BETWEEN:

RONALD D. GRANT .....APPELLANT;

1963
Apr. 10
May 3

AND

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

Revenue—Income tax—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4, 85B(1)(b)(d)(e) and 139(1)(e)—Capital gain or income—Appraiser—Sale of farm purchased for alleged residence—Secondary intention—Adventure in the nature of trade—Appeal dismissed.

Appellant who described himself as an agrologist and appraiser, was a regional supervisor for the Department of Veterans Affairs and as such was very familiar with rural property in his district. In 1953 he purchased a farm for a residence. According to the appellant he soon found that part of his farm was to be appropriated for a highway and consequently he began to look for another farm which he could use as a residence. In 1955 he purchased a farm of 140 acres for about $48,000, using borrowed money for the purpose. A few months later he accepted an unsolicited offer of $170,000 for the property. At the hearing of the appeal the bank manager to whom appellant applied for a loan testified that at no time did appellant suggest to him that he intended to occupy the farm as his home and that the appellant's stated intention was to subdivide the property and sell lots. He was assessed for income tax on the profit made on this transaciton. An appeal from the assessment to the Tax Appeal Board was dismissed and a further appeal was taken to this Court.

Held: That appellant's profit on the land transaction was taxable as income from an adventure in the nature of trade.

2. That it was established that appellant acquired the farm for speculative purposes and using the farm as his own residence was not his sole intention.

3. That appellant's main intention was to subdivide the property into lots and sell it off as such as soon as there was a suitable opportunity to do so.

4 That the appeal be dismissed.

APPEAL under the *Income Tax Act*.

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

R. P. Anderson for appellant.

T. C. Marshall and *A. J. Irving* for respondent.

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

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CAMERON J. now (May 3, 1963) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board dated April 5, 1962[1], dismissing the appellant's appeals from re-assessments dated April 25, 1960 and made upon him for the years 1955 to 1958 inclusive. The sole question in the appeal is whether certain profits made by the appellant in the purchase and sale in 1955 of some 140 acres of land in the Municipality of Surrey, British Columbia (and which I shall refer to as the Surrey property) are taxable profits or whether, as the appellant contends, they are capital appreciations.

In his tax returns, the appellant did not include any portion of the said profits as taxable income. In re-assessing the appellant, however, the Minister took into consideration the fact that the property had been purchased for $45,500; that expenses of $2,568.74 had been incurred in the purchase and sale of the property; that it was sold for $170,000 under an agreement of sale which provided for payments over a number of years and that, accordingly, the provisions of s-ss. (*b*), (*d*) and (*e*) of s. 85B(1) of the *Income Tax Act* relating to Special Reserves, were applicable; and added to the declared income of the appellant the amount of profits so computed. It was agreed that the amounts so added had been properly computed and there remains only the question as to whether such gains are taxable.

In the tax returns, the appellant stated that he is an agrologist and appraiser. After receiving the degree of B.S.A. from the University of Saskatchewan in 1942, he served in the armed forces until 1946. Following his discharge, he started a farming operation in Northern Alberta but abandoned it in that year and moved to British Columbia where he entered the Civil Service of Canada as a regional counsel under the *Soldiers' Settlement Act* and the *Veterans' Land Act*. In 1947, he was appointed regional supervisor, continuing as a full-time employee of the Department of Veterans' Affairs until 1956 when he resigned to go into business on his own account.

In 1953, when he was living at Burnaby, he purchased a farm property consisting of some 58 acres at Clearbrook,

[1] 29 Tax A.B.C. 65.

west of Abbotsford on the Trans-Canada Highway, and shortly thereafter took up residence there. This farm I shall refer to as the Clearbrook property. On May 24, 1955, he entered into the agreement filed as Exhibits 2 and 3 regarding the purchase of the 140 acre Surrey property from the owner, J. A. Winter, for $45,500. The agreement (Exhibit 2) provides for the sale of three parcels, the total price being $43,000, of which $500 was paid on that date to the vendor, $2,000 was paid to the solicitor and the balance of $39,000 was to be paid not later than October 31, 1955, or the cash payments were to be forfeited to the vendor. By the terms of Exhibit 3 he was also given the first right to purchase a further adjacent parcel for $3,500. On July 21, 1955, he secured conveyances of the property (or most of it) and of the total cost, $30,000 was borrowed from the Bank of Montreal at New Westminster and $15,000 was borrowed from private sources.

On September 20, 1955, a friend introduced him to one Peter Barnes who offered to purchase the entire property for $170,000. On the same day, he entered into an agreement of sale with Barnes to sell en bloc at that price, the terms of sale providing that $5,000 be paid in cash, $25,000 on July 1, 1956, and $35,000 on the first day of September in each of the years 1957, 1958, 1959 and 1960.

The appellant gave evidence, but no other witness was called on his behalf. He stated that as he was brought up on a farm he had always wanted to acquire, live on and operate a farm and that it was for that purpose that he acquired the Clearbrook property in 1953. Shortly after he moved there in 1954, he noticed that surveyors' pegs were placed across his property, indicating the possibility that the Department of Highways was preparing to construct a new road. From inquiries made, he came to the conclusion that there was a strong likelihood that part of his property would be expropriated for that purpose; that it would seriously interfere with his farm operations and that the road might be very close to his residence; and that if constructed it might sever his property and create a serious difficulty in reaching some portions of it. He could get no definite information as to just when or where such a road might be built. In fact, it was not until 1958 that he did sell a part of that property for that purpose, and later he

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sold the rest of the Clearbrook farm at a very substantial profit. He and his family now reside on a 2,500 acre farm, or ranch, in the Penticton area.

Faced with the possibility of an expropriation of part of his property for a road and the difficulties that might follow, he says he began to look around for a substitute farm which would be available if his own property were so taken. He made a number of inspections of other farms and in May, 1955 decided to purchase the Surrey property. His sole intention, he says, was to use it as a farm where he could take up residence with his family. Only ten acres were cleared, the rest being brushwood or timber. The soil, he said, was suitable, if cleared, for agricultural purposes.

There was no residence on the property purchased, but the vendor, it is stated, assured him that he would be given the first option to buy the residence property which he had retained. In fact, the appellant some years later did acquire it and sold it at a profit. He says that he planned to construct a house on the property if he could not buy the existing one.

When he bought the Surrey property, he said he had no intention whatever of selling. He points out that he did not advertise or list it for sale or seek out buyers; and that he did not previously know Barnes, the purchaser, who was brought to him by a friend. As evidence of his intention to work the property as a farm, he says that in the summer of 1955 he cut the hay thereon with a tractor-mower brought from Clearbrook, but I consider that to be of no importance as it was a very small operation and the machinery was returned to Clearbrook. Nothing else was done on the property prior to sale.

There is other evidence, however, which establishes quite clearly that even before he purchased, he was fully aware of the potentialities of the property for subdivision and sale, or sale en bloc, at an early date and that there was an active and increasing demand for building lots in the area. While it was zoned as farm property, there were a substantial number of houses constructed in the immediate vicinity, many of them under the *Veterans' Land Act*.

His chief problem was that of financing the purchase of the property. Accordingly, he approached Mr. Byrom, manager of a branch of the Bank of Montreal in New West-

minster who was known to him, and asked for a loan of $50,000 in addition to some $1,650 that he already owed that bank. Mr. Byrom was called as a witness on behalf of the respondent and identified Exhibit A dated May 12, 1955 (i.e., prior to the purchase of the property) as the application for a loan which he prepared at the request of and from information supplied by the appellant and then sent to the bank's assistant general manager at Vancouver, it being beyond his powers as local manager to grant a loan of that nature and amount. After stating that the loan would be payable on demand and would be repaid from sale of lots within one year, the report reads:

Mr. Grant, Regional Supervisor for the Veterans Land Act has the opportunity to purchase 120 acres of land @ $375. an acre and has requested our assistance for a non-revolving advance of $50,000. The land is situated 1½ miles from Whalley, B C. on the Ferguson road and at present belongs to an estate, beneficiaries being residents of the United States of America who are anxious to obtain an immediate wind up of the estate. A portion of the land is cleared with the remainder covered with scrub brush. The adjacent property is cleared with a large number of the lots sold and houses built or being constructed under N H.A. The property in question is serviced for water by the Greater Vancouver Water District and it is Mr. Grant's intention to gradually sub-divide the property into 466 lots of which 57 sites are immediately available. A breakdown of the anticipated expenses for servicing the lots is attached. Real estate firms value the land in the area at $1,750 an acre and there is a parcel of 80 acres listed for $120,000.

Mr. Grant is a very shrewd appraiser and in our opinion can be classified as one of the leading appraisers in Canada. As Regional Supervisor for the V.L.A. it is his duty to be familiar with all property in the Valley and in 1949 in the line of his duty an aerial survey was made of this particular district and all property valued. It was during this time that he became interested in the property and made his intentions known to the owner that he would be interested in the purchase. The property passed to the estate and the beneficiaries have just informed Mr. Grant that they would be interested in a quick cash sale.

Financial position of Mr. Grant is approximately the same as outlined in our form 516 of the 21st of July last with the exception that he informs us that property values have increased from the purchase price of $500 an acre to $1,500 an acre making a potential sale value of the property $87,000. The credit requested $45,000 for the purchase of the land and $5,000 for additional expenses clearing etc. will be repaid from sale of individual lots or in parcels and Mr. Grant is confident that no trouble will be experienced. The purpose of the request for accommodation and the security offered is not a normal banking proposition and is a definite promotion scheme but we have a very high opinion of Mr. Grant's ability as an appraiser and we are satisfied that sale of sufficient land say at $800 a lot would be made to repay our advances within one year. Last year Mr. Grant received $5,000 in independent appraisal fees which was used for farm improvements. He also informs us that he appraised a new subdivision on Lula Island and the costs of development were in accordance

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to his estimates. Without disclosing the location of the property he has been offered outside financing, at a premium but does not wish to avail himself of this offer. If the credit is granted there is a good possibility that the branch will derive some new mortgage business. Application recommended and a reply by telephone would be appreciated.

Attached thereto was "the breakdown of the anticipated expenses for servicing the lots", a copy of which was filed as Exhibit 4. This was prepared by the appellant personally and given to the bank manager to be forwarded with the report. It refers to four parcels in which there would be a total of 486 lots; the lots if sold at $800 each (after allowing for sales commissions, roads and water, taxes, surveys, legal expenses and main roads) would yield a profit of $234,838.

The proposed loan was not then granted and after a further interview with the appellant, Byrom again asked for approval of the loan on May 24, 1955 (Exhibit A). After repeating that the purpose of the loan for $50,000 was to assist in purchasing the property and that the demand loan, if granted, would be repaid from the sale of lots within one year, the report stated:

> A recent survey of the proposed purchase of 120 acres near Whalley, B.C. revealed, we are informed, that there appears to be enough cordwood, poles etc. on the property to cover the costs of survey, taxes etc. without any additional expense to Mr. Grant. He also informs us that plans are on the drawing boards for the construction of a new highway from Peterson Hill direct to Abbotsford which would indicate that it will cut diagonally across this property and would require 100 of the 466 lots. The Provincial Government purchases land at the going market price and have in the past obtained appraisals from Mr. Grant.
>
> While we realize that the proposition is speculative and not attractive from a Banking point of view we have every confidence in Mr. Grant's ability to valuate the potentiality of the district for development purposes. Also as a civil servant he is closely associated with certain department of the Provincial Government and in this way is in a position to obtain information as to proposed new highways. We have been informed from other sources that it is the intention to build a new highway direct from Peterson Hill to Abbotsford by-passing Whalley, therefore it would appear that his information is authenticate as to the proposed construction but could be problematical as to the actual route to be taken. With 57 sites available almost immediately Mr. Grant is confident that there would be no difficulty in disposing of them at around $800 a lot grossing $45,600. If the advance is granted and not retired within one year Mr. Grant has assured us that he would obtain outside financing at any time the Bank requested to retire outstanding advances and as we consider him a man of integrity, held in high esteem by his employers, we have no reason to doubt his word. He has again mentioned that if we cannot assist him he will be forced to obtain outside financing that has already been promised at a premium.

Recommended on a non-revolving basis for a period of one year, a reply by telephone would be appreciated.

The proposed loan was not approved. However, on June 16, 1955, the manager, after a further discussion with the appellant, applied for a new loan (Exhibit A) of $40,000, $30,000 of which was to complete the purchase and $10,000 for development, if required. It states:

With reference to our forms 516 of the 12th and 24th of May we apply on behalf of Mr. Grant for a Non-revolving credit of $40,000—$30,000 for the purchase of 120 acres of land and $10,000 if required for temporary development. The cost of the land is $40,000 and Mr. Grant has already paid $2,000 on an option to purchase which expires on the end of this month He will have by that time $8,000 in cash from undisclosed sources and if his request for our assistance is granted he will complete the purchase and lodge title with us. However he has definitely informed us that he is going ahead with the purchase, with or without our assistance as he states he can if necessary obtain outside support.

Your Manager accompanied Mr. Grant on a tour of the property which is a 5 minute drive from Whalley shopping centre and there are 2 schools close by which also lends to the desireability of the land for a subdivision and when developed should be very attractive. Fraser Valley Lands Ltd. have approached Mr. Grant to see if he would be interested in selling all or a portion of the land. They have tentatively offered for the 120 acres $200,000 with $50,000 down and the balance over a period of 5 years and he has informed them that he is interested in the proposition of that nature. However it is still in the discussion stage and may take a week or two before final decision is reached. We have suggested that he take their offer and be satisfied with a profit of $160,000 spread over a 5 year period. However the option to purchase expires on the end of this month and he is desirous of finalizing arrangements to complete the purchase of the property in event the sale of the land to Fraser Valley Lands Ltd. is held up or does not materialize. Therefore he has again applied to us for the reduced credit for a period of not more than one year with the security as outlined in the panel of the form. Application recommended as we are very confident that Mr. Grant would not enter into this obligaiton if he were not satisfied that he could either sell the property outright, or by piece meal if necessary and retire our advance within the period of one year.

In the result a bank loan of $30,000 was granted about June 30, thus enabling the appellant to complete the purchase assisted by other loans privately arranged.

Mr. Byrom was a careful witness and after refreshing his memory by referring to these three reports, stated that the data contained therein came entirely from the appellant (except that he had authenticated from other sources the appellant's statement as to the possible route of the new road from Peterson Hill to Abbotsford) and that at no time did the appellant state or suggest to him that he planned to occupy the property as his own home. I accept his evidence

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unreservedly. In general the appellant did not disagree with Byrom's evidence, although he said he could not recall having mentioned one or two items in the reports, but would not deny Byrom's statement that he had, in fact, done so.

The appellant, however, does say that notwithstanding the information given to Byrom as to his intentions regarding the property, he had, in fact, no intention of disposing of it at any time until Barnes offered him $170,000, an offer which was so large that he was "staggered" by it and consequently immediately accepted it so as to make a substantial profit. He says that in order to secure the bank loan it was necessary to satisfy the bank authorities that the loan was well secured, that it would be liquidated within one year and that the property he wished to secure was of such a nature that, if the bank had to take it over, it could readily sell the property in lots or en bloc at prices much in excess of the amount of the loan. While he had made no definite plans for re-paying the loan within one year, he felt he could rely on sources other than the sale of the Surrey lots. There was a strong likelihood that part of the Clearbrook property (in which he had an equity of $21,000) would be expropriated and through that and the sale of the balance, he could pay off the loan. Alternatively, he had discussed the matter with his father who had agreed to and could advance monies to pay off the bank.

On the whole of the evidence, I must come to the conclusion that the appellant has failed to satisfy me that his intention in acquiring the property was to secure a farm which he would occupy and operate with his family in the event that the Clearbrook property was expropriated. His evidence on the point is entirely uncorroborated. On the other hand, his intention as disclosed to Byrom was without doubt to buy the land for speculative purposes, to subdivide and develop it by installing facilities and to sell it off in lots or en bloc as soon as there was a suitable opportunity. His costs of development and his estimate of potential profits were carefully worked out and he gave assurances to the bank that he proposed to pay off the loan by such sales within one year.

Moreover, he was well aware of the potentialities of the purchase when it was made. In his official capacity as a

supervisor, he had acquired a full knowledge of land values in the whole of the Fraser Valley. He knew of the demand for building lots in the Surrey area where many houses were being built under the *National Housing Act*. He knew that a new road was likely to be built in the vicinity which would enhance the value of his property and facilitate its sale. The estimated profits which he anticipated by subdivision, development and sale, as shown by Exhibit 4, indicate quite clearly not only what his intentions were, but also that prior to his purchase he was fully aware that the property could be acquired at a bargain and that he would in all likelihood reap a substantial profit by selling it. As shown by the bank manager's third report dated June 16, 1955, the appellant was interested in an informal offer from Fraser Valley Lands Ltd. to purchase the whole property for $200,000; that was before the bank loan was made and prior to completion of the purchase.

In my opinion, the appellant acquired the property for speculative purposes. I think his main intention was to subdivide it into lots suitable for residences, install the necessary facilities and then sell the lots as soon as possible; but that he was always prepared to dispose of it in some other way, such as by sale en bloc. It is therefore similar in many respects to the case of *Day v. Minister of National Revenue*[1] in which I held that the profits received by the taxpayer from the purchase and sale of 129 acres of land were taxable as an adventure or concern in the nature of trade, notwithstanding the fact that there was only one venture and that the original intention of the taxpayer was to subdivide the property, develop it in the usual way and then sell off the lots; and that intention was frustrated by a lack of capital and accordingly the taxpayer sold the property en bloc. In that case I followed *McIntosh v. Minister of National Revenue*[2], a decision of the Supreme Court of Canada which upheld the judgment of Hyndman, D.J. in this Court[3]. In that case the Court unanimously agreed with Mr. Justice Hyndman's findings with reference to the appellant, that "Having acquired the said property there was no intention in his mind to retain it as an investment,

[1] [1958] Ex. C.R. 44. [2] [1958] S.C.R. 119.
[3] [1956] Ex. C.R. 127.

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but to dispose of the lots, if and when suitable prices could be obtained".

But even if I had accepted the evidence of the appellant in the present case that he had in mind the intention to acquire the property as a farm for his own use, it is abundantly clear that such was not his sole intention. At all relevant times there was at least an alternative, and probably the main, intention to dispose of the property as soon as possible, either by promoting a subdivision and selling lots or by sale en bloc. In such circumstances, the case falls clearly within the principles laid down by the Supreme Court of Canada in *Regal Heights Limited v. Minister of National Revenue*[1]. In that case Judson J., in delivering judgment for the majority of the Court, agreed with the opinion of Dumoulin J. at trial, that the primary aim of the partners in the acquisition of the properties was the establishment of a shopping centre, but that there was also an intention to sell at a profit if they were unable to carry out their primary aim. At p. 907, Judson J. said:

> Their venture was entirely speculative If it failed, the property was a valuable property, as is proved from the proceeds of the sales that they made. There is ample evidence to support the finding of the learned trial judge that this was an undertaking or venture in the nature of trade, a speculation in vacant land. These promoters were hopeful of putting the land to one use but that hope was not realized. They then sold at a substantial profit and that profit, in my opinion, is income and subject to taxation.

I must therefore hold that the appellant's profit from the sale of the real estate in the 1955 taxation year (and as computed in the re-assessments in question) was a profit derived from an adventure or concern in the nature of trade and was therefore income from a business within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act*.

Accordingly, the appeal will be dismissed with costs and the re-assessments made upon the appellant for each of these years will be affirmed.

Judgment accordingly.

[1] [1960] S.C.R. 902.