BETWEEN:

HARRY HORTICK ..... APPELLANT;

1964
Feb. 24, 25
Mar. 25

AND

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

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, s. 139(1)(e)—Income or capital gain—Purchase and sale of real estate—Financial venture.

In 1956 the appellant, who was president of Harry Hortick Machinery & Supply Co. of Montreal, purchased the machinery and real property of the Birmingham Small Arms Company in Montreal, paying $120,000 for the land and $55,000 for the machinery. The real property purchased consisted of 15,000 sq. ft. of factory space, 2,000 sq. ft. of office space, a railway siding, 30,000 sq. ft of paved exterior space and 300,000 sq. ft. of vacant land. The appellant's company which was leasing office and storage facilities had never required more than a total of 7,500 sq. ft. of space, including 600 sq. ft. of office space. The appellant was not financially able to complete the purchase by himself and entered into an arrangement with Charles and Harry Shafter who put up $160,000 for a 50% interest in the said property, the appellant contributing the balance of $15,000. The respective interests of the appellant and the Shafters in the property were set out in the deed of sale dated November 8, 1956, as Charles Shafter, 30%, Harry Shafter 20%, and the appellant, 50%. A few days after the appellant had completed the purchase and had taken possession of the property, he approached a representative of Peacock Co. Ltd. with the information that the machinery and plant were for sale. On November 15, 1956, Peacock Co. Ltd. made an offer to purchase the property, excluding the machinery, for $450,000, which offer was accepted by the appellant and the Shafters. The sale to Peacock Co. Ltd. was completed on December 14, 1956, and the appellant and the Shafters realized a profit of $330,000 thereon.

The appellant's taxable income for 1956 was reassessed by the respondent to include his share of the profit realized on the sale of the said property.

Held: That the transaction in question was a financial venture within the meaning of s. 139(1)(*e*) of the *Income Tax Act*, notwithstanding the appellant's professed intention at the time of the purchase of the property to acquire it as a long-term investment; and the two decisive factors supporting this conclusion are the appellant's lack of capital, necessitating a quick sale to prevent the interest charges on the borrowed money, the taxes and other expenses from mounting to too large a sum, and the degree by which the accommodation afforded by the purchased property exceeded the requirements of the appellant's company.

2. Appeal dismissed.

APPEAL from a decision of the Tax Appeal Board.

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

Claude Couture for appellants.

Paul Boivin, Q.C. and *P. R. O. MacKell* for respondent.

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

DUMOULIN J. now (March 25, 1964) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board, dated September 20, 1962[1] in respect of the assessment for taxation year 1956, of one Harry Hortick, of 4960 Glencairn Avenue, Montreal; the above-mentioned decision affirmed a reassessment by the Minister of National Revenue which dealt with a $450,000 real estate transaction as income for the pertinent year and not as a realization of a capital asset.

At the start of the hearing, it was agreed by all parties that the two other cognate appeals, *post* p. 931 and *post* p. 932, should also be decided according to the evidence presently adduced.

The facts of the case offer no great complexity.

Mr. Harry Hortick, the appellant, is president of the Harry Hortick Machinery & Supply Co., dealing in machinery and machinery supplies. At no time the requirements of his business needed any larger space than 7,500 square feet. In 1956, for instance, the appellant's commercial premises were located on Notre Dame St., with a floor space of only 600 square feet, plus some open air storage in a neighbouring yard. Harry Hortick was not the owner but the lessee of his office and storage facilities.

Mr. Hortick, in his evidence, relates that during 1956, having purchased a certain quantity of material from B.S.A. (Birmingham Small Arms) Company, he came in touch with one Victor Bull, then manager of this firm's Montreal branch, who inquired whether or not he would be interested in buying their stock of machinery and also the entire B.S.A. property consisting of approximately 15,000 feet of factory space, 2,000 feet of office space, a railway siding,

[1] (1962-63) 30 Tax A.B.C. 8.

30,000 feet of paved exterior space and 300,000 feet of vacant land, for a total price of $275,000. Mr. Bull told Hortick that B.S.A. had decided to give up their business pursuits at that particular place and were, therefore, desirous of liquidating their assets, moveable and immoveable. Hortick declined the suggestion but, some time after, he was asked to quote a price and agreed to offer $55,000 for the stock in trade and $100,000 for all of the real estate, which submissions, in turn, were refused by the B.S.A. people. Eventually, Harry Hortick tendered a price of $120,000 for the land and $55,000 for the machinery and this met the approval of the company.

On October 6, 1956, B.S.A.'s acceptance was evidenced in a letter also acknowledging receipt from Harry Hortick Machinery & Supply Co., of a $5,000 cheque as a guarantee of good faith and a bond of sale. (cf. Ex. A-2).

I may note immediately that the appellant, in his testimony, emphatically stated his intention of entering into this transaction merely as a long-term investment, proposing, at least so he said, to install his office in part of the B.S.A. buildings and to rent the residue accommodation both inside and outside on the 300,000 feet of land. Until then, Hortick had occupied an office of 600 square feet and concluded arrangements with the J. B. Baillargeon Express Co., for storage up to a limit of 15,000 square feet, a maximum capacity which was never attained.

Hortick's only concern was, next, to devise ways and means of obtaining indispensable financial assistance, since he practically possessed no monetary means. In his quest for money, he first approached one of his brothers-in-law, Mr. Jack Cohen, who was interested and, with the prospective borrower, inspected the B.S.A. property. Shortly after this initial talk, Mr. Cohen was confronted with the obligation of moving his offices elsewhere, having received notification that the expiring lease would not be renewed. He still would have advanced up to $150,000 or $160,000 on condition that the land be sold over to his own company, a proposal to which Hortick could not accede.

Subsequently, the appellant met one of his clients, Meyer Levine, suggesting a partnership on an equal 50-50 footing. Levine showed interest in the proposal, although he did not require more than some 8,000 square feet for storage pur-

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poses, but insisted on Hortick investing dollar for dollar with him, a requirement totally impossible in Hortick's actual financial straits.

The people subsequently contacted by the appellant were two well-to-do brothers, Messrs. Charles and Harry Shafter, dealers in heating supplies. Four or five months before the date of purchase, November 8, 1956, Charles Shafter had carefully looked over the B.S.A. property with the view of installing his business there. A couple of years previously the Shafter's place of business on Dorchester St. had been expropriated by the City of Montreal and they were faced with the necessity of moving to more spacious quarters than their actual ones. The interior storage space needed amounted to 40,000 or 50,000 square feet and approximately 100,000 feet of outdoor storage.

Mr. Charles Shafter, who testified at some length, stated that he and his brother were willing to obtain the open space at the B.S.A. property and eventually agreed on a loan to Hortick of $160,000 on a 50-50 ownership basis. This sum included both machinery valued by Hortick at $55,000 and the land set at $120,000. The residue, $15,000, was provided by Hortick personally, this being his only contribution in the deal.

At this point, some contradiction between Shafter's and Hortick's evidence crept in, but can nowise influence the issue. According to Shafter, the appellant's only objective was the buildings, for which the Shafter brothers wanted a monthly rental of $3,000, much over and above Hortick's offer of $1,000. "And therefore", continues Mr. Shafter, "a certain degree of friction between ourselves could not be avoided". Hortick, in his testimony, had denied the intrusion of any friction whatsoever and insisted upon the smooth unity of views between himself and the Shafters.

The deed of sale entered into with B.S.A. Ltd. apportioned the interests in the property as follows: Charles Shafter 30%, Harry Shafter 20%, and Harry Hortick 50%, and bears date November 8, 1956 (Ex. A-3).

Shortly after, the appellant took possession of the buildings and, wishing to dispose of some machinery, telephoned one of the superintendents of the Peacock Co. Ltd. in Montreal, Mr. Fred MacKay, who hastened to meet him. Called as a witness, MacKay stated that in the course of

their conversation Hortick told him the plant was for sale. Mr. MacKay immediately relayed this information to the president of his company, Mr. William Ferguson, adding that a large quantity of machinery and tools was also up for sale.

William Ferguson, also a witness, declared that Peacock Ltd. hoped to expand its business facilities, especially in the Ville La Salle area. "That same afternoon" (November 14, 1956) continues this witness, "Mr. Lucas and I went on the grounds. I asked Mr. Hortick if he would consider selling the property; this gentleman replied that, first of all, he must consult his partners. I arranged an interview for 10 o'clock the following morning at my office. Charles Shafter and Harry Hortick duly showed up the next day. I consulted with the vice president of Peacock Bros., Mr. Lucas, and we took the initiative of inquiring about a price for the entire B.S.A. property, land and buildings. Shafter and Hortick spoke of a price of $500,000. A discussion ensued and this was reduced to $450,000. On behalf of Peacock Ltd., Lucas and myself accepted; written offers and acceptances were at once prepared". Mr. Ferguson, in cross examination, remained unshaken in his statement that "my company" (Peacock Ltd.) "had no intention whatever of renting space so that any mention of this would have quickly been passed off. I opened the conversation with Hortick on the possibility of buying".

Mr. Frank Lucas, the next witness, corroborates Mr. Ferguson on the point that their only motive for visiting the B.S.A. establishment was an eventual purchase of the entire property. Lucas goes on to say: "At the November 15 meeting in Mr. Ferguson's bureau, I, at once, told our two visitors that our company was decidedly concerned in buying the B.S.A. holdings and not at all in machine tools." This same witness adds that at the first meeting, November 14, Mr. Hortick said "Would you be interested to rent the property?".

The conclusion of this bargaining was promptly reached "on or about December 14, 1956, when the aforesaid property was sold to Peacock Bros. Ltd. for a price of $450,000", a profit of $330,000 (the tools and machinery estimated at $55,000 were retained by Hortick) realized in the short period of some five weeks, November 8—December 14. (cf. Notice of appeal, para. 7).

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The problem consists in elucidating the true nature of this transaction: enhancement of a capital asset or an adventure in the nature of trade, or a scheme for profit making, as envisaged by section 139(1)(*e*) of the *Income Tax Act*, 1952, R.S.C. c. 148.

Insofar as Hortick is concerned, two decisive factors are ever present throughout the deal:

a) his lack of available money, making him dependent upon interest bearing loans, imperatively impelled him to seek for the quickest possible way of reaping a profit that payment of interest, civic taxes and sundry other obligations of proprietorship, would whittle away as time passed on;

b) the unbridgeable vacuum between the requirements of his trade, namely, 600 feet of office floor plus an unreached maximum of 15,000 feet of storage allotted to him at Baillargeon Express Ltd., and the much more considerable interior and exterior space afforded by the B.S.A. offices and vacant land, previously mentioned in these notes.

It is unnecessary to discuss at length Hortick's declaration of intent. A long list of precedents in the manner of income tax cases prove that assertions of this sort are given but slight importance, especially so when, as presently, the facts materially contradict such a statement. Hortick may have entertained the notion of a long-term investment upon entering into this bargain and shortly afterwards changed his mind at the alluring prospect of the huge $330,000 gain, thereby fully agreeing to pursue a profit-making scheme.

For the reasons above, the Court is of opinion that Hortick's participation in the matter at bar falls in the category of financial ventures foreseen by section 139(1)(*e*) of the Act and that his appeal from the decision of the Tax Appeal Board, dated September 20, 1962, in respect of taxation year 1956, should be dismissed. The respondent is entitled to obtain all costs after taxation.

Judgment accordingly.