BETWEEN:

SAMUEL FABI .....APPELLANT;

AND

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

1962
Oct. 17
1963
Aug. 6

Revenue—Income—Income tax—Income or capital gain—Business or adventure in nature of trade—Subdivision and sale of land purchased several years previously allegedly for its supply of sand and gravel—Income Tax Act, R.S.C. 1952, c. 148, s. 139(1)(e)—Statutes of Quebec, s. 1415, c. 75, Geo. VI, 1950—Quebec Civil Code, Art. 910.

Appellant was engaged in the general contracting business in the City of Sherbrooke, P.Q. and its vicinity through his management and control of two companies, Fabi et Fils Ltée and Les Produits de Ciment de Sherbrooke Limitée. From 1933 until about 1946 he purchased his supplies of sand and gravel from one William Brault and after his death, from his estate, the sand and gravel being supplied from pits on lots 4 and 5, Township of Orford.

In 1946, 1947 and 1948, the appellant purchased the whole of lots 4 and 5, containing 200 acres, in 3 parcels by 3 separate transactions, ostensibly to secure a source of supply of sand and gravel for his companies.

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Appellant's mother joined him in these transactions apparently only because he did not have enough money to complete them alone. In 1949, the supply of sand and gravel from these lands became exhausted and, after attempting to sell the said lands without success, appellant subdivided them and sold the lots during the period 1952 to 1958.

In 1948, the appellant had purchased part of lot 899-80 known as the Vincent Street lots adjoining said lots 4 and 5, which he subdivided in 1950 into 13 lots, which were sold by 1955. In addition, there was evidence that, during the period from 1944 to 1958, the appellant had engaged in many real estate transactions, consisting of purchases, sales and borrowings and that his wife had entered into similar transactions with monies partly furnished by the appellant.

Held: That the appellant's purchase of said lots 4 and 5 in 3 instalments spread over 3 years negatives his claim that in order to secure the supply of sand and gravel he had to purchase the whole of the two lots.

2. That the evidence that William Brault, before he purchased said lots 4 and 5 in 1916, had soundings taken which indicated the gravel bank should contain at least 1,000,000 cu. yds. of gravel; that at least 1,000,000 cu. yds of gravel had been removed from the bank by 1946; that the appellant made no effort to verify or measure the quantity of gravel remaining in the gravel bank before he purchased said lots 4 and 5; and that there was little gravel on the 67 acres parcel of lot 4 purchased by the appellant in 1946, adjoining the Sherbrooke city limits, all would indicate that the appellant was aware of the virtual depletion of the supply of gravel on lots 4 and 5 and that he was also aware of the adaptability of these lands for subdivision purposes. Furthermore, the unconvincing reason given by Alfred Brault, the executor of the William Brault estate, for deciding to get out of the gravel business and offering to sell lots 4 and 5 to the appellant, i.e. that as executor of the said estate he would be compelled by law to manage and operate the said gravel business without compensation when in fact he could have declined the office of executor, should have put the appellant on his guard if he attributed much importance to the quantity of gravel that remained.

3. That at about the time the appellant purchased said lots 4 and 5, he also acquired an adjoining parcel of land known as the Vincent Street lots for the purpose of subdivision and sale; this is conclusive evidence that the appellant, from 1955 to 1958, and for many years prior thereto, was engaged in the business of buying, selling and speculating in real estate within the meaning of s. 139(1)(*e*) of the *Income Tax Act*.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Kearney at Montreal.

Albert L. Bissonnette for appellant.

Paul Boivin, Q.C. and *R. Boudreau* for respondent.

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

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KEARNEY J. now (August 6, 1963) delivered the following judgment:

The present case concerns an appeal from assessments to tax whereby the Minister added certain amounts (later mentioned) to the appellant's taxable income for each of the years 1955 to 1958 inclusive, on the grounds that the said amounts constituted profits which were realized from real estate transactions carried out by the appellant as a business or adventure in the nature of trade.

The appellant contends that when his mother and himself acquired the real estate in question, which consisted of about 200 acres, known as lots Nos. 4 and 5, in the Township of Orford, near the City of Sherbrooke, Province of Quebec, it was not with the intention of resale but for retention as a fixed asset, particularly for the purpose of selling gravel and sand from pits or banks which were located thereon. The said pits having unexpectedly petered out, after vainly attempting to sell the property en bloc the appellant subdivided parts of it and sold the resulting lots piecemeal in order to realize on a capital asset, but at no time did his real estate transactions constitute a business within the meaning of s. 139(1)(e) of the *Income Tax Act*.

The plaintiff's mother, the late Adolorata Fabi died on February 18, 1957 and by testamentary disposition the appellant became entitled to one eighth ($\frac{1}{8}$) of her estate, including the two aforesaid lots.

By notice of assessment dated July 20, 1959, the Minister, for reasons later more fully described, added to the taxpayer's declared income the following amounts representing profits from the sale of part of the lands in question:

	1955	1956	1957	1958
Samuel Fabi (personally)	$18,618 45	$6,272 86	$8,155.79	$8,043.61
One-eighth ($\frac{1}{8}$) interest in the Estate of the late A. Fabi	....	....	$1,019.47	$1,002.98

The assessment of $18,618.45 included a disposal in 1951 by the appellant of part of lot 5 to Les Produits de Ciment de Sherbrooke Ltée, which he owned and controlled, but the deed to the property was not executed until 1955.

On October 15, 1959, a notice of objection was filed by the appellant in respect of the aforementioned assessments. On

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reconsideration, the Minister, by notice of reassessment dated April 13, 1960, agreed to amend the assessment for the taxation year 1955 by reducing the amount thereof from $18,618.45 to $2,545.82, but not otherwise.

I shall first deal with the case for the appellant.

Apart from testifying on his own behalf, the appellant called one witness, Mr. Alfred Brault. The latter's evidence was short and as it dealt mainly with the history of lots 4 and 5 (hereinafter called "the lots") prior to their acquisition by the appellant I will review his testimony first.

The witness stated that his father, the late William Brault, acquired "the lots" in 1916 for the sum of $30,000 and his reason for doing so was because of the gravel banks which consisted of a small area lying along the side of the lots which abutted on Brompton Road. The owner, a Mr. Ross, would only sell the gravel bank provided the purchaser acquired the entire lots. His father, before buying, caused soundings of the bank to be made, and it was estimated that it should contain at least one million cubic yards of gravel. To the witness' knowledge, his father had, through the years prior to his death in 1942, sold gravel, among others, to Antonio Fabi, father of the appellant, and later to Fabi et Fils Ltée and Dominion Textile at 10¢ a cubic yard. His father had realized over $90,000 from sales to Dominion Textile alone.

The witness said that following his father's death he and his brothers did not continue in the gravel business because he was named as one of the three executors in his father's will and since under the Civil Code of Quebec, unless his father had so provided, he could not receive remuneration, as executor, from the estate, he was not interested in exploiting this business solely for the benefit of his brothers, so it was decided, soon after William Brault's death, to dispose of the said lots.

Shortly after the death of Antonio Fabi, the appellant and his brothers incorporated Les Produits de Ciment de Sherbrooke Limitée, in which the witness acquired a small interest. The Estate Brault first rented to the above company for about three years a part of lot 5 on which there was a well finished stable about 100 feet long. The witness was of the opinion that about 10 acres of gravel bank remained and he did not wish to sell this separately, par-

ticularly as the balance of the property was not suitable for cultivation. He ended up, as later described, by selling the entire two lots to the appellant and to his mother.

When the appellant was called, he testified that at all material time he owned a controlling interest in a cement company known as Les Produits de Ciment de Sherbrooke Ltée and that he also owned about a one-third interest in Fabi & Fils Limitée, of which he was vice-president and general manager and which carried on a general contracting business, including the building of roads, in the city of Sherbrooke, province of Quebec. Both the above-mentioned companies required sand and gravel and they were in the habit of purchasing these supplies from William Brault and later from his estate.

The appellant and his mother Adolorata Fabi, on March 13, 1946, purchased part of lot 4, consisting of about 67 acres, in the county of Orford, for $6,000 (Ex. A-1). When asked what was the purpose of the purchase, he stated it was because the land contained a sand and gravel bank and from which William Brault and his estate had supplied the Fabis with their sand and gravel needs from as far back as 1933. At a given moment, Alfred Brault, for reasons already mentioned, desirous to sell their farm, suggested to the appellant that he should buy it. After some negotiation, the sale for the aforesaid 67 acres was concluded by the appellant and his mother, whom he asked to join him because he had not sufficient money to acquire it alone.

On June 18, 1947, he and his mother bought an additional part of lot 4 and part of lot 5 for $20,000 (Ex. A-2). They were spurred into buying because of the existence on lot 5 of a large horse stable which could be used by Les Produits de Ciment and also because lot 5 contained the best gravel and sand pits: in 1946 and 1947, they took gravel from both lots which, combined, consisted of about 200 acres, and sold gravel both to Les Produits de Ciment de Sherbrooke Ltée and to Fabi & Fils, and to strangers as well, at going prices of 10¢ a cubic yard.

He said Brault Estate did not want to sell the gravel pits unless the whole farm was purchased.

A year later, the Estate offered to sell him, at an attractive price ($1,000), a strip of land forming the remainder of

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lots 4 and 5, which had been purchased by a Mr. Benoit who defaulted on his payments, and the appellant said that another reason which prompted him to buy the strip was because, by doing so, he avoided the necessity of building a fence. Although purchased in 1948 the deed was not executed until 1953 (Ex. A-3).

He continued to exploit the gravel pits until some time in 1949 when the gravel was exhausted.

From 1946 to 1950 the only other use he put the land to was for pasturage. He made a faint effort at cultivating, which never got beyond the ploughing stage. He did not make any attempt at harrowing or seeding and gave it up because, for the most part, the land was rocky, hilly and unfit for cultivation.

The witness also mentioned that the community dump of the city of Sherbrooke was located close to the two lots.

He stated that about 1950, or perhaps 1951, this property, together with others, was annexed to the city of Sherbrooke. See Statutes of Quebec, s. 1415, c. 75, Geo. VI, 1950, sanctioned March 14, 1951.

When he realized that the gravel pits had become exhausted and since the farm was unfit for cultivation and that there was still $15,000 or $16,000 owing on the purchase price, he tried to get rid of it but he did not receive a single offer. Asked by his counsel what effort he made to sell, the witness replied that, among other things, he gave copy of the plan of the farm to Mr. René Hébert, a real estate broker in Sherbrooke, but that the latter never received any offer.

Soon after annexation had taken place, the city of Sherbrooke asked him to sell a 16-foot strip the whole length of his farm to make a boulevard along the Brompton Road. Instead of selling the strip to the city of Sherbrooke the appellant made a deal whereby he gave title to the municipality on condition that it installed a drainage and water system. Before selling any lots he disposed of a site on lot No. 5 to Les Produits de Ciment de Sherbrooke Ltée, as previously mentioned, for $18,000. He then had some hope of selling his property and started to subdivide as per surveyor's plan Exhibit A-4 dated July 30, 1951. This sub-

division was followed by others in the following order of dates:

Ex. A- 5—January 20, 1952
Ex. A- 6—May 21, 1952
Ex. A-12—January 26, 1953
Ex. A-16—May 1, 1954
Ex. A-13—January 4, 1957
Ex. A-14—June 12, 1958
Ex. A-15—April 17, 1961.

The appellant testified that to begin with he did not seek purchasers—they approached him. He owned a tractor and a bulldozer which he used to open up access roads. He did not resort to advertising or publicity during the years 1952, 1953 or 1954. He sold seven lots in 1952, eleven in 1953 (the respondent claims 12) and four in 1954. Beginning in 1955, he erected sale signs and started advertising and continued to do so in subsequent years. He sold ten lots in 1955, five in 1956, two in 1957 and four in 1958.

At the conclusion of his examination in chief, it appeared as if the appellant had made out at least an arguable case. On cross-examination however, after testifying that he never bought other properties than lots 4 and 5 which he resold, the witness, when confronted with many such transactions, was nonplussed and asked to be allowed to consult his accountant. On returning to the witness box he recalled a few of the least damaging purchases and sales but as to others he repeatedly replied, "I don't remember." I will again refer to these other numerous sales later. Counsel for the respondent had the witness file, as Exhibit R-1, a detailed plan of lots 4 and 5, which, *inter alia,* clearly delineates the boundaries of each of the three purchases in 1946, 1947 and 1948 made by the appellant. Mr. Fabi also marked in red pencil the location of the gravel and sand pits. He said that the best gravel bank was on the part of lot 5 which he purchased in 1947 and that this was his reasons for purchasing it. He stated that he had been in the contracting business since 1933 and it was usual for any contractor who was looking for gravel to take soundings in order to determine the quantity available. He did not do so because, judging by appearances, he had no doubt that the unopened part of the bank contained sand and gravel. An

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additional reason for his 1947 purchase was that, apart from the gravel, there was a stable erected on a small part of it, which portion of land he had rented from the Brault Estate and had an option to purchase it for $10,000 and that this was why he paid $20,000 for the whole parcel (over one hundred acres) which he acquired in 1947.

He admitted that when he bought the last strip in 1948 he knew that it did not contain any gravel. When asked if he did not spend at least $40,000 on subdividing his property, he replied that up to date such expenditure would not amount to more than $2,500. He then admitted that the opening of roads on his subdivision costs $5,294.80 and that the salary of the man who operated the bulldozer amounted to $5,000. When asked if the cost of the bulldozer was not $12,650, he replied, "If you have those figures from my accountant, they must be right." In respect of the cost of maintenance of the bulldozer amounting to $7,088.49, he said it should be divided because it was also used for gravel removal. It was possible, he said, that he had leased some machinery such as compressors at a cost of $4,491.89.

The respondent's only witness was Gérard Thivierge, controller of the Income Tax Bureau located at Sherbrooke, and it was he who had examined the appellants' income tax file Exhibit R-2. The same witness produced an extensive statement of real estate transactions, excluding lots 4 and 5, and consisting of purchases, sales and borrowings made by the appellant, the earliest of which dated back to 1944, the most recent to 1958. He also produced as Exhibit R-3 a short list of similar transactions entered into by Claire Fabi, wife of the appellant, with monies which were partly her own and partly furnished by the appellant. A further list was produced as Exhibit 4, which discloses that the appellant and his mother purchased in 1948 a tract of land being part of lot 899-80, called the Vincent Street lots, which adjoins the Brault property, subdivided it in 1950 into thirteen lots which, except for those used for streets, were sold by 1955. In 1958 a new subdivision was made of the balance of lot 899-80, a sale of one of these lots was recorded in 1958.

A glance at Exhibit R-1 shows that the southern extremity of the 67 acres, which constituted the appellant's first purchase in 1946 from the Brault estate, abuts what was the dividing line marking the city limits of Sherbrooke.

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Admittedly there was little gravel on it and it is probable I think that the appellant bought it because of an anticipated postwar growth which led him to expect that it would not be long before his purchase would become part of the city and would be the first to feel the benefits of annexation. As appears by Exhibit "R", subdivision was greatest on the said acreage, which would indicate that the appellant was aware of its adaptability for such purpose. Insofar as his second purchase is concerned, I find it difficult to understand how a man with the appellant's business experience could attach the importance he claimed to an abundant supply of gravel and at the same time fail to verify whether or not it existed. Alfred Brault had quoted his father as saying, when he took the original soundings, that he was convinced that the property contained a million cubic yards of gravel. If, as the evidence of the same witness indicated, more than $100,000 worth of gravel had been removed at a sale price of 10¢ a cubic yard, it became obvious that the bank was near the point of depletion.

The same witness said that the reason why he wanted to sell the property instead of continuing the business of selling sand and gravel was that he had been named as an executor without remuneration under his father's will and if he continued to run the business gratuitously he would be doing so mainly for the benefit of his brothers who were coheirs. The above reason is far from convincing and should, I think, have put the appellant on his guard if he attributed much importance to the quantity of gravel that remained. It is true that Art. 910 of the Quebec Civil Code stipulates that the task of executorship is gratuitous unless the testator decides that it should be remunerative. But the same article also provides that nobody can be compelled to accept the office of testamentary executor, and the witness was free to decline. I find it difficult to credit that the appellant, under the circumstances, was oblivious to extensive gravel depletion which had occurred.

The fact that the appellant bought lots 4 and 5 in three instalments negatives his statement that, in order to secure the gravel that was left, he had to buy both lots.

Exhibits R-2, R-3 and particularly R-4 show that at about the same time as the appellant was making his three purchases from the Brault Estate he acquired a neighbouring property, called the Vincent Street lots, for the purpose

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of subdividing and selling. In my opinion, this is conclusive evidence that the appellant, from 1955 to 1958, and for many years prior thereto, was engaged in the business of buying, selling and speculating in real estate within the meaning of s. 139(1)(*e*) of the *Income Tax Act*.

For the above reasons, I would affirm the assessments appealed from and refer the record back to the Minister to be dealt with accordingly. The present appeal is consequently dismissed with taxable costs in favour of the respondent.

Judgment accordingly.