BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

1962
Nov. 28, 29
1963
Jul. 30

AND

ARTHUR MINDEN ..... RESPONDENT.

*Revenue—Income tax—Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 3, 4, 21(1) and 127(1)(e)—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e)—Capital gain or income—Purchase of agreements for sale and second mortgages at a discount and held to maturity—Investments—Husband and wife joint venture—Profits capital gain or income—Profits of wife in joint trading venture taxable to husband —Appeal allowed.*

[1] [1963] C.T.C. 176. [2] [1963] C.T.C. 311.

1963

MINISTER OF NATIONAL REVENUE v. ARTHUR MINDEN

Respondent, a solicitor and senior partner in a law firm doing a considerable amount of real estate work, acquired an interest in a number of short term mortgages and agreements for sale purchased from clients at a discount and held to maturity or until paid in full. These were acquired without advertisement or solicitation, the purchase money coming from either the law firm's surplus funds or being supplemented by small bank loans. They were acquired in most cases in bulk lots in relatively few transactions and all legal work and collection and accounting were carried out by respondent's firm.

Respondent's wife also, on his advice and with his assistance together with a loan from him of $13,000 00, she putting up $8,000 00 of her own money, acquired a number of short-term agreements for sale at a discount and held them to maturity, realizing in 1950 and 1951 profits therefrom.

The Minister of National Revenue assessed respondent for income tax on the profits realized from those transactions engaged in by him and also for 13/21's of the profits of his wife in her own transactions as having been derived from property transferred to her from him within the meaning of s. 21 of the Act. An appeal to the Tax Appeal Board was allowed and from that decision the Minister appealed to this Court.

*Held:* That the appeal be allowed.

2. That the profits were income from a business within the meaning of ss. 3 and 4 of the Act, since the agreements for sale and the mortgages were acquired for the purpose of realizing the profits that would result from the discounts.

3. That the multiplicity of the transactions, the second class nature of the mortgages and agreements for sale and the short period of time within which the discounts were realized were indicia of a profit making scheme.

4. That the high rate of discount and the short terms giving the prospect of immediate profits from the agreements and mortgages rather than the income receivable by way of interest on them were the motives impelling respondent to enter into the transactions.

5. That the profits of the wife whose transactions were initiated, guided and inspired by the respondent, who was the dominant person throughout, were in reality from a joint venture in the nature of trade and also income from a business in which both participated and so taxable.

6. That the profits were income and not capital gains.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Cattanach at Toronto.

*Donald Guthrie, Q.C.* and *M. Barkin* for appellant.

*W. D. Goodman* for respondent.

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

1963

MINISTER OF NATIONAL REVENUE v. ARTHUR MINDEN

CATTANACH J. now (July 30, 1963) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board, *subs. nom. No. 544 v. M.N.R.*[1] allowing the respondent's appeals against his income tax assessments for the taxation years 1950, 1951, 1952, 1953, 1954 and 1955.

The Minister in reassessing the respondent for the taxation years 1950 to 1955 inclusive, added to the amounts of taxable income respectively reported by him in income tax returns for the years in question the following sums:

| | |
|---|---|
| 1950 | $ 3,137.03 |
| 1951 | 11,266.99 |
| 1952 | 1,660.58 |
| 1953 | 3,105.33 |
| 1954 | 5,293.68 |
| 1955 | 4,373.53 |

The notices of reassessment dated December 26, 1956 for the 1950 and 1951 taxation years, and May 1, 1957 for the 1952, 1953, 1954 and 1955 taxation years, were predicated upon the assumption that $4,044.33 of the sum of $11,266.99, being the amount added to the respondent's taxable income for the year 1951 and the amounts set forth above for the years 1952 to 1955 represented the total of the difference between amounts advanced by the respondent to purchase existing mortgages and agreements for sale and the amounts received by the respondent on the maturity of the said mortgages and agreements for sale.

The amount of $3,137.03 added to the respondent's taxable income for the year 1950 and $7,226.66 of the sum of $11,266.99 added to the respondent's income for the year 1951, were so added as representing the total of amounts of income from property which was transferred by the respondent to his spouse, Beatrice Minden.

After compliance with the statutory requirements regarding notice of objection to the assessments, the respondent appealed against them to the Income Tax Appeal Board. The appeals were heard together and allowed, the Income Tax Appeal Board being under the impression it was bound to do so by reason of the judgment of Cameron J. in *Cohen v. Minister of National Revenue*.[2] It is from this decision that the present appeal is taken.

[1] (1958) 20 Tax A B C. 29. [2] [1957] Ex. C.R. 236.

1963

MINISTER OF NATIONAL REVENUE v. ARTHUR MINDEN

Cattanach J.

In *Minister of National Revenue v. Spencer*,[1] the President of this Court expressed the opinion that it was erroneous to regard the Cohen case as laying down a pattern of principles of general application in cases when a person had purchased mortgages at a discount or acquired them with a bonus and realized profits from them at maturity and he reiterated the well established principle that in determining whether the profits realized were enhancements of the value of investments or gains made in the operation of a business in a scheme of profit-making and, therefore, income within the meaning of sections 3 and 4 of the *Income Tax Act* is a question of fact and its determination must depend on the facts and circumstances of the case and the true nature of the transactions from which the profits were realized.

It therefore follows that the decision in the present case must be made according to its own facts and surrounding circumstances so that the true nature of the transactions from which the respondent realized the profits which the Minister included in the assessments under review, may be determined.

The issues underlying the present appeal are two in number. The first and principal issue is the now familiar one, whether the profits realized by the respondent from the transactions into which he had entered were capital accretions from investments as claimed by him, and, therefore, not subject to income tax on profits from a business or an adventure in the nature of trade, as found by the Minister, and, therefore, taxable income within the meaning of sections 3 and 4 and section 127(1)(*e*) of the *Income Tax Act*, S. of C. 1948, c. 52 as amended, or sections 3 and 4 and section 139(1)(*e*) of the *Income Tax Act*, R.S.C. 1952, c. 148.

The second and secondary issue is whether the amounts of $3,137.03 and $7,226.66, which were added to the respondent's income by the Minister in the taxation years 1950 and 1951 respectively, were income from a business or adventure or concern in the nature of trade within the meaning of the before-mentioned provisions of the *Income Tax Act* in the hands of the respondent's spouse, Beatrice Minden, and if found to be so, whether or not such amounts are deemed to be income of the respondent by virtue of

[1] [1961] C.T.C. 109.

1963

MINISTER OF NATIONAL REVENUE v. ARTHUR MINDEN

Cattanach J.

section 21(1) of the Act, as arising from property transferred by the respondent to his spouse or property substituted therefor.

The facts in the present appeal are not in dispute, but rather the dispute is upon the proper inferences to be drawn therefrom. I, therefore, proceed with a review of the facts.

The respondent is a barrister and solicitor practising in the City of Toronto from 1935 to date and the senior partner in the law firm of Minden, Pivnick and Gross (hereinafter referred to as the law firm). The law firm had a general commercial practice including conveyancing in connection with real estate development by clients and in connection with mortgages. In the course of attending to legal work of this nature, and on other occasions, the respondent and his associates in the law firm and other associates encountered holders of agreements for sale and mortgages, almost exclusively second mortgages, who were desirous of selling such securities at a discount.

The transactions in which the respondent was concerned may be divided into six general categories which for convenience I shall refer to as (1) the Zingrone mortgages, (2) the Pears' mortgages, (3) the Syndicate or group mortgages, (4) the General mortgages, being those owned exclusively by the respondent, (5) the Seaton agreements for sale and (6) the Beatrice Minden transaction. General summaries of the facts relating to the transactions in the six categories mentioned, were filed in evidence by counsel for the respondent, Exhibit "D" with respect to the Zingrone mortgages, Exhibit "E" with respect to the Pears' mortgages, Exhibit "F" with respect to the Syndicate mortgages, Exhibit "G" with respect to mortgages owned 100 percent by Mr. Minden, Exhibit "H" with respect to agreements for sale purchased from a person named Seaton and Exhibit "A" with respect to the transaction involving Beatrice Minden.

I now summarize the facts and circumstances surrounding the purchase of the Zingrone mortgages.

On March 3, 1952 Mr. Minden as trustee for his law partners, Mr. Pivnick and Mr. Gross and on his own behalf entered into an agreement with Joseph F. Zingrone for the purchase of twenty-five second mortgages owned by him. Appended to the foregoing agreement and forming a part

1963

MINISTER OF NATIONAL REVENUE v. ARTHUR MINDEN

Cattanach J.

thereof was a schedule listing twenty-five mortgages having the face value of $48,893.58. The purchase price paid for the mortgages was $36,120.80 so that the mortgages were acquired at about 25 percent of their face value. Mr. Zingrone was a builder and client of the law firm and who was considered by Mr. Minden to be a better than average builder of very good repute. The mortgages held by Mr. Zingrone were encumbered by a loan in the amount of $15,197.61 which together the interest due thereon was assumed by Mr. Minden and his law partners as part of the purchase price and a balance of $20,922.57 in cash was paid to Mr. Zingrone. The money for which the mortgages owned by Mr. Zingrone were encumbered as security therefor, had been loaned to him by another client of the law firm on their recommendation.

The members of the law firm found it necessary to supplement their own resources by a bank loan of between $8,000 and $9,000. Both the loan assumed as part of the purchase price and the bank loan were paid off within a year from the proceeds of the acquired mortgages by way of principal and interest. Mr. Zingrone disposed of the mortgages to relieve himself of the loan on them and to acquire funds for further building ventures.

The mortgages in question were second mortgages taken back by Mr. Zingrone on houses he had built and sold. Most of the houses were in the Western area in Metropolitan Toronto and of modest quality, all of which had been sold subject to first mortgages.

Exhibit "D" was filed in evidence by counsel for the respondent and was a schedule prepared by the officers of the Department of National Revenue from the respondent's records and which schedule was acknowledged by the respondent as being correct. The information therein contained is more extensive than that contained in the Schedule to the agreement dated March 3, 1952 between Joseph E. Zingrone and Arthur Minden which only showed the face value, that is the amounts remaining unpaid on the twenty-five mortgages at the date of their purchase.

Exhibit "D" lists twenty-six mortgages, that is one more than listed in the Schedule mentioned above. The additional mortgage was acquired from Mr. Zingrone by the purchasers subsequent to the agreement between them. Each of the

twenty-five mortgages were acquired by Zingrone in 1951 excepting the additional one listed in Exhibit "D" which was acquired by him in 1952. The total face value of the twenty-six mortgages is $50,332.98. The total amount paid therefor by the respondent and his partners was $38,369.58, so that the total discount thereon was $11,963 of which the respondent's share was $4,787.36.

All of the twenty-six mortgages were second mortgages, the amounts of the face value of which ranged from a low of $270 to a high of $6,325. Six of the mortgages had but one year to run to maturity, seven had two years to run, four had three years to run, seven more had four years to run and two matured in five years.

Two of the mortgages bore interest at the rate of 4½ percent, twenty-two at 5 percent, one at 5½ percent and one at 6 percent. The respondent's interest in the twenty-six Zingrone mortgages was 40 percent and that of his partners, Pivnick and Gross, was 30 percent each.

The next transaction to be considered is that entered into with Allen W. Pears by the respondent, again in association with his legal partners, Pivnick and Gross and with the same distribution of interest, namely, 40 per cent to the respondent and 30 per cent to each of his partners, under circumstances closely comparable to the acquisition of the Zingrone mortgages.

In the month of December 1953 the respondent, together with his law partners, acquired seven mortgages from Allen W. Pears.

The particulars of the Pears mortgage transaction are set forth in Exhibit "E" which was filed in evidence. Exhibit "E" lists the seven mortgages acquired as having a total face value of $11,760.43, a total purchase price of $9,245 and a total amount of the discount of $2,515.43 of which the respondent's share was $1,006.17.

All seven of the mortgages acquired from Pears were second mortgages, three maturing in 1954 (the year after acquisition), three maturing in 1956, that is within two years of acquisition, and one maturing in 1957, that is within three years.

The availability of the Pears' mortgages was brought to the attention of the respondent and his legal partners by a realtor for whom the law firm had done legal work. Pears

1963

MINISTER OF NATIONAL REVENUE v. ARTHUR MINDEN

Cattanach J.

was an auditor associated with the realtor. The respondent did not conduct an inspection of the premises which were security for the mortgages and neither was he certain if either of his partners did so. However, the respondent did know that the premises were located on a subdivision in the east end of Toronto with which the realtor had some connection.

Exhibit "E" does not disclose the rate of interest which the mortgages bore, but this lack was supplemented by evidence of the respondent who testified they all bore interest at the rate of 6 percent, to the best of his recollection.

The funds with which the Pears' mortgages were purchased came from a general account maintained by the respondent's law firm and may also have been supplemented by a small bank loan, although the respondent was not certain that a loan was required to complete the transaction.

Again all of the seven Pears' mortgages were held to maturity and were paid on maturity.

The next transaction to be considered is that which for the purpose of convenience I shall call the Syndicate mortgages, the particulars of which are listed in Exhibit "F" and sets forth, by my count, 123 mortgages acquired between 1949 and 1956 which period extends before and after the taxation years under review.

The total face value of the 123 mortgages listed in Exhibit "F" was $336,234.33 and the total amount paid therefor was $253,839.56, the total discount being $82,403.77.

The members of the group which comprised the mortgage syndicate were Leon Pape and his brother Benjamin as one member, Alexander Cole, Zola Morgan and the respondent. All the members were close friends. Pape was a chartered accountant and Morgan and Cole were associated together in a rug business.

There was no written agreement among the four initial members, but the four made equal contributions and shared the profits equally. A separate bank account was opened on behalf of the Syndicate in which all receipts were deposited.

At the outset, in May of 1949, each member contributed $4,000, a total of $16,000. As the bank account which was established grew from the proceeds of the mortgages already owned, that money and further monies contributed by the members were used to acquire further mortgages.

When the funds in the bank account were insufficient to purchase an attractive group of mortgages which was available for purchase, further levies were made upon the members. Between May 1949 and July 1952 six such levies were made upon the four members each of whom contributed $28,000 or a total amount of $112,000. The respondent held the monies as trustee for the group and Mr. Pape, a chartered accountant, set up a system of accounting within the law firm.

Since an amount of $112,000 was contributed in equal shares by the four members of the Syndicate and the total face value of the mortgages acquired by them was $253,-839.56, it follows that the difference of $141,839.56 must have come from the proceeds from the mortgages by way of principal and interest received by the group and was used by them to acquire the still further mortgages comprising their portfolio.

The mortgages were mostly second mortgages which were offered to the Syndicate in a series of blocks of mortgages at substantial discounts. They all bore interest ranging from 5 to 6½ percent, but the greater number bore interest at either 5 or 6 percent.

The mortgages were acquired in the same pattern as those in the transactions previously mentioned. There was no advertisement or solicitation, but they were acquired through clients of the legal firm or persons having some relationship with the law firm.

The respondent explained the Syndicate's purposes in acquiring these mortgages as being a good return upon the outlay of a small amount of money which he qualified forthwith by deleting the adjective "small".

The composition of the membership of the Syndicate changed from the original members. At the end of 1954 the Pape brothers disposed of their interest to the remaining three members, Mr. Cole, Mr. Morgan and the respondent in equal shares. Mr. Cole retired from the group in 1957 and his share was purchased by the respondent leaving Mr. Morgan and the respondent as the only persons interested in the mortgages. A short time later the respondent and Mr. Morgan agreed upon a division between them of the mortgages then held by them.

It was the intention of the group to hold all mortgages until maturity thereby realizing the amount of the discount

1963

MINISTER OF NATIONAL REVENUE v. ARTHUR MINDEN

Cattanach J.

as well as the interest payable. However, in June 1954 some members of the group, who were not identified in evidence, wished to withdraw some monies for their own purposes, so ten mortgages having a face value of $28,983.71 were sold to S. Rosenthal, a client of the law firm for $24,793.71. No further mortgages were disposed of by the Syndicate and, excepting the ten mortgages sold, all were held to maturity.

By reason of the withdrawal of members of the Syndicate the respondent's interest in the mortgages changed from 25 percent at the outset in 1949 to 33⅓ percent on the retirement of the Pape brothers at the end of 1954, then to 50 percent on the retirement of Mr. Cole in 1957 and 100 percent of those purchased by the respondent from Mr. Cole and to an ultimate 100 percent on the division of the mortgages held by the respondent and Mr. Morgan between them.

Apart from the foregoing syndicate mortgages a portion of which the respondent eventually came to own in whole, there was a still further number of mortgages which the respondent owned to the extent of 100 percent which I have called the "general mortgages", again for the purpose of convenience.

The particulars of the "general mortgages" in question were outlined in Exhibit "G". There were five mortgages in all, two of which were acquired by the respondent in 1949 with four years to run to maturity, two in 1951 maturing in one year and two years respectively and one maturing in 1956, but the date of acquisition to this last mentioned mortgage by the respondent was not given. The face value of the mortgages ranged from a low of $662.10 to a high of $11,250 with the face value of the three between averaging slightly over $4,000.

The total face value of these five mortgages was $24,987.10 all of which were acquired at a discount for the price of $22,350, the total amount of discount which the respondent stood to realize and did realize being $2,637.10. Again these mortgages were acquired from clients of the respondent or the law firm without advertisement or solicitation.

The next category of transaction to be considered is that entered into by the respondent with Benjamin Seaton

which is what I have referred to as the Seaton agreements for sale.

A general summary of the facts relating to their purchase was filed in evidence as Exhibit "H". It showed that in a single transaction in 1950 the respondent acquired from Benjamin Seaton thirty-two agreements for sale, the sale price of which had averaged about $1,500 per lot when originally sold by Seaton. In the interval between the original sale by Seaton to the purchasers and the acquisition of the agreements by the respondent, payments were made by the purchasers to Seaton so that at the time of acquisition by the respondent the total balance of $20,-465.71 was outstanding. The consideration paid by the respondent to Seaton was $17,000 so that the total discount thereon was $3,465.71.

The respondent had acted in his professional capacity for Seaton in placing a registered plan of subdivision upon an area in the Township of North York. It was from the sale of lots in this subdivision that the agreements for sale arose. The area was of a virgin nature not then fully developed. Seaton, in addition to being a client of the respondent, was also a friend and being in need of money had borrowed slightly in excess of $17,000, without interest, from the respondent. Seaton was anxious to discharge this loan and the most convenient way for him to do so was to transfer the agreements for sale to the respondent at the discount mentioned which the respondent was willing to accept. The agreements were held to maturity and collected by the respondent. No specific information was given as to the length of time the agreements had to run to maturity nor the interest rate on the agreements, although the respondent did say they were interest bearing.

The last category of transactions to be considered, which gives rise to the issues now in dispute, is one involving Beatrice Minden, the wife of the respondent.

In the three year period between September 1949 and September 1952, Mrs. Minden purchased a total of 124 agreements for sale in eleven transactions spread over the period.

Exhibit "A" was filed in evidence by counsel for the respondent which gave particulars of these agreements, that is, the date of each transaction, the number of agreements involved in it, the name of the vendor, the face value of

1963

MINISTER OF NATIONAL REVENUE v. ARTHUR MINDEN

Cattanach J.

the agreements at the date of purchase, the amount of the discount at which they were purchased and the cost of the agreements to Mrs. Minden.

The total face value of the agreements at the time of their purchase was $103,393, the total amount of the discount was $21,971.20 and the total cost to Mrs. Minden, the purchaser, was $81,421.80. Mrs. Minden knew very little about the transactions. She entered into them at her husband's suggestion and left everything to him.

There were three vendors involved in the transactions, namely, R. H. Legget, Granite Securities Ltd. and Mrs. Mary E. Welch. Mr. Legget was the sole owner of all shares in Granite Securities Ltd. and the son-in-law of Mrs. Welch. Mr. Legget was a client of the respondent's law firm and the only person with whom the respondent dealt in these transactions. The respondent also represented his wife in the transactions.

The lots covered by the agreements for sale were remnants of old subdivisions which had not been sold at the time of the original promotion and were situated in the vicinity of the DeHaviland Airport in Toronto. Most of the lots were in subdivisions without water mains and all of them were vacant.

The lots had been sold under agreements for sale at small purchase prices ranging between $800 and $1,200 per lot with the average price being $1,000. There was usually a small down payment of about $100 with the balance payable in small monthly instalments usually about $20 per month. A typical agreement for sale, from which the foregoing information was gathered, was filed in evidence as Exhibit "B". The agreements normally had two or three years to run until their maturity. They were all interest bearing, the greater number at 5 percent though the respondent thought the later agreements might have carried interest at the rate of 6 percent.

The lots were vacant and had been sold to persons who wished to own land upon which to build a home in the future. The houses in the area were modest. The risk factor was the small down payment and the unimproved nature of the lots, but the respondent considered the purchases to be reasonably reliable. He, therefore, recommended the purchases to his wife since she had money available. An amount of $21,000 was required by the respondent's wife

1963

MINISTER OF NATIONAL REVENUE v. ARTHUR MINDEN

Cattanach J.

to complete the purchase of the agreements for sale in 1949. Apparently the respondent's wife, at that time, had $8,000 available in Government bonds and the respondent advanced her the balance of $13,000. This information was confirmed by evidence of an officer of the Department of National Revenue as a result of investigations conducted by him. It was not disputed and I accordingly accept it as correct.

The respondent advanced Mrs. Minden monies on three occasions, (1) $12,500 on October 31, 1949, $5,700 on March 2, 1950, and $2,000 on June 20, 1950, a total of $20,200. Mrs. Minden issued two cheques payable to her husband, the respondent, the first on October 30, 1950 in the amount of $7,200 and the second on March 2, 1951 in the amount of $13,000, a total of $20,200. The first advance of $12,500 related to the purchase by Beatrice Minden of the agreements for sale and the respondent stated that the two lesser amounts were advanced to his wife for a purpose bearing no relation to the purchase of the agreements for sale. I should add that no interest was charged by the respondent on the advances made to his wife.

In addition to being a housewife and mother of three children, the oldest of which was 13 years of age in 1950, Mrs. Minden also had a business interest. She owned a golf driving range which was operated under the supervision of a manager employed by her. Prior to her marriage she had worked for various companies and it was from her savings before her marriage to the respondent that constituted the $8,000 which she used to purchase the agreements for sale in question which amount was supplemented by an advance of $13,000 to her by the respondent. The total advances by the respondent to his wife as outlined above were returned to him by March 1951. The notices of reassessment for the respondent's taxation years 1950 and 1951 were dated December 26, 1956.

There is no doubt that the respondent was his wife's counsellor and advisor in the transactions in question as well as her agent. She gave the respondent a free hand to act for her.

There are certain factors common to all six categories of transactions enumerated above.

In each category of transactions the law firm handled all legal work in connection with the acquisition of the mort-

1963

MINISTER OF NATIONAL REVENUE v. ARTHUR MINDEN

Cattanach J.

gages and agreements for sale and the collection of principal and interest thereon. For these services the law firm charged legal fees in accordance with the applicable tariff of fees, with the exception of the category of general mortgages being those owned exclusively by the respondent.

In every instance where mortgages and agreements for sale were acquired, they were so acquired because of a relationship of the vendor thereof with the law firm usually being the relationship of client or associate of a client.

Because of the manner in which the securities were acquired by the respondent and his associates, it follows that they were acquired without solicitation or advertisement and at no time did the respondent, or the respondent and his associates, hold themselves out publicly as being in the market for securities of the type and nature of those acquired.

None of the premises which were security for the mortgages or agreements for sale were inspected by the respondent or by anyone on his behalf, but he did have a general knowledge of the area in which they were located and their nature. The respondent relied upon the various vendors of whom he had intimate knowledge because of his relationship with them.

In explaining these transactions the respondent stated that he never advertised he was willing to buy second mortgages or agreements for sale, and made the general statement that the securities which were acquired would be dependent, in each instance, on some particular situation which prevailed in the office of the law firm. The respondent explained such statement as meaning that the securities were acquired from clients of the law firm or from persons who had some association with the firm. He also stated that he did not purchase all mortgages or agreements for sale which were offered, but rather he chose those he considered to be more desirable placing reliance on the person with whom he was dealing rather than upon the real estate which was the security.

The second mortgages which were acquired were admittedly riskier than first mortgages would have been, but they were all held to maturity (with the exception of ten Syndicate mortgages mentioned above) and were all paid on due date. In testifying, the respondent explained that first

1963

MINISTER OF NATIONAL REVENUE v. ARTHUR MINDEN

Cattanach J.

mortgages were not acquired because, while a better security, first mortgages ran for a longer time and accordingly he and his associates never regarded themselves as being in a position to acquire first mortgages thereby tying up their funds for a protracted time. On the contrary, the respondent felt that he and his associates were in a position as he put it, "to take a little more risk and expect a little more yield," and I might add, realize that greater yield in a much shorter time.

The prevailing rates of interest on prime first mortgages on Toronto residential properties where the loan did not exceed 60 percent of the valuation of the property were as follows:—1949 to 1953 5 percent, 1951 5½ percent to 6 percent, 1952 to 1953 6 percent and 1954 and later years 6½ percent.

On the facts as above recited, I have no hesitation in finding that the profits which the respondent realized from his participation in the acquisition of the Zingrone mortgages, the Pears' mortgages, the Syndicate mortgages, the Seaton agreements for sale, and from those mortgages which he owned himself exclusively were taxable income. Neither do I have any hesitation in similarily finding that the profits which Mrs. Minden realized from her agreements for sale were also taxable income.

It was not necessary for the respondent to set up an organization for the conduct of the mortgages and agreements for sale transactions. He was already well equipped for that purpose. The law office looked after the legal work necessary in the transactions as well as the collection of, and accounting for payments under the mortgages and agreements as they fell due just as was done for clients for the firm.

Cases such as *Rutledge v. C.I.R.*[1] and *Lindsay et al. v. C.I.R.*[2] establish that it is not essential to a transaction in the nature of trade that an organization should have been set up to carry it into effect. But, obviously, the fact there was such an organization goes some way to the conclusion that such an adventure was contemplated. As I have already said, the respondent did not have to set up an organization because it was in existence. All that was needed to be done was to utilize it. Further, it was from

[1] (1929) 14 T.C. 490.

[2] (1932) 18 T.C. 43.

1963

MINISTER OF NATIONAL REVENUE v. ARTHUR MINDEN

Cattanach J.

the existence of this organization that the opportunity to acquire mortgages and agreements for sale arose. The transactions into which the respondent entered were closely related to his legal work and they arose out of his connection with clients or associates in every instance.

The fact that the respondent did not seek out the mortgages and agreements for sale or advertise that he was in the market for them, does not make the respondent an investor in them. In fact he did not have to do so because they came to him and he was in a position to select those he considered most advantageous.

The respondent held his interest in all mortgages and agreements which he had acquired until their maturity or until paid, except ten. These ten were part of the mortgages held by the Syndicate and were sold to a client of the respondent at a discount to accommodate those members of the group who wanted an immediate return.

Therefore, I conclude the mortgages and agreements were acquired for the purpose of realizing the profits that would result from the discounts within the short time the mortgages had to run to their maturity. They were not the kind of securities a prudent investor would consider. Their attraction to the respondent was the high rate of discount and short terms giving the prospect of immediate profit therefrom, rather than the income receivable by way of interest on them. I base these conclusions on the evidence of the respondent when he stated he and his associates were not interested in first mortgages because of the longer terms thereof, but were prepared "to take a little more risk and expect a little more yield".

The multiplicity of the transactions into which the respondent entered does not by itself determine that they were operations of business in carrying out a scheme of profit-making, but when considered in the light of the surrounding circumstances it is a very strong factor. In the present case the mortgages or agreements which were acquired by the respondent on his own account and in association with others were numerous. Excluding those agreements for sale which Mrs. Minden purchased, I compute the number of mortgages and agreements in which the respondent held an interest as 193. However, there were not 193 separate transactions since substantial numbers of the securities were acquired in a block in one transaction.

1963

MINISTER OF NATIONAL REVENUE v. ARTHUR MINDEN

Cattanach J.

The 26 Zingrone mortgages were one purchase as were the seven Pears' mortgages and the 32 Seaton agreements. However, the 123 Syndicate mortgages were acquired over a period of time and there were a series of transactions in each of which a block of mortgages was acquired. The five mortages held by the respondent on his own account were acquired in five separate transactions.

In my opinion the multiplicity of transactions, in the circumstances of the present case, is a very strong indication that they were not entered for investment purposes.

It may also be fairly considered that the fact the respondent entered into many of the transactions with associates, indicates that they were joint ventures for profit-making rather than joint investments. I refer, of course, to those transactions entered into by the respondent with his legal partners and particularly those transactions which have been described herein as the Syndicate mortgages.

The circumstance that in the purchase of the Zingrone and Pears' mortgages the respondent and his legal partners required small bank loans to complete the transactions, which loans were liquidated within a short time from the proceeds of the mortgages as they fell due, as was the encumbrance on the Zingrone mortgages, and the circumstance that the proceeds from the Syndicate mortgages, to the extent of $141,839.56 was used to acquire further mortgages, indicates to me that the policy of the respondent and his associates was to embark upon a course of conduct in purchasing mortgages and agreements for sale at a discount that were risky and of a second class nature with only a short time to run to their maturity with a view to realizing profits on the discounts. It is reasonable to infer from such course of conduct that the true nature thereof was the operation of a scheme of profit-making rather than that of an investment.

In my view the cumulative effect of the circumstances under which all transactions were entered into by the respondent negative any *indicia* that normally characterize an investment, but rather the multiplicity of the transactions, the second class nature of the mortgages and agreements for sale and the short period within which the discounts were realized are indications that the transactions in question were business transactions. There is support for

1963

MINISTER OF NATIONAL REVENUE v. ARTHUR MINDEN

Cattanach J.

this view in *Noak v. Minister of National Revenue*[1] in which case Kerwin J. as he then was, said at p. 137:

> The number of transactions entered into by the appellant and, in some cases, the proximity of the purchase to the sale of the property indicates that she was carrying on a business and not merely realizing or changing investments.

While this was a decision on whether the appellant in that case was carrying on a "business" within the meaning of the term used in the *Excess Profits Tax Act*, S. of C. 1940 c. 32 nevertheless the statement is applicable to the facts of the present case.

I am also of the opinion, that even on the facts, it is impossible to distinguish those of this case from those in *Scott v. Minister of National Revenue*[2] in which the decision of the President of this Court was unanimously confirmed by the Supreme Court of Canada, or from the facts in *Minister of National Revenue v. MacInnes*[3] in which case the Supreme Court of Canada in an unanimous decision reversed the decision of the Exchequer Court, and wherein the Supreme Court of Canada decided that the appellant and respondent in the respective cases were in the highly speculative business of purchasing obligations of this nature at a discount and holding them to maturity in order to realize the maximum profit out of the transactions.

I, therefore, find that the discounts realized were taxable income since they were profits or gains from a trade or business within the meaning of sections 3 and 4 of the *Income Tax Act*, S. of C. 1948, c. 52 or sections 3 and 4 of the *Income Tax Act*, R.S.C. 1952, c. 148.

The Minister was, therefore, right in assessing the respondent as he did for the taxation years 1952 to 1955 inclusive and in adding an amount of $4,044.33 to the respondent's taxable income for the taxation year 1951.

There remains to be considered whether the amounts of $3,137.03 and $7,226.66 were properly added by the Minister to the respondent's taxable income for the taxation years 1950 and 1951 respectively which amounts were realized as a consequence of what I have described as the Beatrice Minden transactions.

[1] [1953] 2 S.C.R. 136. [2] [1963] C.T.C. 176.
[3] [1963] C.T.C. 311.

The respondent, as his wife's counsellor and advisor as well as her agent, recommended that she should purchase the agreements for sale, previously described, at a discount. At the outset an amount of $21,000 was required to effect the purchase of the agreements of which amount Mrs. Minden contributed $8,000 of her own money and the balance of $13,000 was advanced to her by the respondent.

The Minister in assessing the respondent for income tax for the taxation years 1950 and 1951 attributed the profit realized from the discounts on the agreements for sale received in these respective years, the proportions of 8/21's to Mrs. Minden and 13/21's to the respondent with the mathematical result that the amounts of $3,137.03 and $7,226.66 represented the proportion of the profits realized and which were attributed to the respondent by the Minister in the taxation years 1950 and 1951 respectively and were so added by him to the respondent's taxable income for those years.

The proportions attributed to Mrs. Minden for the years 1950 and 1951 and which were added to her income for those years (as well as profits for subsequent years) were the subject of an appeal to this Court and the decision of the President is reported in *Minister of National Revenue v. Beatrice Minden*[1] wherein he held that Arthur Minden, as agent, engaged his wife with the responsibility for a scheme of profit-making and that on the evidence, the profits realized by her were profits from a business within the meaning of sections 3 and 4 of the *Income Tax Act* applicable or in the alternative were profits from an adventure or adventures in the nature of trade and, therefore, profits from a business within the ambit of the definition of "business" as contained in the above Acts.

The transactions which give rise to the present appeal by the respondent herein as to the amounts of $3,137.03 and $7,226.66 for the taxation years 1950 and 1951 respectively, were the identical transactions under consideration by the President in the Beatrice Minden case *(supra)* and I am in complete concurrence with his decision and reasons therefor. It follows, therefore, that the sole question remaining for determination is whether the foregoing amounts are taxable income in the hands of the respondent in the years in question.

[1] [1962] C.T.C. 79.

1963

MINISTER OF NATIONAL REVENUE v. ARTHUR MINDEN

Cattanach J.

The respondent, in giving testimony, stated that he advanced his spouse the amount needed to initially complete the transactions by way of a loan and that subsequently in March 1951 the loan was repaid. His auditor testified that entries in the respondent's books indicated that sums of money in varying amounts had been deposited to Mrs. Minden's account and further entries indicated that monies in the same total were credited from Mrs. Minden to the respondent on divers dates.

It is significant that the respondent did not charge interest on the advances made to his wife, no promissory note was in existence, no particulars were given as to the terms of the alleged loan and no security was given therefor. In short, none of the normal written and tangible indications of a loan were present. These unusual circumstances might be normal in a transaction between a husband and wife, but because the husband in this case is a lawyer of ability and familiar with the provisions of the *Income Tax Act*, particularly section 21 thereof, the purpose of which is to prevent the avoidance of tax by transfer of property between persons who are in the close relationship of husband and wife, it seems incongruous to me that he did not take extraordinary caution to create and retain these normal evidences of a loan.

The material time at which the intention of the respondent must be determined is at the time he made the advance to his wife and it is well established that a taxpayer's statement of what his intention was in entering upon a transaction, made subsequently to its date, should be carefully scrutinized.

There are three possible categories into which the advance by the respondent to his spouse might fall, (1) a loan, (2) a gift and (3) a joint venture of the respondent and his wife in the nature of trade, carried on in the name of the wife, in the proportion of their respective contributions thereto.

The respondent, by his *ex post facto* declaration maintained the advance to his wife was a loan, which while possible, does not appear to me to have been probable bearing in mind the complete lack of other extrinsic evidence which normally accompanies a loan.

The presumption of gift is rebutted by the fact that the monies advanced to his wife were returned to him and the

1963

MINISTER OF NATIONAL REVENUE v. ARTHUR MINDEN

Cattanach J.

circumstance that the monies were so returned, leads me to the conclusion that this was the return of a capital asset with which a business or adventure in the nature of trade was begun. I am confirmed in this conclusion by the circumstance that the total cost of the agreements of sale, as shown by Exhibit "A", was $81,421.80. Mrs. Minden did not have that amount of money available when the transaction was entered into. It follows, therefore, that as the proceeds of the agreements of sale were received they were used to complete the transaction and as there was no further need of the advance made by the respondent, it was returned to him.

At the time the advance was made, its nature was susceptible of the three possible interpretations I have enumerated and it follows that, at that time, there should have been a clear and unequivocal expression by the respondent of his intention supported by the usual indications thereof and the respondent should not be left in the enviable position of being able to select, at a later time, the interpretation most advantageous to his own interest.

In short, having heard the respondent's testimony that the advance to his wife was by way of a loan, and although such was possible, I am not convinced that such was probable or that it was the true nature and substance of the transaction.

On the contrary, it is my view, on the respondent's entire course of conduct, as the dominant person throughout and initiator of the transactions in which his wife participated, that the transaction between them was in reality a joint venture in the nature of trade.

In the alternative it might be argued that the amount of $13,000 which the respondent transferred to his wife was a transfer of property within the meaning of section 21(1) of the *Income Tax Act* and that any income derived by Mrs. Minden from that property or property substituted therefor could properly be deemed to be income of the respondent within the meaning of the aforesaid section.

It follows that, under the circumstances, the Minister was right in assessing the respondent as he did with the

1963

MINISTER OF NATIONAL REVENUE v. ARTHUR MINDEN

Cattanach J.

result that the appeal herein must be allowed and the Minister's assessments confirmed.

The Minister is also entitled to costs to be taxed in the usual way.

*Judgment accordingly.*