FIRST TORLAND INVESTMENTS LTD. *et al*[1] ..... APPELLANTS;

AND

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

Winnipeg 1968 Dec. 16-20

Ottawa 1969 Feb. 18

Income tax—Trading profit or capital gain—Investment company—Sale of farms leased to tenants—Whether business or realization of investment.

During the depression years after 1930 a mortgage loan company acquired by foreclosure and quit claim a large number of farms which were then leased back to their former owners on a crop share basis under the supervision of farm managers and on the understanding that the tenants would have the first opportunity to purchase their farms. In 1952 the loan company, having obtained wider investment powers and with a view to qualifying as an investment company under the *Income Tax Act*, sold 156 farms in Manitoba to the three appellants, all wholly-owned subsidiaries incorporated to carry on an investment business, the sale price being the book value of the farms on the vendor's books, which was much less than their market value. Appellants continued to carry on in the same manner as their parent, employing farm managers who were remunerated by commission on rents collected and on the sale price of farms sold. During the years 1953 to 1963 appellants derived rents from the farms and in each year sold a number of farms to the tenants. In the four years 1960 to 1963 appellants sold 75 farms compared with 21½ sold in the five preceding years and 31 in the two years before then. Appellants were assessed to income tax on their profits from sales in the four years 1960 to 1963. The court found on the evidence that appellants' policy from their inception was to dispose of farms at the maximum gain.

Held, affirming the assessments, the inference to be derived from the evidence was that the gains made by appellants on the sales of the farms were not merely enhanced values from the realization of investments but were gains made in dealing with such investments as a business.

California Copper Syndicate (Limited and Reduced) v. Harris (1904) 5 T.C. 159; *Anderson Logging Co. v. The King* [1925] S.C.R. 45; *Noak v. M.N.R.* [1953] 2 S.C.R. 136; *Thew v. The South West Africa Co* 9 T.C. 141; *Scottish Investment Trust Co. v. Forbes* 3 T.C. 23, referred to

INCOME TAX APPEAL.

S. E. Edwards, Q.C. and *R. J. Fraser* for appellants.

D. G. H. Bowman and *R. D. Janowsky* for respondent.

[1] The other appellants are Second Torland Investments Ltd. and Third Torland Investments Ltd.

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CATTANACH J.:—The appeals of the three appellants[2] are from assessments to income tax for their respective 1960, 1961, 1962 and 1963 taxation years and all appeals were heard together on common evidence because the identical considerations and principles are applicable in each instance.

There is no dispute about the accuracy of the amounts included in the assessments but rather the dispute lies in whether those amounts are taxable as income of the appellants. Neither is there any dispute about the basic facts involved in these appeals. The controversy between the parties is in the proper deduction to be drawn from those facts.

In assessing the appellants on the profits from the sale of a number of farms by each of them in the taxation years in question, the Minister did so on the assumption that certain farm properties acquired by them were so acquired with a view to dealing in, turning to account or otherwise realizing profits and accordingly the profits so realized were income from a business or adventure in the nature of trade within the meaning of sections 3 and 4 and section 139(1)(*e*) of the *Income Tax Act* which reads as follows:

> 3 The income of a taxpayer for a taxation year for purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all
>
> (*a*) businesses,
>
> (*b*) property, and
>
> (*c*) offices and employment.
>
> 139. (1) In this Act,
>
> . . .
>
> (*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;
>
> . . .

On behalf of the appellants it is contended that the disposition of the farm lands was the realization of an investment and that the attendant profits were received on capital account and accordingly were not income within the meaning of the above quoted section of the *Income Tax Act*.

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[2] See footnote [1].

The distinction between profits that are subject to income tax and those that are not, together with the test to be applied in determining on which side of the dividing line they fall, was clearly stated in the classical case of *Californian Copper Syndicate (Limited and Reduced) v. Harris*[3] which was, of course, cited to me and will bear repeating. Lord Justice Clerk said at page 165:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax
>
> What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

It is well settled that each case must be considered according to its facts. Accordingly the facts in the present appeals are set forth.

The three appellants are private companies incorporated by Federal letters patent dated March 13, 1952. The particulars of the letters patent incorporating the three appellants are identical in all respects excepting the corporate names.

The purposes and objects of all three appellants read as follows:

> to invest the capital of the Company, accretions to capital and the income of the Company or such part thereof as the directors of the Company may from time to time determine in real estate, mortgages, bonds, debentures, stock, shares and other securities and commodities and from time to time to change said investments by sale, exchange or otherwise, and to invest the proceeds of any such sale or sales in other investments of a like nature.

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[3] (1904) 5 T.C 159.

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The head office of each appellant is in Winnipeg, Manitoba and the capital stock of each consists of 50,000 shares without nominal or par value. Each of the appellants is a wholly owned subsidiary of Toronto and London Investment Company Limited formerly known as The Trust and Loan Company of Canada.

The Trust and Loan Company of Canada was incorporated by an Act of the Province of Canada, being chapter 63, Statutes of Canada 1843 as amended by subsequent acts of the Parliament of Canada and carried on the business of lending money on the security of mortgages on farm lands in Saskatchewan and Manitoba. In the course of its carrying on this business, this company acquired by way of quit claim or foreclosure numerous farm properties upon the security of which money had been lent. This was particularly so during the depression years of 1930 and those immediately following. If my recollection of the evidence is correct an excess of 800 farm properties were so acquired.

As a loan company, The Trust and Loan Company of Canada was subject to the *Loan Companies Act,* now chapter 170, R.S.C. 1952 and the predecessors of that statute, all of which contained a section in language similar to section 76 of the present Act which permits a company to hold real estate that having been mortgaged or hypothecated to it is acquired by it for the protection of its investments with authority to sell, mortgage, lease or otherwise dispose thereof. However, by the same section no parcel of land so acquired is to be held for a period longer than seven years after its acquisition, but shall be sold so that the company no longer retains any interest therein unless by way of security. The period of seven years might be extended by order-in-council to a period not exceeding twelve years in the total. Her Majesty, on six month's notice, may claim forfeiture of any land held beyond the prescribed period.

The Trust and Loan Company of Canada was financed by English capital, its head office was in London, England and its affairs were conducted by a board of directors resident in England.

In 1951 the directors gave consideration to an offer received from the Canada Permanent Mortgage Corporation to purchase the Canadian assets of the company at a price of $7,250,000.

Even prior to the receipt of this offer from the Canada Permanent Mortgage Corporation the directors had been giving consideration to the future of the company. The company's business of lending on mortgages was meeting increasing competition from competitors in Canada who had the advantage of ample facilities for cheap borrowing not available to companies controlled from England as well as from life insurance companies entering this field with income tax advantages over companies such as The Trust and Loan Corporation of Canada. Further, since the *Loan Companies Act* did not permit the permanent retention of real estate holdings by a mortgage company, as the lands which came into the company's possession around 1930 were sold off the relative disadvantage of the company would be compounded.

The directors were therefore considering (1) the continuation of the business on the same basis as it was then conducted which was not considered advantageous, (2) removing the control to Canada which would be beneficial for administrative reasons but would still be subject to the disadvantages outlined immediately above, (3) liquidation, which in addition to its cost would deprive the stockholders of their participation in Canadian business, or (4) to remove control to Canada coupled with the establishment of the business on a new basis as an "investment company" by the sale of its assets and the "investment" of the proceeds on the basis of a wider field in selected Canadian securities.

The offer from Canada Permanent Mortgage Corporation made possible the implementation of an arrangement along the lines of the fourth possibility being considered by the directors.

The directors considered that such arrangement would enable their stockholders to retain their interest in Canada, but it would be spread over a broader field than hitherto. The directors also concluded that the head office of the company should be removed to Canada and that the board of directors should be reconstituted so that the majority of the directors would be resident in Canada.

Accordingly the offer of Canada Permanent Mortgage Corporation was accepted and an agreement dated May 9, 1951, was entered into by the parties whereby The

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Trust and Loan Company of Canada agreed to sell, *inter alia*, all freehold and leasehold properties belonging to it.

To implement the arrangement and decisions of its directors The Trust and Loan Company of Canada petitioned the Parliament of Canada to enact a private Act which was granted, being chapter 74, Statutes of Canada 1951 entitled an Act respecting the Trust and Loan Company of Canada.

By section 4 of that Act the corporate name was changed to Toronto and London Investment Company Limited. By section 6 the head office of the company was fixed at the city of Toronto subject to change as therein provided, and by section 7 the board of directors was fixed at five also subject to change of that number as therein provided.

The reorganization of the capital of the company was set out in Schedule I to the Act and the agreement dated May 9, 1951, between the company and Canada Permanent Mortgage Corporation was annexed as Schedule II to the Act which was confirmed and declared to be operative and effective.

The objects and powers of the company were set out in section 5 of the Act which reads as follows:

> 5. The objects and powers of the company shall be to carry on the business of an investment company and in connection therewith the company may:
>
> (*a*) acquire and hold shares, stocks, debentures, debenture stock, bonds, obligations, choses in action, certificates of interest and securities issued or guaranteed by any individual, partnership, association, company or corporation, public or private, constituted or carrying on business in Canada or elsewhere and debentures, debenture stock, bonds, obligations, choses in action, certificates of interest and securities issued or guaranteed by any government, sovereign ruler, commissioner, public body or authority, supreme, municipal, local or otherwise, whether in Canada or elsewhere;
>
> (*b*) underwrite, subscribe for, purchase, invest in or otherwise acquire and hold any such shares, stocks, debentures, debenture stock, bonds, obligations, choses in action, certificates of interest and securities and hold the same absolutely as owner or by way of collateral security or otherwise and sell, exchange, pledge or otherwise dispose of and deal in any such shares, stocks, debentures, debenture stock, bonds, obligations, choses in action, certificates of interest and securities and while the owner or holder thereof exercise all rights, powers and privileges of ownership including all voting rights, if any, with respect thereto;

(c) purchase or otherwise acquire and hold and deal in real and personal property and rights and in particular lands, buildings, hereditaments, business or industrial concerns and undertakings, mortgages, charges, contracts, concessions, franchises, annuities, patents, licences, securities, policies, book debts and any interest in real or personal property, any claims against such property or against any person or company and any privileges and choses in action of all kinds;

(d) do all or any of the above things as principals, agents, attorneys, contractors or otherwise and either alone or in conjunction with others;

(e) take part in the management, supervision or control of the business or operations of any company or undertaking in which the Company holds any shares, bonds, debentures or other securities and for that purpose appoint and remunerate any directors, accountants or other experts or agents;

(f) employ any individual, firm or corporation to manage in whole or in part the affairs of the Company and employ experts to investigate and to examine into the conditions, prospects, value, character and circumstances of any business concerns and undertakings and generally of any assets, property or rights.

The contemplated future policy of the company was that the funds available might be invested, broadly, 25% in land, and 75% in debentures, preferred and common shares, the latter percentage being made up by 20% in public utility companies, 20% in oil and natural gas companies, 10% in textile and engineering companies and the balance of 25% in companies in other fields including mining. However it was recognized that such a broad policy would be subject to revision from time to time, as circumstances varied but such was the broad policy as envisaged.

In order to implement the policy of investing 25% of its funds in land, the agreement dated May 9, 1951, contained a provision whereby the vendor, The Trust and Loan Company of Canada, now Toronto and London Investment Company Limited (which for convenience will hereafter be referred to as T. & L. Investment Co.) could repurchase the farm lands situate in the Province of Manitoba for the sum of $1,431,864. (See paragraph 14 of Schedule II to S. of C. 1951 c. 74.) The sum of $1,431,864 was the price at which the farm lands had been sold to Canada Permanent Mortgage Corporation and was the value at which they were carried in the books of The Trust and Loan Company of Canada. The book value was also the cost of acquisition to the vendor under its original name.

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When considering the sale of the Canadian assets to Canada Permanent Mortgage Corporation and the future policy of T. & L. Investment Co. to acquire farm lands, there was a divergence of opinion among the directors as to the advisability of retaining the Manitoba farm lands. The option to repurchase the farm lands was included in the agreement dated May 9, 1951, to facilitate the acquisition of such lands in the event that the directors should decide it was expedient to do so.

Canada Permanent Mortgage Corporation was quite agreeable to the inclusion of such an option in the agreement because it was contemplated that Canada Permanent Trust Company, its subsidiary, would undertake the management of those farm lands on behalf of T. & L. Investment Co. at a commission of 20% on the revenue received from the farms and a commission of 5% on any farm lands sold. The staff of The Trust and Loan Company of Canada which had been managing the farm lands in possession of that company were to be engaged as employees of Canada Permanent Trust Company in which capacity they would continue to perform the identical functions that they had performed previously for The Trust and Loan Company of Canada.

On or about August 1, 1951, The Trust and Loan Company of Canada, under its new name of Toronto and London Investment Company Limited exercised the option in the agreement dated May 9, 1951, and repurchased the Manitoba farm lands for the sum of $1,431,864 which sum was, of course, identical to the price at which the farm lands had been sold to Canada Permanent Mortgage Corporation.

T. & L. Investment Co. wished to qualify as an investment company under the provisions of section 62 of the *Income Tax Act*, chapter 52, Statutes of Canada 1947-48, (now section 69(2)). In order to so qualify a company must meet the conditions, amongst others, that 80% of its property is shares, bonds, marketable securities or cash and that no more than 10% of its property consists of shares of any one corporation.

Accordingly to meet these conditions T. & L. Investment Co. caused the three appellants to be incorporated and the appellants became its wholly owned subsidiaries.

Of the 156 individual Manitoba farm properties then owned by T. & L. Investment Co.:

1. 53 were sold to the appellant, First Torland Investments Ltd. for a consideration of $456,050, being the book value thereof payable by,
   (i) $400,000 by the issue and delivery of debentures of First Torland to T. & L. Investment Co. in that principal amount;
   (ii) $49,997 by the issue and allotment of 49,997 fully paid shares of First Torland Investments to T. & L. Investment Co. and
   (iii) the balance of $6,053 in cash.
2. 54 farms were sold to Second Torland Investments Limited, the second appellant herein, for a consideration of $453,948, again being the book value thereof, payable by
   (i) the issue and delivery to T. & L. Investment Co. of $400,000 principal amount debentures of Second Torland Investments Limited;
   (ii) $49,997 by the issue and allotment of 49,997 fully paid shares of Second Torland Investments Limited; and
   (iii) the balance of $3,951 in cash.
3. 49 farms were sold to the third appellant herein, Third Torland Investments Limited by T. & L. Investment Co. for the sum of $453,096, being the cost thereof to T. & L. Investment Co. and the book value thereof, payable by,
   (i) the issue and delivery to T. & L. Investment Co. of $400,000 principal amount debentures of Third Torland Investments Limited;
   (ii) $49,997 by the issue to T. & L. Investments Co. of 49,997 fully paid shares of Third Torland; and
   (iii) the payment of the balance of $3,099 in cash.

The foregoing sales were effected by agreements dated March 31, 1952.

There is no question that the cost at which the farm lands were acquired by The Trust and Loan Company of Canada and as carried in its books was considerably less than the market value thereof in either 1951 or 1952.

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The greater bulk of the farms were acquired in the depression years of 1930 and following, from mortgagors who were so hopelessly involved in debt that they were willing to execute quit claims to extricate themselves from their overwhelming burdens or consent to foreclosure proceedings where the farms were also encumbered by other mortgages ranking after the first mortgages held by The Trust and Loan Corporation of Canada.

The almost invariable practice of The Trust and Loan Corporation was to lease back the farms so acquired by it to the former owners who were, in almost every instance, good husbandmen, on a one-third crop share basis.

The functions of the farm managers employed by the company were to render every assistance within their expert competence to the tenants by advice as to proper methods of cultivation, crop rotation, seed selection and general farm management. In many instances repairs were made by the company to buildings at the request of the tenant or voluntarily by the landlord and buildings such as granaries were supplied. The tenants were encouraged to bring more land under cultivation by clearing and breaking. They were offered and accepted advice on crop spraying, weed control and fertilization. The advice so proffered as a matter of corporate policy served a two-fold purpose, (1) to increase the revenue of the company through better crops, and (2) to rehabilitate the tenant so that in time he would have accumulated sufficient funds to repurchase the farm and in that event to enable him to make a substantial cash down payment.

The 166 farms held by The Trust and Loan Company and which were repurchased from Canada Permanent Mortgage Corporation by T. & L. Investment Co. of which 156 were subsequently sold to the three appellants, had been categorized by the farm managers employed by The Trust and Loan Company, as follows:

(A) 11 farms
(B) 81 farms
(C) 72 farms
(D) 2 farms

Within the four main categories there were intermediate categories such as B plus and B minus. The categories are

self-explanatory and were broadly that farms categorized as A were excellent, B were good, C were fair and D poor. These categories were arrived at by the farm managers in consultation and applying their best judgment taking into account such factors as the quality of the soil, number and condition of the buildings, the state of cultivation and the desirability of location. On cross-examination of two of the farm managers, it was suggested that a factor in determining into which category the farms would be placed would be the returns produced by the farms. It was agreed that such would be the case but that it was subject to so many variables that the returns from a farm were not the sole determining factor. I should have thought that when the quality of the soil of a particular farm was excellent that it would follow logically that the returns from such a farm would naturally be greater than those from a farm on which the soil was of an inferior quality barring such catastrophe as prolonged drought. However it was explained that an outstanding tenant on a lower categorized farm might well produce greater returns than an inferior tenant on a superior farm.

During the years 1953 to 1963 inclusive the appellants sold the following number of farms:

	First Torland	*Second Torland*	*Third Torland*	*Total*
1953	8	7	5	20
1954	5	4	2	11
1955	1	1	3	5
1956	1	2	1	4
1957	3	1½	0	4½
1958	1	1	1	3
1959	2	1	2	5
1960	2	3	8	13
1961	6	6½	6	18½
1962	9	4	6½	19½
1963	9	9	6	24
Total	47	40	40½	127½

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It would follow that after the 1963 taxation year the 28½ remaining farms were held by the three appellants, 6 by First Torland, 14 by Second Torland and 8½ by Third Torland.

Since 166 farms were repurchased from Canada Permanent Mortgage Corporation by T. & L. Investment Company and 156 farms were purchased by the appellants from T. & L. Investment Company, it follows that during the interval 10 farms had been sold by T. & L. Investment Company.

From document 124 in Vol. II of the respondent's exhibit book, I have extracted the following information.

In the year ending March 31, 1951, T. & L. Investment Co. sold a total of 6 farms, 1 class A, 2 class B and 3 class C. In the year ending March 31, 1952, it sold 4 class C farms.

Between the years ending March 31, 1953, and March 31, 1959, the three appellants sold the number of farms of the classes indicated below.

Year ending March 31	*Class A.*	*B.*	*C.*	*D.*	*Total*
1953		1	15	1	17
1954		2	9		11
1955			6		6
1956		4	2		6
1957		1	1½		2½
1958		2	1		3
1959		2	2	1	5
	nil	12	36½	2	50½

The above sales were disclosed in their income tax returns for the years in question but the Minister did not assess the appellants upon the gain realized upon those sales.

During the taxation years now under review the appellants sold the number of farms of the classes indicated hereunder:

	Class A.	*B.*	*C.*	*D.*	*Total*
1960	2	7	4		13
1961	1	8	6½		15½
1962	5	15	4½		24½
1963	1	15	8		24
	9	45	23	nil	77

Of the 28½ farms on hand after 1963 one was a class A farm, 22 were class B farms and 5½ were class C. farms.

As intimated before, during the period The Trust and Loan Company carried on the business of lending money on the security of farm lands, it was obligated under the provisions of the *Loan Companies Act* to dispose of the lands acquired by it for the protection of its loans within a maximum period of twelve years. Farm managers were employed by it to increase the returns from the farms when held by the company by way of rentals on a crop share basis from tenants who, in most instances, had been formerly the owner of the farm. Surprisingly the farm managers enjoyed cordial relationship with the tenants without exception. It was the practice of the farm managers to encourage the tenant to take a "proprietory interest" in the land by which it was meant that the tenant was to treat the land as his own and it was made known to the tenants that when the time came for a farm to be sold the tenant thereof would be given first opportunity to purchase it. In doing this the farm managers were implementing the policy adopted by the company.

When The Trust and Loan Company became Toronto and London Investment Company Limited by chapter 74 of the Statutes of Canada 1951 by reason of the change in objects and powers as outlined in section 5 thereof the company was no longer subject to the provisions of the *Loan Companies Act*. Toronto and London Investment Company Limited exercised its option in the agreement with Canada Permanent Mortgage Corporation to repurchase 166 farms.

Because the ownership of 166 farms would entail considerable management an agreement was made with Canada Permanent Trust Company to undertake that management at a guaranteed minimum fee of $12,000 per annum,

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a commission of 20% on the first $150,000 of rents collected during the year and a commission of 15% of rents in excess of $150,000 collected during the year. It was also provided that Canada Permanent Trust Company should receive a commission on the sale price of farms at the rates of 5% on sales up to $6,000, on sales between $6,000 and $20,000, 5% on the first $6,000 and 4% on the excess and on sales over $20,000, 5% on the first $6,000, 4% on the next $14,000 and 3½% on the excess over $20,000.

The rate of commissions with respect to farm management was considered eminently fair by the parties because of the intensive management provided.

When 156 farms were sold by T. & L. Investment Co. to the appellants, they adopted the above agreement between T. & L. Investment Co. and Canada Permanent Trust Company.

The farm managers formerly employed by The Trust and Loan Corporation were employed by Canada Permanent Trust Company and those employees conducted their functions in the same manner as they had when they were employees of The Trust and Loan Corporation. They continued to encourage good husbandry and held out to the tenants the prospect of them being given the opportunity of purchasing the farms. Because of their intimate knowledge of the farms and the tenants thereof, the farm managers were in the best position to recommend which farms might be sold and to assess each tenant as a prospective purchaser.

The Canada Permanent Trust Company had prepared in late 1951 a standard form of offer to purchase to be completed by those tenants who wished to make such an offer.

It is my understanding of the evidence that all sales made by T. & L. Investment Co. in the years 1951 and 1952 being 10 in number and the 127½ sales made by the appellants from 1953 to 1963 were in every instance to tenants who wished to purchase. One reason for doing this, as was explained in evidence by the farm managers, was little or no adjustment was required to be made in the sale price for improvements made by the tenant and accordingly a higher price was obtained than if the sale was made to an outside purchaser. The only instances, which

were very few in number, when sales were made to purchasers other than the tenant were when the tenant was not interested in purchasing. In this event the farm managers would approach farmers in the area. Only in one instance was a farm advertised for sale or listed with a real estate agent and that was in circumstances peculiar to one sale. The particular tenant made an offer which the farm manager considered to be ridiculously low. In order to force a more realistic offer the farm manager advertised this farm for sale and received offers in accordance with the market price. The ruse was successful because the tenant met the competing offers and became the purchaser.

The reason for not advertising farms for sale was consistent with the policy of affording the tenant the first opportunity to purchase because advertising farms for sale would deter the tenant from taking a "proprietory interest" in the land with a corresponding reduction in crop and rental returns.

The average profit to the appellants on class A farms sold was approximately 48%, on the class B farms approximately 51% and on the class C farms approximately 47%, making an average profit on all farms sold of approximately 49%.

As previously stated the Minister added the profits realized from the sale of 77 farms in the taxation years 1960 to 1963 to the appellants' income for those years as being profits from a business, which assessments the appellants dispute contending that the gains were merely enhancements in value realized upon the sale of capital assets.

In support of his contention that the profits from the sales of the farm properties by the appellants were income from a business, counsel for the Minister submitted that the sale of the farms was an integral part of the activities of the appellants from their inception and that the great number of sales is an indicia of business. Further he submitted that the policy of the appellants throughout, by its then program of intensive farm management, was not only to increase rental income but to place the tenants in a position to buy. There was a close relationship between good crop returns and the sales program because when the crops were good the tenants were ready to purchase and the farm managers were in an ideal position to encourage

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the tenants to make offers to purchase. From the foregoing he submitted that the conclusion is irrebuttable that the farms were acquired by the appellants with a view to their resale, which is what the appellants actually did having embarked upon a continuous deliberate sales program with the object of generating profits.

As indicative of the appellants' intention as from their inception he pointed to the fact that standard forms of offer to purchase were prepared and available when the farm lands were held by T. & L. Investment Co. and that an agreement to pay commission on sales was entered into with Canada Permanent Trust by T. & L. Investments Co. at the outset which agreement was continued by the appellants.

Specifically he referred to exchanges of correspondence as early as September 8, 1951, that the farm managers should recommend farms that should be sold and that any good offers for any farm of whatever category should be submitted to T. & L. Investment Co. and later to the appellants, which would then be considered.

In 1952, which was a good crop year, T. & L. Investment Co. acknowledged a recommendation from the farm managers that 22 farms selected by them might be sold. The company expressed its willingness to do so if satisfactory offers were received.

Correspondence in a similar tenor continued to be exchanged between Canada Permanent Trust Company, Canada Permanent Mortgage Company and the appellants, T. & L. Investment Co. and its directors in England and Canada until 1959.

Counsel for the Minister also pointed to a minute of the meeting of the directors of T. & L. Investment Co. dated June 5, 1952, with respect to the land sale policy when "it was agreed that in the present favourable market the farms should be sold at the rate of about 20% per year" and a minute of a meeting of the directors of T. & L. Investment Co. dated October 6, 1953, (which is a date subsequent to the incorporation of the appellants and the transfer of the farm lands to them both of which events occurred in March 1952) stating that with respect to the farm sale policy "after a review of the policy of the sale of farms set forth in the Minutes of the Meeting of June 5, 1954, it was

moved by Mr. Griffin (later the president of T. & L. Investment Co. and of the appellants) and seconded by Col. Frank, (a director resident in England), that the policy as to the sale of farms as set forth in the Minutes of the Meeting of June 5, 1952 be confirmed, and that the policy of selling Class C farms be continued, and that any offers for the sale of Class A and Class B farms, should be carefully considered."

On the other hand, counsel for the appellants submitted that there was a single purchase of farm lands which was basically an investment in accordance with the objects and purposes for which T. & L. Investment Co. and the appellants were incorporated and that other than the initial purchase of the farm lands there were no other purchases. He further pointed out that the farms always produced revenue and no farm was ever sold at a loss. The appellants carried on the farming operations for rental revenue and when that revenue ceased to be attractive the directors took the decision on March 12, 1959, to dispose of all farms then held by the appellants by an accelerated and aggressive sales program. This decision, he submitted, was done for valid reasons consistent with an investment and the appellants' objects and purposes which permit of the variation of their investments. He said that the sales which occurred between 1952 and 1959 (when the ultimate decision was taken to sell all farms) were made to improve the quality of the investment and thereby improve the revenue by the policy adopted to dispose of the inferior farms, i.e. Class C category and that no concerted effort was made to sell the Class A and B farms. During 1956, 1957 and 1958 he argued that the directors were reappraising their policy which culminated in the decision of a March 12, 1959, to sell all farms. He therefore submitted that the appellants' business was that of investment and that all actions of the appellants were consistent with that business and further there was nothing in the way of business in converting one type of capital asset into another type.

At this point I should mention that neither T. & L. Investment Co., nor the appellants recorded in their books the revenue received from individual farms, nor did Canada Permanent Trust Co., but that they did so on a total basis. The farm managers did keep a record of the returns

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from individual farms but they did so for their own purposes. Undoubtedly this information was used by the farm managers in recommending what farms would be sold.

I would add that the appellants retained the mineral rights on all farms sold where they held those rights. The appellants derived income from oil leases.

On behalf of the appellants a number of charts in graphic and written form prepared by a chartered accountant were introduced in evidence to show the rate of the aggregate of farm revenue. Exhibit A5 was a schedule showing the aggregate return to all three appellants on farm investment as percentage of average book value (i.e. cost) for the years 1953 to 1963 as follows:

1953	— 11.12%	1958	— 3.68%
1954	— 6.94%	1959	— 5.20%
1955	— 4.60%	1960	— 4.77%
1956	— 5.10%	1961	— 6.72%
1957	— 8.10%	1962	— 3.29%
		1963	— 11.15%

It should be borne in mind that these charts were prepared from the financial statements after the event and for the purpose of showing that the declining rate of return justified the decision of the directors to dispose of the farms and invest the proceeds in securities which would yield an equal or greater return with less inconvenience. By way of example, document 71 in Vol. I of the appellants' Exhibit Book shows the average interest rates on long term Canada bonds as being 3.65% in 1952; 3.79% in 1953; 3.32% in 1954, 3.19% in 1955; 3.59% in 1956; 4.13% in 1957; 4.02% in 1958; 4.96% in 1959; 5.16% in 1960; 5.11% in 1961; 5.06% in 1962 and 5.07% in 1963.

Percentages based on the book value of the farms as shown in Exhibit A5 are less than the average rates of return on long term Canada Bonds in the years 1958, 1960 and 1961 and slightly higher in the other years. I should think that a prudent investor would look at the return based on the current market value of the assets rather than their cost. The market value of the farms was much higher at the time of their acquisition by T. & L. Investment Co. and the appellants, than their cost to them, which was the

costs of acquisition by the Trust and Loan Company and in the interval the market value continued to increase. Therefore, based on the market value the rate of returns would be less than that shown in Exhibit A5.

The directors did not have the benefit of the charts produced in evidence but they did have the financial statements upon which the charts were based and they would be aware of the then current interest rates.

The Minister called as an expert witness a chartered accountant who completed an affidavit in accordance with Rule 164B attached to which were charts showing (1) the number of farms sold by each of the appellants in the years 1963 to 1965 and (2) charts showing the percentage profit on the disposition of individual farms by the appellants, based upon the excess of the proceeds over book value. Such profits in the years 1953 to 1959 range from 18% to 177% and in the years 1953 to 1964 from 15% to 308%. The average rate of profit from sales during the years 1953 to 1959 was approximately 46% and for the years 1953 to 1964 approximately 50%.

In the opinion of this witness there was no co-relation between the revenue from the farms and their category, nor in the percentage of the returns thereon. That is to say, the revenue from the Class C farms was the approximate equivalent from those on the Class A and B farms on a percentage basis. It seems to me that this would be explained by the fact that the book value of the Class C farms would be less and the revenue therefrom would not need to be as great so as to result in a percentage return equivalent to that in the Class B and Class A farms but this does not alter the fact that the percentage rate of return would be approximately the same from which it would follow that there would be no advantage in the policy of disposing of the Class C farms first and then proceeding through the Class B and Class A farms on the basis of their categories.

The question to be decided in these appeals is whether the gains realized by the appellants upon the sales of farm lands in question were profits from a "business" within the meaning of that word, which as defined in the *Income Tax Act*, includes "a trade, manufacture or undertaking of any kind whatsoever".

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As has been repeatedly stated, the question is one of fact and as scores of reported decisions demonstrate, the conclusion to be drawn from the facts is often balanced upon a knife edge.

The difficulty in these appeals is compounded by the fact that the nature of the subject matter of the transactions is not such that would preclude the possibility that its sale was the realization of an investment or otherwise of a capital nature or that it could have been disposed of otherwise than in trading transactions.

In these appeals the subject matter of the transactions was real property which is equally capable of being held as an investment. The fruits of the property in the form of crop share rentals had been gathered by the appellants and there is no question that the revenue by way of rental returns is properly subject to income tax but the salient question remains whether the gains realized by the appellants upon their sales of farm lands were merely enhanced values obtained from a realization or change of investments as contended by them or gains made in dealing with such investments as a business as contended by the Minister.

The incorporation of a company raises the presumption of an intention to carry on business. Duff J., as he was then, said in *Anderson Logging Co. v. The King*[4] that the sole *raison d'être* of a company is to have a business and carry it on and that if the transaction in question belongs to a class of profit-making operations contemplated by its objects, then, *prima facie*, at all events, the profit derived from that transaction is a profit derived from the business of the company. However that presumption may be rebutted by the evidence as was done in the case of *Sutton Lumber and Trading Co. v. M.N.R.*[5]

The objects of the appellants are not helpful in determining what their business was to be. They are "to invest the capital of the Company, accretions to capital and the income of the Company . . . in real estate, mortgages, bonds, debentures, stock shares and other securities and commodities and . . . to change said investments by sale exchange or otherwise and to invest the proceeds of such sales in other investments of a like nature", or to para-

[4] [1925] S.C.R. 45.

[5] [1953] 2 S.C.R. 77.

phrase those objects, as has been the practice to state them in numerous object clauses, e.g. those of T. & L. Investment Co., "to carry on the business of an investment Company". The proceeds from the sales of farms were used by the appellants to reduce or discharge their debenture obligations, to make an interest free loan to an associated company and to purchase stocks and bonds. But because they did this does not answer the question whether such "proceeds" were "accretions to capital" or "income" of the appellants.

The subject matter in which the appellants are authorized by their letters patent to invest their capital, accretions to capital and income are the normal subject matter of investment with the possible exception of "commodities".

But what is the business of investing?

I should think that there are two senses in which the word "investing" can be used, viz: (1) purchasing articles or property for the income that can be obtained from them, and (2) purchasing articles or property with a view to their resale at a profit. Admittedly because an article is purchased with the view to its resale is not sufficient to constitute such a transaction as carrying on a business but if a company embarks upon an enterprise of purchasing property for the purpose of realizing an enhanced value, I cannot see why it cannot be said to be engaged in the business of realizing "capital" gains (except that the use of the word "capital" is a contradiction in terms). To put it another way the "investments" (an ambiguous term) are, in reality, its stock-in-trade or inventory, rather than "capital assets".

I do not attach particular significance to the objects set out in the appellants' letters patent because, as I see it, the question to be determined is what did the appellant companies do and whether what they did was a business.

Here each of the appellants, in a single purchase, bought a large number of farms at a price, to the knowledge of and agreeable to both the vendor and purchaser, because of the circumstances outlined above, which was well below the market value at that time, so that a profit was certain and with a rising market, prospects were good for an even greater profit. In the meantime revenue rental was also assured.

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In my opinion the evidence clearly indicates that the policy of the appellants from their inception was to dispose of farms (as they did dispose of the farms) of any category at the maximum gain. I draw this inference from their readiness to consider offers for any category of farm and their policy of embarking upon a program of selling Class C farms in the first instance. The policy of the appellants was inherited from their parent, T. & L. Investment Co., under whose control and direction they were, through boards of interlocking directors.

The policy of the parent is unequivocally set out in its minutes of the board of T. & L. Investment Co. that the farms (without any reference to category) should be sold at the rate of 20% per year. This policy was confirmed by the minute of the board of T. & L. Investment Co. of October 6, 1953, and that the policy of actively encouraging the sales of Class C farms should be continued and offers for Class A and B farms should be considered.

The policy of the parent so set forth was adopted by the appellants and implemented. I have listed the sales by the three appellants in the years 1953 to 1963, which total 127½, of which the sales which occurred in the years 1960 to 1963 inclusive have attracted the assessments appealed against. It is an impressive list and on a *prima facie* view it looks like trading whatever label the appellants seek to attach to it. Added to this is the fact that in the year 1953, the same year in which the appellants were incorporated and acquired the lands, there were 20 sales which total was not equalled or surpassed until 1963. In a decision as to whether an appellant was carrying on a "business" as used in the *Excise Profits Tax Act*[6], Kerwin J. as he was then, said in *Noak v. M.N.R.*[7] at page 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. . . .

It is true, that apart from a single instance, to which special circumstances applied, the appellants' agents, the Canada Permanent Trust, never advertised the land for sale. It did not have to do so because the avowed policy of the

[6] S. of C. 1940, c. 32.

[7] [1953] 2 S.C.R. 136.

appellants to sell to the tenants created a very special and ready market. The arrangement between the appellants and Canada Permanent Trust created the most efficient organization to carry the policy directions into effect. While those policy directions were the responsibility of the appellants, they were undoubtedly affected by the recommendations of the farm managers of Canada Permanent Trust, all of whom had been former employees of the appellants' parent. Their recommendations as to what farms could be sold, what price could be obtained, and which tenants could make down payments were certainly heeded. They were also in the best possible position to encourage the tenants to make offers to purchase. Further I fail to follow how any of the sales can be said to be fortuitous in the circumstances outlined.

Considerable emphasis was placed by the appellants on the fact that the farms were revenue producing assets. It does not follow from the fact that a property may be revenue producing that the property cannot also be the subject matter of trade.

Similar emphasis was also placed upon the fact that the policy of the appellants to sell off the inferior farms first was consistent with a policy of investment because that policy improved the quality of the investment. It should be borne in mind, however, that there were only 11 Class A farms and 2 Class D farms. The bulk of the farms were classified B and C, there being 81 Class B farms and 72 Class C farms. Only the Class D farms were classified as "dogs" one of which was sold in 1953 and the other in 1959. The Class A, B and C farms all produced well. In assessing the evidence to the best of my ability, it seemed to me that the percentage of the rental returns was the same in all three categories and that the percentage of profit on the sale of Class C farms exceeded that in Class A and B farms. Accordingly, I cannot attribute any special significance to the categorization of the farms.

On March 12, 1959 the decision was made by the appellants to sell all farms on hand. Between 1953 and 1959 the appellants had sold 50½ farms, of which total included 2 D's, 36½ C's and 12 B's slightly under one-third of the total farms acquired. Between 1959 and 1963, 77 farms

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were sold, of which 9 were Class A, 45 Class B and 23 Class C, which is slightly under one-half of the farms held, leaving about one-sixth undisposed of.

It was the submission of the appellants that the decision to sell their farms made on March 12, 1959, as a prelude to placing the proceeds into different and more satisfactory investments, was a change in policy. In view of the fact that sales in considerable numbers were made prior to March 12, 1959, I do not construe that decision as being a change in policy but rather the adoption of a more aggressive implementation and an acceleration of an already existing policy of selling farms when acceptable prices were obtainable therefor. In this respect the fact that no farm was at any time sold at a loss has a bearing. They were not going to divest themselves of their farms in any event, but only when that divestment could be effected at a satisfactory gain.

The fact that, apart from the original acquisition of the farms, the appellants never acquired further farms, is not conclusive (see *Thew v. The South West Africa Co.)*[8]

The various individual facts above outlined, considered separately, are indeterminate but their cumulative effect leads me to the conclusion that the business of the appellants was part of a single, though multiform business.

In this conclusion I am supported by the decision in *Scottish Investment Trust Co. v. Forbes*[9].

The Lord President pointed out at page 234 that:

> As its name indicates, this is an Investment Company, and the Memorandum makes it plain that its profits are to be derived from various operations relating to investments.

This company had power "to vary the investment of the company and generally to sell, exchange, or otherwise dispose of, deal with, or turn to account any assets of the company". I can see no fundamental distinction between that power and the objects of the appellants herein.

The Lord President then continued:

> . . . it appears that the varying the investments and turning them to account are not contemplated merely as proceedings incidentally necessary, for they take their place among what are the essential features of the business.

[8] 9 T.C. 141.

[9] 3 T.C. 231.

With considerable hesitation, after finding the issue to be a narrow one, I find myself unable to conclude that the appellants have discharged the onus which is upon them to rebut the assumption of the Minister that the farm properties acquired by the appellants were so acquired with the view to dealing in them or turning them to account by sale or otherwise and that accordingly the profits from the sales of the farms were profits from a business.

Before concluding this matter I should point out that counsel for the appellants mentioned that in the appellants' taxation years, prior to 1960, the profits from the sale of farms were not assessed by the Minister as income. His purpose in directing attention to this fact was that it might be a cogent factor in the determination of a similar point in a following year.

However, as I pointed out in *Admiral Investments Ltd. v. M.N.R.*[10] a concession made in one year in the absence of any statutory provisions to the contrary, does not preclude the Minister from taking a different view in a later year. An assessment is conclusive as between the parties only in relation to the assessment for the year which it was made.

The appeals are, therefore, dismissed with costs.

[10] [1967] 2 Ex. C. R. 308.