
Toronto
1966
Mar. 15, 16
Ottawa
Apr. 7

BETWEEN:

MINISTER OF NATIONAL REVENUE ...APPELLANT;

AND

BELMONT HEIGHTS LIMITED .....RESPONDENT.

Income tax—Purchase of lands in trust for proposed company—Deposit received from subsequent purchaser—Whether trust created—Construction of contract—Income Tax Act, s. 63(6) and (7).

In April 1956 Mrs. A contracted to purchase from I P Ltd a large parcel of land in Ontario in trust for a company to be incorporated. In August Mrs. A made an agreement (not purporting to do so as a

trustee) to sell part of the land to L Co and received a deposit of $25,650 which was returnable if a plan of subdivision was not registered by December 15th 1956. On September 5th 1956 Mrs. A. assigned her interest in the contract with I P Ltd to respondent (which had been incorporated in May to acquire the lands) and covenanted that she had done nothing to encumber the lands. On September 20th 1956 she sold half her interest in respondent to E and H, and as a term of her contract with them agreed to pay respondent on or before November 10th 1956 the $25,650 which she had earlier received as a deposit from L Co, but she did not in fact do so.

On December 17th 1956 L Co demanded repayment of its deposit because a plan of subdivision had not been filed. In October 1957 respondent assigned its interest in the lands to R Co, one of the terms of the arrangement being that R Co indemnified respondent and Mrs. A with respect to their liabilities under the contract with L Co, and Mrs. A, in agreement with respondent, simultaneously acknowledged her debt of $25,650 to respondent and declared that it would be satisfied when the deposit of $25,650 was repaid to L Co. The deposit was paid by R Co to L Co late in December.

The Minister contended that the deposit was received by Mrs. A. as trustee for respondent and that it became chargeable to income tax in respondent's hands in its 1958 tax year (which ended on May 31st) under s. 63(6) and (7) of the *Income Tax Act* either when R Co as a term of its contract with respondent agreed to return the deposit or at a later date when it did return the deposit (both dates being in respondent's 1958 taxation year).

Held: (1) Respondent was not beneficiary of a trust of the $25,650 received by Mrs. A either on the date when the deposit was returned by R Co or at any later date in respondent's 1958 tax year. If Mrs. A received the deposit in trust for respondent (which was doubted) the trust came to an end on September 20th 1956 when the respondent's rights against Mrs. A merged in the rights which accrued to respondent under its contract of that date with Mrs. A, which (by reason of her covenant that she had done nothing to encumber the lands) impliedly included an obligation by her to indemnify respondent against claims on the land by L Co and for repayment of the deposit if the transaction with L Co was completed.

(2) Moreover, the effect of the transactions subsequent to September 20th 1956 was that Mrs. A was not at any time thereafter bound as between herself and respondent to pay respondent the amount of the deposit.

(3) Even if Mrs. A was liable to pay respondent $25,650 by November 10th 1956 by virtue of her contract of September 5th 1956 with E and H (that contract having been incorporated in her contract of September 20th with respondent), such liability was not upon any trust but was a simple contractual liability and was incurred in respondent's 1957 taxation year, and the $25,650 was therefore not assessable as income of respondent's 1958 taxation year.

Income tax—"Amount Receivable"—Meaning of—Sale of land—Price payable as land re-sold—When purchase-price to be brought into computation—Onus of proof—Income Tax Act, s. 85B(1)(b).

In its 1958 taxation year respondent sold certain lands for $125,000, to be paid at the rate of $5,000 an acre as the lands were sold by the

1966

MINISTER OF NATIONAL REVENUE v. BELMONT HEIGHTS LTD.

purchaser. Respondent included the whole $125,000 in computing its income for 1958 but claimed an over-all operating loss for that year. Respondent's computation was upheld on an appeal to the Tax Appeal Board. On an appeal by the Minister to this court, respondent asserted that the $125,000 should not have been brought into computation at its full amount but at a valuation of $73,399, and produced its books which showed that the $125,000 was received between March 30th 1959 and July 1st 1964.

Held, rejecting respondent's contention, the onus was on respondent to prove, if it could, that the sales made by the purchaser upon which the $125,000 was to become due, were not made in its 1958 taxation year, and evidence that the amount was received by the respondent in later years would not serve to establish the relevant fact. Had it been established that the sales by the purchaser were made after the respondent's 1958 taxation year, *semble* the $125,000 would not have been an "amount receivable" in that taxation year within the meaning of s. 85B(1)(*b*).

APPEAL from a decision of the Tax Appeal Board.

T. Z. Boles for appellant.

S. H. Starkman for respondent.

THURLOW J.:—This is an appeal from a judgment of the Tax Appeal Board[1] which allowed an appeal by the respondent from a re-assessment of income tax for the year 1958.

In its income tax return for its fiscal period which ended on May 31st of that year the appellant showed an operating loss for the year of $218,26. In making the re-assessment the Minister added to the revenue declared in the return an amount of $25,650 in respect of what was referred to as "additional consideration on sale to Ridge Realty Limited not recorded" and assessed tax accordingly. Later by his notification pursuant to s. 58 of the Act[2] following notice of objection by the respondent the Minister agreed to amend the assessment to allow an amount of $19,775 as a deduction from income under s. 85B(1)(*d*) but otherwise confirmed the reassessment as made. The respondent thereupon appealed to the Tax Appeal Board which held that the respondent was not liable for tax in respect of the $25,650 and allowed the appeal and referred the matter back to the Minister for reconsideration and re-assessment. On the present appeal the first issue to be determined is whether the Minister was correct in adding the $25,650 in computing the respondent's income. If not his appeal must

[1] (1963) 33 TAX A B C 114. [2] R.S C. 1952, c. 148

1966

MINISTER OF NATIONAL REVENUE v. BELMONT HEIGHTS LTD.

Thurlow J.

fail. But a further issue has also been raised by the respondent and will require determination if the Minister was right in adding the $25,650. This issue is whether an amount of $125,000 which was included by the respondent in computing its income was properly brought into the computation at its full amount rather than at $73,399.71 which the respondent now asserts was its value in the 1958 taxation year. Since the net amount to be added in the computation of the respondent's income following the Minister's undertaking is but $5,875 the appeal must also fail if the respondent is right to that extent on this issue.

The facts are somewhat confusing but for the most part they are not in dispute. By an agreement dated April 30, 1956 Islington Park Limited agreed to sell to "Juliana Allonsius (as trustee for a company to be incorporated)" a parcel of land in Etobicoke Township consisting of 70.377 acres for $703,770 payable in stated payments extending over a period ending on August 20, 1961. Thereafter on May 29, 1956 Juliana Allonsius caused the respondent to be incorporated and this company is admittedly the "company to be incorporated" referred to in the Islington Park agreement. Its business, as described by one of the witnesses was the development of the Belmont Heights subdivision which seems to have consisted of the property comprised in the agreement.

By an indenture dated September 20, 1956, in which it is recited that the respondent is the company referred to as the "company to be incorporated" in the agreement between Islington Park Limited and "Juliana Allonsius (Trustee for a company to be incorporated)", the latter, as assignor, "in consideration of the premises" and of $5.00 assigned to the respondent all her interest in the lands described in the agreement to hold the same subject to the terms of the agreement and the covenants and conditions therein. The respondent covenanted to assume and pay all moneys due and to become due under the agreement and to save the assignor harmless and indemnify her against the payment thereof and on her part the assignor covenanted that she had performed all the covenants, provisos and conditions contained in the agreement and that she had done no act to encumber the lands.

By the time this indenture was executed Mrs. Allonsius had made payments totalling $75,000 on account of the

1966

MINISTER OF NATIONAL REVENUE v. BELMONT HEIGHTS LTD.

Thurlow J.

purchase price of the property, and two other persons, Harry Evans and Irving Howard, neither of whom had been interested in the agreement at the time when it was made, had entered into a contract with her dated September 5, 1956, under which they acquired certain rights as against her including a right to shares in the respondent company. By a further agreement, also dated September 20, 1956, it was agreed between Mrs. Allonsius and the respondent that she should sell to the respondent and that the respondent should purchase from her the Islington Park agreement and the lands comprised therein and all her interest therein for $75,000 payable, as to $1,000, by the issue to her of 1,000 shares of the respondent, as to a further $20,000, by the assumption of an indebtedness of that amount which she then owed to Evans and Howard, and as to the remaining $54,000, on demand, but subject to what was set out in her agreement with Evans and Howard which, it was stated, was attached and formed a part of the agreement between her and the respondent.

The contract of September 5, 1956 between Mrs. Allonsius, Evans and Howard contained corresponding provisions by which she undertook to assign the Islington Park agreement and the lands described therein to the respondent for $75,000 payable in the same manner as described in her agreement of September 20 with the respondent but went on to say:

> 4. Allonsius agrees to account and pay to the Company forthwith, *subject to what is hereinafter set out with respect to the sale to Lempicki* for all monies received by Allonsius whether by way of deposit, part or full payment or otherwise with respect to any lots or lands sold by Allonsius whether conditionally or otherwise out of (whether partially or otherwise) the lands described in agreement for sale No. 167633 (hereinafter referred to as the "Company Lands"); it being understood and agreed that any such transactions were entered into by Allonsius as Trustee for the Company and are for the Company's benefit. *Allonsius acknowledges that she has sold 38 lots on a proposed plan of subdivision to T. Lempicki Construction Company Limited under an agreement of purchase and sale registered as instrument No. 173,022 and has received the deposit of $25,650.00 therein set out. Allonsius shall forthwith pay to the Company the sum of $5000.00 out of such deposit and shall pay the balance of such deposit to the company on or before the 10th day of November, 1956.* Allonsius shall furnish satisfactory proof as to the existence or non-existence of any other such transactions before any payments are made by Howard and Evans hereunder.
>
> 5. Upon such accounting and payment being made by Allonsius as set out in paragraph 4 (which accounting and payment shall be made forthwith) Howard and Evans agree to purchase from Allonsius and

Allonsius agrees to sell to Howard and Evans in such shares, as they agree, 500 common shares of the Company for the sum of $500.00. Howard and Evans further agree to then lend the Company the sum of $295,500.00 and to then assign and discharge mortgage No. 172962 for $20,000.00 which shall be owed by the Company to them so that the Company shall then owe Howard and Evans a total of $49,500.00 in such proportions as Howard and Evans agree. The Company shall then repay Allonsius the sum of $4500.00 so that the total indebtedness of the Company to Allonsius shall be $49,500.00. Howard and Evans agree to lend such monies to the Company on or before the 21st day of September, 1956, notwithstanding that Allonsius shall be indebted to the Company in the sum of $20,560.00, with respect to the Lempicki deposit, provided, however, that if at the time of such loan by Howard and Evans, Allonsius is still indebted to the Company with respect to any portion of the said Lempicki deposit, then Allonsius shall convey 25% of the issued common stock of the Company owned by her to Howard and Evans as pledge and security for the repayment by her to the Company of the balance of the Lempicki deposit on or before November 10th, 1956.

(Italics added).

The references to the Lempicki sale arose from the fact that on August 7, 1956 Mrs. Allonsius had agreed to sell a portion of the land to T. Lempicki Construction Company Limited for $171,000 and had received $25,650 on account of this price as a deposit. The contract did not purport to be made by Mrs. Allonsius as a trustee and it was expressly made subject to the registration of a plan of subdivision of the property. It went on to provide that if the plan was not registered on or before December 15, 1956 the purchaser might terminate the contract and in that event would be entitled to repayment of the deposit within one month. By September 20, when the Islington Park agreement was assigned to the respondent, it had already become apparent that the plan would not be registered by December 15, 1956 and that the Lempicki company would become entitled to cancel its contract and demand repayment of the deposit. A notice exercising the purchaser's rights and demanding repayment of the deposit was in fact given by the Lempicki company on or about December 17, 1956, but the money was not repaid either by Mrs. Allonsius or by the respondent nor was any part of the deposit ever paid by Mrs. Allonsius to the respondent as contemplated by the contract between her and Evans and Howard.

On March 29, 1957 the respondent accepted an offer from Aluminum Company of Canada Limited for the purchase of another portion of the land for about $110,000 and received $5,000 as a deposit.

1966

MINISTER OF NATIONAL REVENUE v. BELMONT HEIGHTS LTD.

Thurlow J.

The respondent, however, ran into difficulties and delays in carrying out its proposed development of the property and in finding purchasers for portions of it and therefore endeavoured to find a purchaser who would take the whole project off its hands. In this as well it did not succeed at first but ultimately, by an indenture dated October 7, 1957 and made between the respondent of the first part, Ridge Realty Limited of the second part and Evans and Howard of the third part, the respondent assigned to Ridge Realty Limited all its interest in the lands described in the Islington Park agreement together with all its interest in or under the agreement, in consideration of $125,000 to be paid by Ridge Realty Limited to Evans and Howard at the rate of $5,000 an acre on the sale, transfer or conveyance by Ridge Realty Limited of any of a certain portion of the lands, such payment to be secured in the meantime by a vendor's lien on that portion of the property in favour of the respondent and in favour of Evans and Howard.

It was a condition of the assignment that Ridge Realty Limited should also pay the installments then due and thereafter to become due to Islington Park Limited and Ridge Realty Limited further agreed to assume the agreements for sale with T. Lempicki Construction Company Limited and with Aluminum Company of Canada Limited which agreements the respondent convenanted to assign to it. The indenture then went on to say:

> In this connection T. Lempicki Construction Company Limited has paid to one, Juliana Allonsius the sum of $25,650.00 and the said Aluminum Company of Canada Limited has paid to the Assignor the sum of $5000.00. Neither the said Juliana Allonsius or the Assignor shall be required to account to the Assignee for the said money so received and as against the said Assignee shall be deemed entitled to retain the said monies so received. The Assignee covenants and agrees to assume the said agreements and to indemnify and save harmless the Assignor and the said Juliana Allonsius of and from all actions, manner of actions, debts, liabilities and demands whatsoever with respect to the said agreements and either of them

On the same day Juliana Allonsius executed an acknowledgement under seal with respect to her interest in the $125,000 to which was appended a covenant by Evans and Howard to hold the $125,000 when received upon certain trusts for her and them. The acknowledgement by Mrs. Allonsius, which was admitted to have been made "in

agreement with" the respondent contained the following with respect to the Lempicki deposit:

> I, JULIANA ALLONSIUS, hereby acknowledge that attached hereto are unsigned copies of assignments of agreements from Belmont Heights Limited to Ridge Realty Limited and of an agreement between Murray Gruson and myself, together with Harry Evans and Irving Howard, all of which are dated October 7th, 1957.
>
> ...
>
> And I, the said Juliana Allonsius, further acknowledge that I still owe Belmont Heights Limited the monies received by me from T. Lempicki Construction Company Limited in the sum of $25,650.00 notwithstanding anything contained in the assignment of agreement from Belmont Heights Limited to Ridge Realty Limited, a copy of which is attached hereto, *provided however that when the debt to Lempicki is satisfied then the said debt to Belmont Heights Limited is also satisfied.*
>
> And I, the said Juliana Allonsius, further covenant, acknowledge and agree that I will indemnify and save harmless Harry Evans, Irving Howard and Belmont Heights Limited of and from all actions, causes of actions, claims and demands whatsoever with respect to any monies paid to me by T. Lempicki Construction Company Limited or anyone else on behalf of any of the lands referred to in the Islington Park Limited agreement registered as instrument No. 167633.

(Italics added).

The transaction with Ridge Realty Limited was completed and at some time prior to May 31, 1958 that company repaid the Lempicki deposit. Later, by several payments, the first of which was made on March 30, 1959 and the last on July 1, 1964, it also paid the $125,000.

The Minister's case for adding the amount of the deposit in computing the respondent's income for 1958 is that though the $25,650 was never in fact paid over to it, Mrs. Allonsius was a trustee for the respondent of the puchaser's rights under the Islington Park agreement when on August 8, 1956, she made the agreement with the Lempicki company and that she received the deposit as trustee for the respondent, that at that time the $25,650, being a mere returnable deposit, was not income in anyone's hands but that on October 7, 1957 when the transaction between the respondent and Ridge Realty Limited was entered into or subsequently when Ridge Realty Limited repaid an equivalent amount to the Lempicki company the deposit made earlier became income in the hands of Mrs. Allonsius and that since she was trustee of the deposit for the respondent the latter then became entitled to enforce payment thereof and the amount was therefore income of the respondent by virtue of s-ss. 63(6) and (7) of the Act.

1966

MINISTER OF NATIONAL REVENUE v. BELMONT HEIGHTS LTD.

Thurlow J.

These subsections read as follows:

(6) Such part of the amount that would be the income of a trust or estate for a taxation year if no deduction were made under subsection (4) or under regulations made under paragraph (*a*) of subsection (1) of section 11 as was payable in the year to a beneficiary or other person beneficially interested therein shall be included in computing the income of the person to whom it so became payable whether or not it was paid to him in that year and shall not be included in computing his income for a subsequent year in which it was paid.

(7) For the purposes of subsections (4), (4a) and (6), an amount shall not be considered to have been payable in a taxation year unless it was paid in that year to the person to whom it was payable or he was entitled in that year to enforce payment thereof.

On the facts which I have outlined I do not think the Minister's contention can prevail. It depends, as I understand it, (among other things) on the respondent having been, at the time when Ridge Realty Limited paid $25,650 to the Lempicki company, that is to say, either on October 7, 1957 or on some later date prior to May 31, 1958, the beneficiary of a trust of the $25,650 which Mrs. Allonsius received from the Lempicki company on August 8, 1956. On the facts this in turn depends on whether the respondent had on August 8, 1956 rights as beneficiary of a trust in the $25,650 received by Mrs. Allonsius and continued to have such rights up to the time when Ridge Realty Limited repaid an equivalent amount to the Lempicki company. This, in my view, is negatived by the evidence. Though I doubt that the respondent was ever in the position of beneficiary of a trust of the purchaser's rights under the agreement, even if it be assumed that this was the situation when on August 8, 1956 Mrs. Allonsius, not purporting to act as a trustee, agreed to sell a portion of the property to the Lempicki company and received the deposit, and that despite her personal liability to return it to the Lempicki company in events which later occurred the respondent was entitled to the benefit of whatever rights she acquired in it, the rights of the respondent as against her in my opinion become merged in the rights which accrued to the respondent as a result of the transaction of September 20, 1956 between her and the respondent. The result of this transaction, consisting of the agreement of that date together with the indenture of the same date, appears to me to have been that as between Mrs. Allonsius and the respondent the latter became entitled (i) to the rights of the purchaser

under the Islington Park agreement, subject to the respondent assuming the burden of making the remaining payments under that agreement; (ii) to a right to be indemnified by Mrs. Allonsius against any claim against the land by the Lempicki company for repayment of the deposit; and (iii) to payment of the deposit in the event of the Lempicki transaction being completed. The two last mentioned rights in my opinion flow from her covenant that she had done nothing to encumber the lands. As between Mrs. Allonsius and Evans and Howard, Mrs. Allonsius was also bound to pay the deposit over to the respondent by November 10th but I do not think that anything in the agreements rendered her liable to the respondent to do so except on the indemnity basis already mentioned in events which never arose. Had Mrs. Allonsius repaid the money to the Lempicki company her liability to all concerned would plainly have been discharged. On the other hand had she paid the money to the respondent it would I think be clear that the respondent would have come under an obligation to indemnify her against any claim by the Lempicki company for return of the deposit based on her personal liability to that company to repay it. Accordingly, it appears to me that even if the respondent had rights in the Lempicki deposit as beneficiary of a trust prior to September 20, 1956, (which, as already stated, I doubt) the trust came to an end with the transaction of that date and from that time onward did not exist[1].

Moreover, in my view, in the events which later transpired the respondent never did have a right to recover the amount of the Lempicki deposit from Mrs. Allonsius or from anyone else. It is, of course, plain that if Mrs. Allonsius had paid the amount to the respondent and the same agreement had thereafter been made between the respondent and Ridge Realty Limited the respondent might have realized $25,650 more than it in fact realized. But this did not happen. Instead with no right upon which it could recover the deposit from Mrs. Allonsius the respondent made a contract with Ridge Realty Limited which provided *inter alia* that both the respondent and Mrs. Allonsius should be saved harmless from any claim by the Lempicki

[1] There is a further question as to which, in view of my conclusion on the facts, no expression of opinion is necessary, whether s. 63(6) has any application to trading income.

1966

MINISTER OF NATIONAL REVENUE v. BELMONT HEIGHTS LTD.

Thurlow J.

company. At the same time a declaration executed by Mrs. Allonsius "in agreement with" the respondent acknowledged that she owed the deposit to the respondent provided, however, that when the Lempicki claim was satisfied her obligation to the respondent should be at an end as well and by the same document she went on to covenant to save Evans, Howard and the respondent harmless from any claim by the Lempicki company for the deposit. In my view, as already mentioned, in the events which transpired Mrs. Allonsius was not at any time after September 20, 1956, bound as between herself and the respondent to pay over the deposit and the effect of the declaration, which I think plainly amounts to a contract between her and Evans and Howard if not between her and the respondent as well, is to relieve her, in the event mentioned in the proviso, from her earlier undertaking to Evans and Howard to pay the deposit to the respondent and at the same time to state what was already implicit in the situation that when the Lempicki company was repaid and her contracts to indemnify the respondent were thus at an end there would be no right in the respondent to recover the amount from her. Neither Evans nor Howard were trustees of their rights for the respondent and their right under the agreement of September 5, 1956 to require Mrs. Allonsius to pay the deposit to the respondent was, in my view, subjected to and modified by the terms of the declaration so that when the Lempicki claim was satisfied they too were no longer in a position to require Mrs. Allonsius to pay the amount to the respondent.

Moreover, even if the legal result of the wording by which the contract of September 5, 1956 between Mrs. Allonsius and Evans and Howard was incorporated into the transaction of September 20, 1956 between Mrs. Allonsius and the respondent can be regarded as having been that Mrs. Allonsius became liable to the respondent for the $25,650 it is I think plain that such liability was not upon any trust but at most a simple contractual liability to pay by November 10, 1956. The amount, as previously mentioned, was not income in anyone's hands at that time but neither can it be regarded as income of the respondent in 1958 since the effect of the transaction which took place in that year between the respondent and Ridge Realty Limited, in my view, was not to give the respondent any

further right against Mrs. Allonsius but simply to relieve her and the respondent from any claim by the Lempicki company for the deposit. At the same time the declaration of Mrs. Allonsius, which is the only indication of a contract between her and the respondent at that time negatived her liability to the respondent in events which transpired. If, therefore, Mrs. Allonsius ever did become indebted to the respondent for the deposit the liability must have been incurred in the 1957 and not in the 1958 taxation year.

I am accordingly of the opinion that there is no basis upon which the Minister could properly include the $25,650 in the computation of the respondent's income for 1958 and that his appeal therefore fails.

In view of this conclusion it is not strictly necessary for me to deal with the alternative issue whether the $125,000 to be paid at some indefinite future time when parts of the property might be sold by Ridge Realty Limited should have been brought into the computation of the respondent's 1958 income at its full amount but as the issue is raised and in certain events could conceivably bear on the computation of the respondent's income for later years. I shall express my view on it.

It will be recalled that the $125,000 was voluntarily brought into the computation by the respondent in its return for 1958 at its full amount. It was suggested by counsel that this might have been done because even so the computation showed a loss so that there was no tax to pay in any event but that when the Minister brought the $25,650 into the computation the respondent became entitled on its part to show that the $125,000 brought into its computation was more than should have been accounted for. It is of course not difficult to understand that $125,000 payable without interest at some uncertain future time could scarcely be regarded as having a present value of $125,000.

The Minister's position on this issue was that the $125,000 was required to be brought in at the full amount by s. 85B (1)(*b*) which provides that:

85B (1) In computing the income of a taxpayer for a taxation year,

...

(*b*) every amount receivable in respect of property sold or services rendered in the course of the business in the year shall be included notwithstanding that the amount is not receivable until a subsequent year

1966

MINISTER OF NATIONAL REVENUE
v.
BELMONT HEIGHTS LTD.

Thurlow J.

unless the method adopted by the taxpayer for computing income from the business and accepted for the purpose of this Part does not require him to include any amount receivable in computing his income for a taxation year unless it has been received in the year;

It is, I think, plain that if the $125,000 was an "amount receivable" within the meaning of this subsection at any time in the respondent's 1958 taxation year it was properly included at its full face amount. On the other hand the terms upon which it was to be paid were such that no right to any part of the amount would arise until at some indefinite time the purchaser sold certain portions of the property and as this might never occur I should not have thought that the amount or any part of it would fall within the meaning of "amount receivable" until the event upon which the amount would become payable occurred. In my view it was therefore open to the respondent to show if it could, and the onus was upon it to do so if it was to succeed on this issue, that the event or events upon which the $125,000 was to become payable did not occur prior to May 31, 1958. As I see it, however, no evidence was given to establish when the event or events occurred. All that was put in evidence was a copy of a ledger sheet showing the amounts and dates of the payments by which the $125,000 was said to have been received commencing with a payment on March 30, 1959 and ending with a final one on July 1, 1964. In my view this does not establish when the sales upon which the $125,000 was to become due were made by Ridge Realty Limited and in particular it does not establish that they were not made prior to May 31, 1958.

A submission was also made that the wording of s. 85B (1)(*b*) would not apply because the contract made between the respondent and Ridge Realty Limited was not a sale of the property "in the course of the [respondent's] business" but on the facts I do not regard this submission as tenable. There is accordingly, in my view, no basis upon which it may be held that the $125,000 was not properly included in the computation.

As already indicated, however, the Minister's appeal fails on the issue as to the $25,650 and it will therefore be dismissed with costs.