

1952  
 Jan. 22  
 Mar. 14

BETWEEN :

BYRON B. KENNEDY ..... APPELLANT;

AND

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

*Revenue—Income Tax—Income War Tax Act, R.S.C. 1927, c. 97 s. 3(1)—Transaction so nearly identical and closely associated with appellant's operations not to be considered as an isolated transaction—Failure by appellant to satisfy burden that the Minister's decision is erroneous—Appeal from decision of Income Tax Appeal Board dismissed.*

In 1944 the appellant bought thirty lots of land located north west of the city limits of Toronto, sixteen of which were in 1948 expropriated by the Province of Ontario; the amount of compensation money resulted in a net profit to the appellant of \$12,117.52. The appellant did not report that amount in his income tax return for 1948 on the ground that the purchase of said lands was for the purpose of an investment and not, in any way, related to his business of speculative builder of high class residential houses in Toronto and vicinity. The amount was added to the appellant's income by the Minister and the former appealed to the Income Tax Appeal Board which dismissed his appeal.

*Held:* That the purchase by the appellant of the lots of land is so nearly identical and closely associated with his business operations that it should not be considered as an isolated transaction or completely divorced from the business normally carried on by him.

2. That the appellant has not satisfied the burden on him to demonstrate that the decision of the Minister was erroneous.

APPEAL from the decision of the Income Tax Appeal Board dismissing the appellant's appeal against his 1948 assessment.

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

*O. J. D. Ross* for the appellant.

*Gerard Beaudoin, Q.C.* and *T. Z. Boles* for the respondent.

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

ARCHIBALD J. (now March 14, 1952) delivered the following judgment:

This is an appeal by Byron B. Kennedy of Toronto, Ontario, from the Income Tax Assessment made by the Department of National Revenue for Canada, against him for the year 1946. The appellant complains that there

was added to his Income Tax the sum of \$12,114.13. The said sum was added to his Income Tax by reason of the profit received by the appellant from the sale of certain lots of land owned by him, which land had been expropriated by the Ontario Department of Highways for the purpose of constructing a highway.

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The appeal was heard before me in Toronto on the 22nd day of January, 1952.

The record shows that the Notice of Assessment was dated the 20th February, 1950. The Notice of Objection was duly filed by the appellant and the reply of the Minister of National Revenue was dated the 19th July, 1950. In the said reply of the said minister, a claim respecting disposal of a car was allowed, but the said assessment on the profit received from the said expropriation of the lands, amounting to \$12,117.53, was confirmed. This decision of the said minister was appealed to the Income Tax Appeal Board and by that board was heard on the 24th day of January, 1951. The appeal was dismissed by the Income Tax Appeal Board on the 28th day of February, 1951, and the decision of the Income Tax Appeal Board was duly appealed to this Court.

The facts as I find them are as follows:

- (i) That according to appellant he became interested in acquiring the lands hereinafter referred to as the "Challenor Estate," in 1943, and that on the 20th day of January, 1944, the appellant offered to purchase from the Challenor Estate, thirty lots of land and paid for the same the sum of \$7,000 on the 13th day of April, 1944.
- (ii) That the said lands are located north west of the city limits of the city of Toronto in North York township, and are between Avenue road and Bathurst street, and that said lands had been in possession of the Challenor Estate for a period of more than twenty years prior to the sale to the appellant.
- (iii) That some time (the dates are not certain) during the years 1946 and 1947, the appellant had discussions with the representatives of the Province of Ontario, and learned from them that said province had under consideration the construction of additions

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to the Toronto to Barrie highway and, that a portion of said lands would be required by said province for the construction of said highway, and negotiations followed as to the compensation which should be paid by the said province to the appellant.

- (iv) That on the 16th day of February, 1948, the appellant was paid by the said Province of Ontario, the sum of \$16,802.05, as compensation for the portion of the land later conveyed by the appellant to said Province of Ontario, and amounting, in all, to sixteen lots, and that there then remained unsold by the appellant, fourteen lots out of the lands purchased by him from the said Challenor Estate.

In his Income Tax return submitted for the year 1948, the appellant did not report the said sum of \$12,117.53 as part of his taxable income. The reason given by him for not doing so, and which was urged with great force by his counsel before me, is that he had for upwards of twenty-two years been engaged in the business of "speculative builder" in the city of Toronto and that the purchase of the said lands by him from the Challenor Estate was for the purpose of an investment and not, in any way, related to his business.

In the course of the representations made by the appellant's counsel to me, it was represented that the Income Tax Appeal Board was in a large measure influenced by reason of the failure of the appellant to appear in person before that Board and clarify his intentions as to the purpose for which said lands had been purchased by him. The appellant did, however, appear before me, and after having given careful consideration to his evidence, I am of opinion that he failed completely to clarify his intentions respecting the purchase of these lands.

His evidence as to the purpose for which the lands were acquired is far from satisfactory. He endeavoured to show that he paid the sum of \$7,000 for these lands to assist a friend, whose friends in England were unable to bring to Canada sufficient money to pay the taxes and, that his action in purchasing the property, prevented a tax sale of said lands. He repeatedly refers in his evidence to this as his purpose in buying said lands. However, later in his evidence, and particularly on cross-examination, he states

that the purchase of the Challenor Estate lands for \$7,000 was a "good buy"; that he felt it could be later disposed of at a "profit," and again indicated his intention of building at some later date apartment houses on the said lands. Indicating that his business comprised *inter alia*, that of buying lands to be re-sold for homes or other buildings. In short, the purchase by him of the Challenor Estate lands is so nearly identical and closely associated with his business operations, that it should not be considered as an isolated transaction or completely divorced from the business normally carried on by the appellant.

Furthermore, it should be borne in mind that there was filed with me an exhibit to his evidence indicating the operations as builder carried on by him for the years 1927 to 1946 inclusive. This exhibit, filed before me and marked "1", clearly indicates that during the years 1940, 1941, 1942, 1943, 1944 and 1945, the buildings constructed by the appellant and sold by him showed a striking decrease in cost of the houses so constructed. It is apparent that the costs of buildings constructed during those years, bear little resemblance to the costs of the buildings previously constructed by him. The appellant endeavoured to explain this by indicating that the difficulty in obtaining materials and government restrictions as to the size and costs of the buildings, made it necessary for him to adopt a building of much lower cost. The lowest point in his building costs and operations apparently was reached by the appellant about the year 1943, and that is the year in which discussions were had by him with respect to the purchase of the Challenor Estate lots.

It should be noted also, that during the years 1943 and 1944, the appellant became interested with three other gentlemen in acquiring and developing for sale as building lots, thirty other lots on the outskirts of Toronto, in the Hunt Club Golf Course property, so called; that he participated with his colleagues in the various meetings held from time to time with respect to this property, and that after having contributed large sums of money towards the purchase of this property, he participated in the development and sale of the lands at a profit. It is also in evidence, that he subsequently purchased six lots of land in the Summit property, so called, and when it was later discovered

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that the municipality had made changes in the building restrictions, he sold these lands, again at a profit, and without having built houses thereon.

His counsel, in the course of his skilful argument, urged that the transaction with respect to the Challenor Estate lands, was an investment, pure and simple, and that it was quite apart from the business which he normally conducted. As I have already indicated, I am satisfied such was not the case, and I am confirmed by the appellant's own evidence, both in the manner in which it was given, and in the actual testimony itself.

Having regard also to the trend in the quality and type of houses he had under construction, and having regard to his interests at or about the same time, in transactions affecting lands of similar type, it is clear to me that he has not satisfied the burden on him to demonstrate that the decision of the Minister of National Revenue was in error.

My decision is that this appeal should be dismissed with costs.

*Judgment accordingly.*