BETWEEN:

WILLIAM C. MAINWARING .....APPELLANT;

AND

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

1962
Oct. 1, 2, 3

1964
Sept. 24

Revenue—Income—Income tax—Income or capital gain—Promoter of oil and natural gas company—Promotional techniques focused upon profit-making—Long term investment belied by appellant's small cash payment to company—Customary pattern and style of profit-making schemes—Profit-seeking venture—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e).

This is an appeal from the income tax assessments of the appellant for the taxation years 1951, 1952, 1953, 1955 and 1956. The appellant, who at the time, was a senior official of British Columbia Electric Company, joined in 1949 with George H. Cloakey, Stanley E. Slipper, Alexander Bruce Robertson, the appellant in *Robertson v. Minister of National Revenue* [1964] Ex C.R. 444 and Robert H. B. Ker, the appellant in *Ker v Minister of National Revenue,* (unreported) to form a company called Britalta Petroleums Limited, incorporated as a private company under the laws of the Province of British Columbia. The appellant entered into an agreement with his colleagues, by the terms of which he agreed to subscribe to 41,667 shares in the capital stock of the company at (½) one-half cent per share, with an option to purchase additional shares at the same price in accordance with the terms of the agreement Subsequently, during the years 1951 to 1956, the appellant sold some of his shares in many different transactions and his profits thereon were assessed as income by the respondent.

The evidence established that throughout the entire period under review the appellant devoted constant and diligent attention to the financial requirements of Britalta Petroleums Limited

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Held: That sufficient evidence had been adduced to legally and factually consider each of the original subscribers to the memorandum of association and particularly the appellant as the promoters of the oil drilling engaged in by the company.

2. That the inceptive stages undergone by Britalta Petroleums Limited and its subsequent successful evolution were in all aspects identical to the promotional technique of similar enterprises, focused upon profit making.

3. That the appellant's admission that the only cash he ever paid for his shares in Britalta Petroleums Limited was the original disbursement of $200 or $300 hardly connotes a notion of a long term investment.

4. That the whole record of transactions, dealings, allotments and pooling of shares, the more or less complex incentives devised to obtain underwriting assistance, consistently adopted the customary pattern and style of profit-making schemes.

5. That the analogy between the facts of this case and those of *Alexander Bruce Robertson v. Minister of National Revenue* [1964] Ex. C.R. 444 is absolute.

6. That the appellant's relationship with Britalta Petroleums Limited was similar to that of an ordinary dealer and it appears clearly that the appellant and his partners had in mind, as a set objective, the pursuit of a profit-seeking venture envisaged by s. 139(1)(*e*) of the *Income Tax Act*.

7. That the appeal is dismissed.

APPEAL under the *Income Tax Act*.

The appeal was heard by the Honourable Mr. Justice Dumoulin at Victoria.

C. C. Locke, Q.C. and *W. N. Carlyle* for appellant.
W. J. Wallace for respondent.

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

DUMOULIN J. now (September 24, 1964) delivered the following judgment:

This is an appeal from the income tax assessments for the taxation years 1951, 1952, 1953, 1955 and 1956 of William C. Mainwaring, a resident of the City of Vancouver, B.C.

The appellant, 68 years of age in 1962, had for several decades figured in his native province of British Columbia as one of its leading business men, whose particular concerns were in the gas and oil production enterprises. During the period 1932 to 1958, when he retired on pension, he was employed by British Columbia Electric Company in which he occupied the highly responsible posts of Vice

President and Assistant to the President for the ten years preceding his retirement, from 1948 to 1958.

In January, 1949, Mainwaring, on his company's behalf, attended, in the City of Calgary, the sittings of the Dinning Commission; this engagement brought him into contact with one George Cloakey, an expert in oil and gas lands, and also with Stanley E. Slipper, a highly reputed geological expert. These three gentlemen then and there agreed to pool their respective experience and scientific knowledge for the setting up of a company whose objective would be the search of oil and natural gas, both on Graham Island, one of the Charlotte group, and more so within the confines of the Province of Alberta.

Shortly afterwards, the appellant used his personal connections with Mr. Bruce Robertson, another Vice President and also Chief Counsel of the British Columbia Electric Co., and with Mr. R. H. Ker of Victoria, described as "one of the most successful business men in British Columbia through the years", to have them join the budding syndicate.

On April 12, 1949, the projected company was incorporated as a private one under the laws of British Columbia with the name Britalta Petroleums Limited.

On May 5, 1949, (ex. 4) an agreement was reached by Britalta Petroleums Ltd. and George H. Cloakey, Stanley E. Slipper, William C. Mainwaring, Robert Henry Brockman Ker and Alexander Bruce Robertson, whereby:

1. The Subscribers hereby agree that they will severally subscribe forthwith for the respective numbers of shares in the capital of the Company set out opposite their names below:

George H. Cloakey	62,500	shares
Stanley E. Slipper	62,500	"
William C. Mainwaring .	41,667	" (including the share subscribed for by him in the Company's Memorandum of Association)
R. H. B. Ker	41,666	shares
A. Bruce Robertson	41,667	" (including the share subscribed for by him in the Company's Memorandum of Association).
	250,000	shares

2. The full price at which the said shares shall be allotted shall be one-half cent (½¢) per share and it shall be payable in cash forthwith after allotment.

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The subscribers obtained the additional right of an option exercisable from time to time whenever hereafter the company might decide to allot shares beyond the first 500,000 initially allotted by it, at a price of ½¢ per share to an amount and conformably with terms and conditions set out in the aforesaid agreement.

Mr. Mainwaring, as shown in ex. 9, had purchased, in November, 1949, 125,000 Britalta shares at ½¢ per unit and in the same month of November, same year, resold a block of 33,333 to his wife, Mrs. Gladys Mainwaring, at the above stated price of ½¢ per share.

At this point of my notes, it seems imperative to further clarify the appellant's relationship with the newly-formed Britalta Company.

In an Examination on Discovery, at Vancouver, February 13, 1962, the exchange of questions and replies between counsel for the appellant, Mr. C. C. Locke, Q.C., and Mr. Mainwaring, at page 14 of the transcript, reads thus:

61. And would it be correct to say your part in such a venture would be to assist in the high level management of such a company and to find the necessary financing for it?

A. No, it was not—it was never intended that I would be connected with the high level management of the company. My responsibility was to form a company, endeavour to secure the finances the company needed, set it up as a corporate structure and see that capable management was secured; but it was never intended that I would take an outstanding position inasfar as management was concerned.

62. Well, perhaps I was using a wrong terminology. I didn't mean a day to day management, but at a directorial level.

A. Yes, at a directorial level I would say, yes.

Next, at the bottom of page 16 and top line of page 17, we have the following question and answer:

72. So in a sense you formed this board, at least you brought them all together?

A. That's correct, yes, I did.

On the March 31, 1949, (ex. B), a Memorandum was drafted and agreed upon, setting out an "understanding reached between the undersigned" (G. H. Cloakey, Stanley E. Slipper, W. C. Mainwaring, R. H. B. Ker and A. B. Robertson), clauses 3 and 6 of which state that:

3. Messrs. Mainwaring and Ker are to concentrate on obtaining finances for the Company.

6. The shares in the capital of the Company which will be subscribed for by the promoters in order to provide funds for incorporation and other preliminary expenses will be divided among and be the property of the parties in the following proportions:

Mr. Cloakey	$\frac{1}{4}$
Mr. Slipper	$\frac{1}{4}$
Mr. Mainwaring .	$\frac{1}{6}$
Mr. Ker	$\frac{1}{6}$
Mr. Robertson ..	$\frac{1}{6}$

and the monies payable to the Company therefore will be paid by the parties in the same proportions.

This same quality of "promoters" is mentioned in a communication, dated May 13, 1949, from the Company's secretary, A. Bruce Robertson, addressed to W. C. Mainwaring, Esq., in connection with the Britalta Petroleums Ltd., of which the first three lines follow:

Dear Sir:

I hand you herewith for your personal file a duplicate original of the agreement dated 5th May, 1949 between the above Company and the five promoters.

The appellant in his evidence said that "within a week after the company was formed at my endeavours and request, I put up of my own money $12,000 and obtained a digging permit on the Charlotte Islands."

Thus far, sufficient material had been adduced to legally and factually consider each of the original subscribers, and more particularly so the only party I need be concerned with, the appellant, as the promoters of this oil digging.

Reverting now to the chronological sequence of events, it should be said that in the autumn of 1949, Britalta sorely needed exploitation capital in the sum of at least $500,000; its directors, Mr. Mainwaring one of these, started negotiations with a New York financier, Mr. R. L. Reed, represented in British Columbia by James Chisholm Ralston, a local solicitor, as his duly accredited agent.

Pursuant to this need, a tripartite agreement, ex. 6, dated December 23, 1949, was drawn up between Britalta, James Chisholm Ralston representing the Reed group, and the five initial partners, in which the original shareholders undertook to have their company converted into a public company and to increase its capital from 1,000,000 to 3,000,000 shares without nominal or par value. The

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company also agreed in this covenant "to issue to the purchaser 500,000 shares of the Company and to grant the purchaser, i.e., James C. Ralston, agent, an option to purchase 750,000 other shares at the prices and on the terms and conditions hereinafter set out." Those terms and conditions for the eventual exercise of the option to purchase 750,000 additional shares were as follows:

> All or any part of two hundred and fifty thousand (250,000) shares at forty cents (40¢) per share on or before the 2nd day of January, 1951;
>
> All or any part of two hundred and fifty thousand (250,000) shares at fifty cents (50¢) per share on or before the 2nd day of July, 1951; and
>
> All or any part of two hundred and fifty thousand (250,000) shares at sixty cents (60¢) per share on or before the 2nd day of January, 1952.

It may be of some interest to note that a further instrument of the same date, (December 23, 1949) (ex. 7), obligated the vendors so designated in ex. 6, Mainwaring and associates, to deposit with the Royal Trust Company in escrow share certificates covering 750,000 shares of the company owned by these vendors; of such certificates, 300,000 should be endorsed by the transferors in blank for delivery by the Royal Trust Company to the Purchaser (J. C. Ralston) upon payment by him of the purchase price of such shares, as provided for in the deed ex. 6.

Previously however, on November 5, 1949, Britalta had issued 83,333 shares to the appellant, again at ½¢ per share, totalizing his holdings at 125,000.

In the meantime, and before December 23, Mr. Mainwaring had actively pursued his task of procuring working capital for Britalta. Documentary evidence of this is quite abundant and two samples, if I may be permitted the expression, amply suffice to enhance the fact. On May 4, 1949 (ex. F) Mainwaring informed his co-director, Mr. George H. Cloakey, that their colleague, Robbie Ker, had arranged a meeting at his office with one Mr. Clements who apparently acted as a financial counsellor to the Marshall Field group.

Paragraph 2 of that letter mentions the possibility of inducing that powerful mercantile firm to invest capital "in our company".

Another letter, dated May 25, 1949, from Charles E. Clements to W. C. Mainwaring, raises the joint possibility of obtaining exploration funds from the Bronfman Distilleries.

Throughout the entire period under review, the appellant devoted constant and diligent attention to the financial requirements of Britalta Petroleums. As revealed in the numerous written exhibits filed by both parties, the inceptive stages undergone by this oil company and, in no smaller a degree, the subsequent phases of its successful evolution, the peak level attained by the shares being in the vicinity of $10, were in all aspects identical to the promotional technique of similar enterprises, focused upon profit making.

Mainwaring, for instance, according to ex. 18, listing 26 sales, from October 5, 1951, to August 17, 1955, would have disposed of some 70,000 Britalta shares at prices rising from a low of $2.65 to a high of $9.35.

In October, 1951, as stated in his evidence, the appellant consented to sell 25,000 shares to Dillon, Reed and Co., the New York brokers and purveyors of working funds to Britalta, at 25¢ below the current market price, which then stood at $3.75 a unit, thereby sustaining a loss of some $6,250. Dillon, Reed & Co., at the time, insisted on obtaining a block of 75,000 shares at $3.50 a piece as the condition of extending pecuniary support for the operation of Britalta Petroleums.

Mr. Mainwaring was faced a second time with the obligation of shouldering a loss of about $3,000 when Robert Reed, in a letter dated April 25, 1952 (ex. 19), addressed, amongst others, to the appellant, requested he should transfer 1,429 shares at the price of $4 per unit, the market prices then fluctuating between $5.50 and $6, in order to obtain for the company the services of one Kendall Hert.

More could be written concerning the trading course of Britalta until the end of 1955, but it would be along lines identical to the preceding ones and, moreover, this corroborative material may be found in the voluminous record of exhibits.

The instant appeal is essentially predicated on the argument submitted in paragraphs 23 and 24 of the Notice of Appeal to the effect that:

> 23. The appellant further says that the gains realized by the appellant on the disposal of Britalta shares in the aforesaid years are not income but constitute capital.

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24. The appellant further says that the Britalta shares were not acquired by the appellant in or pursuant to, or in relation to any class of profit-making operation of the appellant previously contemplated or carried on, or then or afterward intended to be carried on, or as a profit-making scheme, but were acquired by the appellant for investment purposes.

This case, as most others of a like nature, derives its legal characteristics from a set of facts each of which, taken separately, might remain inconclusive.

An initial suggestion that the five promoters above mentioned intended to launch a profit-making scheme and inadvertently or otherwise assumed the *de facto* quality of traders could possibly be derived from the undergoing excerpt in clause 21 (ex. 2) of the Articles of Association of Britalta Petroleums Limited:

The basis on which the Company is established is that the Company shall allot shares and give an option to subscribe from time to time for further shares on the terms set forth in the said agreement subject to any such modification and accordingly it shall be no objection to the said agreement that all or some of the individual parties to the said agreement are or may be promoters of the Company or that in the circumstances the Directors of the Company do not constitute an independent Board and every member of the Company both present and future is to be deemed to join the Company on this basis.

And, again, Mr. Mainwaring's admission, consigned on page 27 of the Examination on Discovery, that the only cash he ever paid for his shares in Britalta Petroleums was the original disbursement of $200 or $300, hardly connotes a notion of a long term investment.

Subsequently, the whole record of transactions, dealings, allotments and pooling of shares, the more or less complex incentives devised to obtain underwriting assistance, consistently adopted the customary pattern and style of profit-making schemes.

Counsel for the appellant relied mainly on the authority of *Irrigation Industries Limited v. Minister of National Revenue*[1], wherein a majority in the Supreme Court decided, *inter alia,* as written by Mr. Justice Martland at page 352, that:

The positive tests to which he (Thorson, P.) refers as being derived from the decided cases as indicative of an adventure in the nature of trade are: (1) Whether the person dealt with the property purchased by him in the same way as a dealer would ordinarily do and (2) whether the nature and quantity of the subject-matter of the transaction may exclude the possibility that its sale was the realization of an investment, or otherwise

[1] [1962] S.C.R. 346 at 352.

of a capital nature, or that it could have been disposed of otherwise than as a trade transaction.

The circumstances and incidents here seem completely different from those obtaining in Irrigation Industries. The latter Company, in 1953, purchased directly from a mining concern 4,000 Treasury Shares of an initial issue of 500,000. Irrigation Industries Ltd. resold those shares within a few months at a profit of $26,897.50. Manifestly, the aforementioned deal consisted in an isolated transaction and the Directors of Irrigation Industries took no participation whatsoever in the organization of the mining company and had nothing to do with its financing, promotion or management.

On less compelling grounds, in *re Regal Reights Limited v. Minister of National Revenue*[1], Mr. Justice Judson, who spoke for the majority of the Supreme Court, held that this was a venture in the nature of trade and the profit from it taxable within the meaning of ss. 3, 4 and 139 (1) (*e*) of the *Income Tax Act* (R,S.C. 1952, c. 148).

Moreover, the Court is unable to differentiate the matter at issue from the decision of Mr. Justice Kearney in *Alexander Bruce Robertson v. Minister of National Revenue*[2]. The analogy between both suits is absolute.

I have no hesitation in finding that appellant's relationships with Britalta were similar to those of an ordinary dealer and, furthermore, it appears clearly that W. C. Mainwaring and his partners had in mind, as a set objective, the pursuit of a profit-seeking venture envisaged by s. 139 (1) (*e*) of the *Income Tax Act*. Then, should this assumption be correct, ss. 3 and 4 of the Statute, decreeing that income derived from a business is assessable to income taxation, should apply.

Consequently, the appeal is dismissed and the re-assessments made up the appellant are affirmed. The respondent is entitled to costs after taxation.

Judgment accordingly.

[1] [1960] S.C.R. 902.

[2] [1964] Ex. C.R. 444.