure in the nature of trade which was the decision ruled by the Tax Appeal Board, which case was referred to. Hence, this appeal was launched before the Exchequer Court.

The main contention, in supporting this ground, was an alleged oral term, which made the sale to the affiliated company, subject to reconveyance to the appellant of any land that could not be used as a cemetery. The appellant also argued that even if the profit was taxable as income, only but the excess of the proceeds over the fair market value of the land should have been subject to tax.

Held, That the appeal be dismissed on condition that the profit be re-assessed in conformity with section 85B.

2. That within the Court's view, there was no evidence of any oral term which would create a vested equitable interest in the appellant company with the option which could be exercised conditionally if the land in question could not be used as a cemetery.

3. That there was no memorandum in writing to comply with the *Statute of Frauds.*

4. That the lack of any action by the appellant to delete an absolute assignment of the land by the affiliated company to the municipality indicated that there was no such oral term.

5. That nothing was done by the appellant when the land which it eventually sold to the developer was first declared by the affiliated company as "now on the market for open bidding".

6. That the land sold by the appellant, in the Court's view, was not an investment, forasmuch as the land was vacant and yielded no revenue.

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7. That besides, because the appellant did not qualify as a *bona fide* developer and could not hold the land, with the opinion of the Court, that section 14(2) of the Act required in mandatory language that the property be valued at the lower cost.

APPEAL from a decision of the Tax Appeal Board.

W. A. MacDonald for appellant.

M. A. Mogan and *S. Hynes* for respondent.

SHEPPARD D.J.:—This appeal is by Bronze Memorials Limited from the decision of the Tax Appeal Board of the 13th November, 1963, dismissing the appeal by this appellant from a re-assessment by the Minister for the taxation year 1958 whereby he added $138,150.00 as taxable income, being the profit received from the sale of Parcel A in Block 3, District Lot 73, Plan 3060 NWD.

This appellant contends that the alleged increase of taxable income was capital gain or, alternatively, was negligible in amount. The facts are as follows:

Bronze Memorials Limited (called Bronze Co.) is one of a group of four inter-related companies incorporated in British Columbia. Those companies and their objects are:

(1) Forest Lawn Cemetery Company (called Cemetery Co.) incorporated in 1935 with the objects of owning and operating a cemetery, and has owned and operated the Forest Lawn Cemetery in the Corporation of the District of Burnaby (hereinafter called Burnaby), B.C.

(2) Forest Lawn Development Limited (called Development Co.) has the objects of maintaining, operating and developing the cemetery.

(3) Bronze Co., the appellant, deals in memorial tablets and statuary.

(4) Forest Lawn Florists and Nurseries Limited (called Nurseries Co.) supplies flowers used in the cemetery.

The first three are here of particular importance. The Cemetery Co. by statute was prohibited from distributing dividends or profits to its shareholders other than interest on the money subscribed (Section 22, *Cemetery Companies Act*, R.S.B.C. 1948, Cap. 59). The majority of shares in the Cemetery Co. and therefore the control were throughout in the Development Co. The shareholders of the Development Co. and Bronze Co. were the same and therefor those

shareholders elected the directors of all three companies. The operation of the cemetery has been carried on as follows.

By agreement between the Cemetery Co. and the Development Co. the Cemetery Co. was to sell graves and to pay Development Co. 75% of the receipts of the Cemetery Co. for the Development Co. performing certain services, such as maintaining the cemetery and certain other services. By order of the Public Utilities Commission, according to Arnold, the President of Bronze Co., 25% of the receipts of the Cemetery Co. was payable to a trust fund to secure the maintenance of the cemetery in perpetuity.

By agreement of the 27th February, 1939 (Ex. 1) between the Cemetery Co., Development Co. and Bronze Co., the Bronze Co. was given the exclusive right to supply memorials, grave markers, tablets and statuary used in the cemetery, and was to pay the Cemetery Co. and Development Co. for certain services in installing these articles. An estimate of the proposed revenue to be derived from the operation of Parcel A as a cemetery (Ex. 16) indicates that the profits from the proposed operation were intended to go to the Development Co. and to the Bronze Co: there they could be distributed as dividends to the shareholders.

The issue arises out of the sale of 29.36 acres, being Parcel A, Block 3, District Lot 73, Group 1, Plan 3060 NWD (Ex. 6) by Bronze Co. to Wilfrid J. Sung *et al* (Ex. 7). On the 26th October, 1946, Burnaby agreed to sell to Universal Investments Ltd., Block 3, District Lot 73, Group 1, Plan 3060 NWD, consisting of approximately 40 acres, under deferred payments (Recital 1, Ex. 2). On the 20th December, 1946, Universal Investments Ltd. assigned this agreement to the Nurseries Co. (Recital 2, Exhibit 4). On the 1st June, 1949, the Nurseries Co. assigned to Bronze Co. at cost to the Nurseries Co., and on the 13th August, 1951, Bronze Co., assigned to the Cemetery Co. at the original cost to Bronze Co. by the Cemetery Co. paying to Bronze Co. its outlays and assuming the unmatured instalments. The Cemetery Co. obtained from the Minister of Health and Welfare a permit to operate a cemetery on Block 3, but did not apply for or obtain the permission of the Municipality of Burnaby. Nevertheless the Cemetery Co. operated a cemetery on Block 3 by selling nine graves and certain other sites as "pre need".

In 1952 Burnaby commenced an action against the Cemetery Co. for an injunction to prevent that company using Block 3 for a cemetery, and on the 22nd April, 1953, recovered in the Supreme Court of British Columbia before Coady J. an injunction restraining the use of Block 3 as a cemetery (Ex. 8 & 9), which judgment was affirmed on the 27th September, 1954, by the Court of Appeal (Ex. 10), and on the 4th October, 1955, by the Supreme Court of Canada (Ex. 11 & 12). Thereupon the Cemetery Co. entered into negotiations with Burnaby for the permitted use of Block 3 or some part as a cemetery, and eventually the parties, that is Burnaby and the Cemetery Co., agreed (Ex. 13, Letter A to G):

(*a*) That the Cemetery Co. would convey Parcel A in Block 3 (Ex. 6) to a *bona fide* developer (Ex. 13);

(*b*) That the Cemetery Co. would convey to Burnaby a strip 66 feet wide for Woodsworth Street (Ex. 13 C), and

(*c*) That Burnaby would give permission to the Cemetery Co. to use Parcel B in Block 3 and the adjoining Parcel B, Plan 12495 (Ex. 6) as a cemetery. By minutes of 7th January, 1957 (Ex. 23), of 21st January, 1957 (Ex. 22), of 4th November, 1957 (Ex. 14), of 7th November, 1957 (Ex. 15), the Cemetery Co. agreed to sell to Bronze Co. at cost to the Cemetery Co. (Ex. 14) the land not permitted to be used for a cemetery.

On 11th December, 1957, the directors of Bronze Co. resolved to have Parcel A appraised by three appraisers and to "accept not less than $4,000.00 per acre" (Ex. 18).

On 17th December, 1957, the Cemetery Co. conveyed to Bronze Co. Parcel A in Block 3 for the sum of $30,950.00 (Ex. 5); being the cost of Parcel A to the Cemetery Co. (Ex. 14). The Bronze Co. had Parcel A valued and listed with real estate agents and on the 7th October, 1958, Bronze Co. agreed to sell to Wilfrid J. Sung *et al* said Parcel A for $176,000.00 on deferred payments (Ex. 7) and would thereby receive the sum of $138,150.00 as profit, which the Minister re-assessed as taxable income for the taxation year 1958.

On Notice of Objection that re-assessment was affirmed and an appeal to the Tax Appeal Board was dismissed.

Bronze Co. has now appealed to this Court.

Counsel for Bronze Co. has contended:

I. That the monies received on resale to Sung *et al* are capital and not income;

II. Alternatively, that the taxable income is only the excess of the purchase price payable by Sung *et al* over the fair market value, therefore the taxable income is negligible.

I. The appellant contends that the monies realized from the sale were the receipt of a capital sum and therefore not subject to income tax for the following reasons:

(1) That the shareholders and directors of the companies are substantially the same;

(2) That the agreement of the 27th February, 1939 (Ex. 1) gave to Bronze Co. a monopoly of supplying tablets to the cemetery. Without that monopoly its business would cease. Therefore Parcel A, which was purchased by Bronze Co. and resold to the Cemetery Co. at cost, was intended by the Bronze Co. to extend the life of the Cemetery Co. and thereby extend the duration and sales of Bronze Co.;

(3) That the sale to the Cemetery Co. was subject to an oral term express or implied that if Block 3, or presumably a part thereof, were not to be used as a cemetery, the block or part would be reconveyed to the Bronze Co. at cost to the Cemetery Co., therefore the sale to Bronze Co. in 1957 was pursuant to this term.

The appellant therefore contends that Block 3 and Parcel A therein were throughout capital assets of the Cemetery Co. and of Bronze Co.

That contention should not succeed. There was no such term. Such a term would be of the type found in *London and South Western Railway Company v. Gomm*[1], and would create a vested equitable interest in the Bronze Co. with the option to be exercised conditionally upon Block 3 or a portion not being used as a cemetery. The interest of Bronze Co. was therefore an interest in land and there was no memorandum in writing of that oral term to satisfy the *Statute of Frauds*. The Cemetery Co. did not throughout recognize the term as an enforceable agreement; but on the

[1] (1882) 20 Ch. D. 562.

contrary, the Cemetery Co. agreed with Burnaby to convey Parcel A to a *bona fide* developer (Ex. 13 E) and informed Burnaby by letter of 1st December, 1956, that "this property is now on the market for open bidding" (Ex. 13 F).

Further, the oral term could only operate as a condition subsequent in defeasance of the assignment from the Bronze Co. to the Cemetery Co., which is inconsistent with the purported absolute sale contained in the assignment (Ex. 5). The Bronze Co. has made out no case for rectification as against the absolute terms of the assignment.

Again, the minute of the Cemetery Co. of the 13th August, 1951 (Ex. 19) and the minute of the Bronze Co. of the 13th August, 1951 (Ex. 20) authorizing the purchase of Block 3 does not contemplate any such term to Bronze Co.

Also, the conduct of the parties is inconsistent with there having been any such term. After the judgment of Coady J., entered the 22nd April, 1952 (Ex. 8), and affirmed by the Court of Appeal on the 27th September, 1954 (Ex. 10), and by the Supreme Court of Canada on the 4th October, 1955 (Ex. 11), the Cemetery Co. was enjoined from using Block 3 as a cemetery. Nevertheless, Bronze Co. made no demand whatsoever under such oral term, and on the other hand, the Cemetery Co. proposed to deal with Block 3 as absolute owner. By letter of the 29th October, 1956, the Cemetery Co. to Burnaby (Ex. 13 A), the Cemetery Co. offered to grant to the Municipality a strip of Block 3, 66 feet in width, for use as a street. By letter of 9th November, 1956 (Ex. 13 B), Burnaby further proposed that a suitable arrangement be entered into respecting the development of Parcel A (being that portion of Block 3 lying north of Woodsworth Street), and by letter of the 17th November, 1956 (Ex. 13 C) the Cemetery Co. acknowledged receipt of the letter of the 9th November without protest or reference to the alleged oral term, and by letter of 22nd November, 1956 (Ex. 13 E) Burnaby wrote the Cemetery Co. that the Municipality insisted that the Cemetery Co. agree to dispose of Parcel A to "a *bona fide* developer for any use permitted by municipal by-laws". Such oral term, had it existed, would have been raised by the Cemetery Co. as requiring the Cemetery Co. to convey Parcel A to the Bronze Co.

On the contrary, by letter of the 1st December, 1956, the Cemetery Co. stated: "This property is now on the market

for open bidding". That letter is quite inconsistent with any oral term in favour of the Bronze Co. By letter of the 27th November, 1956 (Ex. 13 G), Burnaby to the Cemetery Co., the Municipality sets out the terms of settlement including the conveyance to Burnaby of the road allowance for the extension of Woodsworth Street and that the Cemetery Co. dispose of Parcel A.

The negotiations for the sale by the Cemetery Co. to the Bronze Co. were inconsistent with any outstanding oral term in favour of the Bronze Co. By minute of the 7th January, 1957 (Ex. 23), Bronze Co. authorized its general manager to negotiate with the Cemetery Co. for the purchase. By minute of the 21st January, 1957 (Ex. 22) G. A. Arnold reported to the directors of the Cemetery Co. that he was awaiting the approval of "the Corporation of Burnaby on the 16 acres to be cemeterized bordering on our present property (that would be Parcel B in Ex. 6). He suggested that the balance of Block 3, D. L. 73 not cemeterized be sold to Bronze Memorials Limited". It appears therefore that the requirements of Burnaby came first, and subject thereto an interest in Bronze Co. would depend upon such negotiations for sale. That is inconsistent with such oral term.

By minute of the 4th November, 1957 (Ex. 14), the Bronze Co. offered to purchase Parcel A at $30,950.00, that is its proportionate part of the original price to the Cemetery Co. at $40,000.00 for Block 3, and by minute of the 7th November, 1957 (Ex. 15) the Cemetery Co. purported to accept the offer of the Bronze Co. by setting forth in the minute a recital stating that Bronze Co. "would repurchase the uncemeterized portion". This is the first occasion on which a term of purchase has been referred to, which term is inconsistent with the prior dealings by the Cemetery Co. The sale was completed by deed of the 17th December, 1957 (Ex. 5), for $30,950.00, and the deed contains no reference to the recital contained in the minutes (Ex. 15).

The sale price was taxable income in that the purchase was with the intention of Bronze Co. to resell. The Cemetery Co. had agreed that the lot would be sold to a *bona fide* developer (Ex. 13 E), and further, under letter of the 1st December, 1956, the Cemetery Co. stated: "This property is now on the market for open bidding." At the trial

G. A. Arnold, President of Bronze Co., testified that the Bronze Co. would not qualify as a *bona fide* developer, and therefore could not hold the property. Hence, as Bronze Co. could not hold the parcel its intention in buying must have been to resell.

That intention in buying to resell is borne out by the minute of 11th December, 1957 (Ex. 18), whereby the directors of Bronze Co. resolved "that the management be authorized to proceed and have the company property in Lot A, Block 3, Lot 73, Group 1, comprising approximately 29.36 acres appraised by three independent appraisers and to accept not less than $4,000 per acre", and Bronze Co. resold on the 7th August, 1958, to Sung *et al* (Ex. 7) at the price of $176,000.00 payable on deferred payments, which contained the profit assessed by the Minister. In considering the reason for the sale to Bronze Co. it is not to be overlooked that the Cemetery Co. could not distribute the profit as dividends to its shareholders (Section 22, *Cemetery Companies Act*).

As Bronze Co. purchased Parcel A for the purpose of reselling and at a profit, that profit is taxable income under *Income Tax Act,* Sections 3, 4, 139(1)(*e*).

In the *Minister of National Revenue v. Taylor*[1], Thorson P. said at p. 25:

> In my opinion, it may now be taken as established that the fact that a person has entered into only one transaction of the kind under consideration has no bearing on the question whether it was an adventure in the nature of trade. It is the nature of the transaction, not its singleness or isolation, that is to be determined.

and at p. 30:

> The respondent could not do anything with the lead except sell it and he bought it solely for the purpose of selling it to the Company In my judgment, the words of Lord Carmont in the *Rheinhold* case (*supra*) that "the commodity itself stamps the transaction as a trading transaction" apply with singular force to the respondent's transaction.

and at p. 31:

> I am, therefore, of the opinion that the respondent's transaction was an adventure in the nature of trade within the meaning of section 127(1)(*e*) of *The Income Tax Act* of 1948, and that his profit from it was profit from a business within the meaning of section 3 of the Act and that the Minister was right in including it in the assessment.

[1] [1956-1960] Ex. C.R. 3.

It follows that as Bronze Co. bought Parcel A solely for the purpose of selling, that is a "venture in the nature of trade" within Section 139(1)(*e*), and therefore taxable income within Sections 3 and 4.

Two judgments cited are distinguishable. In *Miller v. Minister of National Revenue*[1], the farm was acquired for use and its increase in value was due to the increase in population. Therefore it was held that the sale at increased value was the realization of a capital asset and it was not taxable income. In *Minister of National Revenue v. Valclair Investment Co. Ltd.*[2], the farm was held to be an investment as bought for revenue purposes, and Kearney J., in referring to *Commissioners of Inland Revenue v. Reinhold*[3] said at p. 473:

> ". . . Lord Dunedin says, in the case I have already cited, at page 423:
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> '...The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on a trade or concern in the nature of trade in respect of his investments, but *per se* it leads to no conclusion whatever' (15 T.C. 360)'
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> * * *
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> I draw attention to Lord Dunedin's language being used with reference to "and investment", meaning thereby, as I think, the purchase of something normally used to produce an annual return such as lands, houses, or stocks and shares. The language would, of course, cover the purchase of houses as in the present case, but would not cover a situation in which a purchaser bought a commodity which from its nature can give no annual return. . ."

and at p. 476:

> I think that those cases which concern the sale of commodities, such as toilet paper or the like, which are consumed by use and by their nature not susceptible of producing income are distinguishable from and inapplicable in the instant case, where the farm was not only susceptible of producing income but actually did so at all material times.

and at p. 477:

> Indeed the passive role played by the respondent was the antithesis of what one would expect from a trader under like circumstances.

The purchase of Parcel A by Bronze Co. cannot be an investment because:

(*a*) The land was vacant and produced no revenue.

[1] (1964) 18 D.T.C. 5084. [2] [1964] Ex. C.R. 466.
[3] 34 T.C. 389.

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(*b*) According to the evidence of Arnold, Bronze Co. did not qualify to hold that parcel under the undertaking given by the Cemetery Co. to Burnaby.

In neither the *Miller* nor in the *Valclair* case was the land purchased by the taxpayer for resale. In the case at Bar the land was purchased by Bronze Co. for resale as indicated by the minutes of 11th December, 1957 (Ex. 18).

II. The appellant has also contended that the taxable income is negligible for the reason that Bronze Co. has the option of having the land valued at its fair value, and upon the evidence of Squarey, a witness of Bronze Co., the fair value at the time of purchase is fixed by the subsequent sale to Sung *et al.* Therefore Bronze Co. contends that as the fair market value equalled the resale price there was no taxable income.

That contention is precluded by Section 14(2) which reads as follows:

(2) For the purpose of computing income, the property described in an inventory shall be valued at its cost to the taxpayer or its fair market value, whichever is lower, or in such other manner as may be permitted by regulation.

On the facts of this case Regulation 1800 (then in force) could not apply to the value of the single Parcel A here in question, and Section 14(2) required in mandatory language that the property "shall be valued at its cost to the taxpayer" as the "lower" and not at the fair market value. It is not necessary to consider whether this contention is open to the taxpayer under Section 14(1) as then in force and repealed by 1958, Cap. 32, Section 6(1).

In conclusion, the parties have agreed that the Minister may reassess in accordance with Section 85B by reason that the purchase price was payable in deferred instalments and it will be referred back to the Minister to be reassessed accordingly, but subject there to the appeal is dismissed.