
BETWEEN:

MARY BILSON .....APPELLANT;

AND

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

AND BETWEEN:

JOHN BILSON .....APPELLANT;

AND

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

Windsor
1966
Oct. 4
Oct. 4

Income tax—Partnership—Computation of income of partners—Motel business—Sale of motel—Recaptured capital cost allowance—Income of which year—Whether partnership dissolved.

Appellants, who were husband and wife, operated a hotel in Windsor, Ontario, until 1951 when they sold it. In 1953 they purchased a motel which they sold on February 7th 1958. During these years they also owned a duplex and an apartment building. From the mode of dealing of appellants the Court found that they were partners at will in the hotel, motel, duplex and apartment business.

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Appellants' fiscal year for the motel business ended on January 31st. The sale of the motel on February 7th 1958 resulted in a recapture of capital cost allowance, and appellants were each assessed to income tax on one-half of that sum for the 1958 taxation year. Appellants filed notices of objection in which they purported to elect under s 15(2) of the *Income Tax Act* that they be assessed on the said amounts in the 1959 taxation year.

Held, allowing their appeals, in the absence of a notice of intention to dissolve the partnership or of circumstances leading to the inference that it was dissolved appellants' partnership continued and accordingly the sum received on the sale of the motel on February 7th 1958 was assessable in the 1959 taxation year.

[*Crawshay v. Maule,* 1 Swanst 495 at 508, referred to]

APPEALS from income tax assessments.

A. B. Weingarden for appellants.

D. G. H. Bowman for respondent.

GIBSON J.:—Both these appeals concern the taxation year 1958. In both appeals there have been minutes of partial settlement between the parties filed, and the only issue for decision is whether the appellants should be taxed in the 1959 taxation year instead of the 1958 taxation year on certain net income received from the operation of a business then owned by them called the Royal Motel, Windsor, during the period February 1 to February 7, 1958. Specifically what is involved in the dispute as to the net income figure, is an assessment for recapture of part of the capital cost allowance heretofore deducted in respect to the building and equipment of the Royal Motel.

The appellants are husband and wife and it is admitted by the parties and amply proved by the evidence that they have been partners for years. Up until 1951 they operated the Arlington Hotel in Windsor, at which time they sold it. Then in 1953 they purchased the Royal Motel, about which we are mainly concerned in this appeal. They then sold the Royal Motel on February 7, 1958. They also during the material period owned a duplex on Victoria Avenue in Windsor and also the Marwood Apartments, Windsor.

The fiscal year of the business of the Royal Motel ended January 31. The income tax returns of the appellants for the year 1958 and prior thereto were filed on this basis.

The appellants having sold the Royal Motel on February 7, 1958, included in their income for the 1958 taxation year the income less allowable deductions for the period February 1 to February 7, 1958, and thereby included income for a longer period than twelve months. This was done on the advice of their accountants.

As a result of the assessment made by the respondent against the appellants wherein certain recapture of capital cost allowance in respect to the Royal Motel was added to their 1958 income, the appellants filed a notice of objection and in it purported to make an election under section 15(2) of the Act (as it then read).

The appellants in these appeals take two positions: Firstly, predicated on the partnership terminating February 7, 1958, they say they did in fact make an election under section 15(2) so as to permit them the relief afforded by that section which in this case would shift, so to speak, the recaptured capital cost allowance or a certain portion of the recaptured capital cost allowance in respect of the Royal Motel from their income for the 1958 taxation year to the 1959 taxation year; or, secondly, and alternatively, that the partnership was still in existence in 1958 and at all other material times and that since the fiscal period of the business of the Royal Motel had not been changed that the income for the period February 1 to February 7, 1958, less allowable deductions (which would include capital cost allowance) in respect of the Royal Motel should be included in their income for the 1959 taxation year and not 1958.

I am of opinion that at all material times the appellants were partners. The evidence of the formation of the partnership was given. *Inter alia*, it is obvious from the mode of dealing adopted by the appellants that they were partners in the Arlington Hotel, the Royal Motel, the duplex and the apartment business. They jointly borrowed the money from the Royal Bank to finance the Royal Motel business. They used one bank account for all these businesses, and had no other bank account, and all receipts and payments were deposited into and made from such account.

I think it is clear that the appellants were in a partnership at will.

To determine such a partnership there must be notice of intention to do so or it must be inferred from all the

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Gibson J.

circumstances that such a partnership was dissolved. Neither situation obtains in this case, and as a result I am of opinion that the partnership at no time was dissolved and exists to-day.

These various assets such as the Arlington Hotel, the Royal Motel, the duplex and the apartment are and were merely part of the stock-in-trade of such partnership.

In Lindley on Partnership[1], there is quoted in part the judgment of Lord Eldon in *Crawshay v. Maule*[2] which is apt in this matter, and I quote:

> Without doubt, in the absence of express there may be an implied contract as to the duration of a partnership, but I must contradict all authority if I say that whenever there is a partnership, the purchase of a leasehold interest of longer or shorter duration, is a circumstance from which it is to be inferred that the partnership shall continue as long as the lease. On that argument the Court, holding that a lease for seven years is proof of partnership for seven years, and a lease of fourteen of a partnership for fourteen years, must hold that if the partners purchase a fee simple, there shall be a partnership for ever (sic). It has been repeatedly decided that interests in land purchased for the purpose of carrying on trade are no more than stock in trade.

In the result therefore, I am of opinion that the partnership between the appellants continued in 1958 and 1959 and was not dissolved at any material time, and therefore the income of the appellants which is in issue in this matter received during the period February 1 to February 7, 1958, less all allowable deductions, should be taxed in the taxation year 1959.

The appeal is therefore allowed.

It is not necessary to consider the first position submitted by the appellants. But this is the only position taken by the appellants in the pleadings. The alternative position which is the basis of the decision on this appeal was not raised in the pleadings, nor was this position defined as an issue in any pre-trial order of this Court. As a consequence, no costs are allowed to the appellants.

[1] 12th Edition, page 160.

[2] 1 Swanst 495 at 508.