Montreal 1968 Jan. 24-25 Ottawa 1968 Feb. 27

BETWEEN:

EUGÈNE LAGACÉ ..... APPELLANT;

AND

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

AND

BETWEEN:

GEORGES LAGACÉ ..... APPELLANT;

AND

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

Income tax—Business profits—Computation of—Profits channelled to controlled company—No bona fide business transaction—Contract requiring profits to be used to pay debts of controlled company—To whom profits chargeable—Acquisition of interest in option on lands—Allowance for cost in computing profits—Income Tax Act, ss. 3, 4.

Appellants, who with *F* had acquired options on certain lands which they intended to turn to account at a profit, later acquired *F*'s interest in the options on terms that the options be taken up by one of two companies controlled by appellants and the profits therefrom applied if necessary to discharge that company's debts, which *F* had guaranteed. The lands were disposed of by appellants in a complicated series of transactions involving the two companies controlled by them. The total profit accruing to appellants and the two controlled companies from the transactions was $150,765, but appellants each reported as his share thereof only $5,642 which was based on the price at which appellants transferred the options to the two controlled companies. No evidence was given that any of the profit from the transactions was applied on one of the controlled company's debts in accordance with appellants' agreement with *F*.

Held, appellants were chargeable to income tax on the $150,765 profit which accrued both to themselves and the controlled companies

1. A trader cannot reduce the profits from his trading transactions for purposes of income tax by merely substituting for a conveyance between himself and a third party a series of conveyances involving companies under his control which do not represent *bona fide* business transactions.

2 Even if the profits from the transactions were used to pay debts of a company controlled by appellants, as required by their contract with *F* (as to which there was no evidence), such profits remained profits from appellants' business operations and therefore were chargeable to tax in their hands.

3. In the absence of any evidence to establish the cost to appellants of acquiring *F*'s interest in the options no allowance could be made for

such cost in computing appellants' profits. That cost might be an appropriate part of the amount paid out of such profits on the controlled company's debts pursuant to the contract with *F* or, if it could be determined, it might be the value of the consideration given *F* for his interest in the options, but, failing evidence of these, would appear to be the amount of the disbursements made as a result of the agreement with *F*, as to which there was no evidence *Harrison v John Cronk & Sons, Ltd.* [1937] A.C. 185 and *Absalom v. Talbot* [1944] A.C. 204, referred to.

INCOME TAX APPEALS.

Philip F. Vineberg, Q.C. for appellants.

Jean-Claude Sarrazin and *A. Garon* for respondent.

JACKETT P.:—These appeals from decisions of the Tax Appeal Board dismissing appeals from the appellants' assessments under Part I of the *Income Tax Act* for the 1958 taxation year were heard together in Montreal on January 24 and 25, 1968.

In each case, the respondent had assessed the appellant on the basis that his share of the profits from certain transactions relating to the acquisition and disposition of lands at Fabreville, Quebec, was $75,382.60, and not merely the lesser amount of $5,642.50 shown by the appellant in his income tax return for the taxation year.

The questions raised, in each case, by the Notice of Objection to the assessment and by the Notice of Appeal to the Tax Appeal Board were (a) whether the appellants' profit from such transactions was $5,642.50 as contended by the appellant or $75,382.60, as found by the respondent, and (b) whether the profit was, in either case, subject to income tax. (There has never been any question raised as to the correctness of the amounts assuming taxability on one basis or another.)

The appellant's position, in each case, at each of those stages, was that the two appellants and one Fortin had, in 1956, acquired certain options to buy land at Fabreville and that each of the appellants had, in 1958, transferred his share in the options to a company for a consideration of $15,000, which, after deduction of his expenses, had yielded him a profit on the transaction of $5,642.50, the amount reported by him as income.

What the respondent had learned before the assessments appealed from is that the appellants had (after acquiring

1968

LAGACÉ v. MINISTER OF NATIONAL REVENUE

Jackett P.

Fortin's interest in the options) not only entered into the transactions during the latter part of 1958 under which they had each received a gross amount of $15,000, but they had, during the same period, caused companies under their control[1] to enter into transactions relating to the land at Fabreville as a result of which the total net profit accruing to the appellants and companies under their control as a result of the acquisition and disposal of the Fabreville lands was $150,765.20. It was apparent that all the actual bargains involved (that is, bargains between the appellants or companies under their control on the one hand and persons with whom they were dealing at arm's length on the other) were negotiated by the appellants with the persons with whom they were dealing at arm's length, and that the appellants subsequently arranged for the various intervening conveyances under which a large part of the profits arising from the dispositions were made to appear as having accrued to companies under the control of the appellants and not to the appellants.

In these circumstances, it seems, although he did not express himself as clearly as he might have done, that the respondent took the position in making the assessments appealed from that the transactions giving rise to the profit of $150,765.20 were either (a) exclusively those of the appellants on their own account (the companies under their control having been used merely as instrumentalities through which implementing conveyances and other operations were carried out[2]), or (b) in part those of the appellants and in part transactions associated with other transactions that brought into play section 16(1), section 17(2), or section 137 of the *Income Tax Act*. On the first

---

[1] The companies referred to as companies under the control of the appellants in these reasons are E. & G. Lagacé Inc. and Adrien Lagacé Inc. While no clear evidence has been forthcoming as to the shareholding in these companies, it is clear that, at least from early 1958, each of the companies was controlled by some or all of the two appellants and their wives

[2] In this connection, it is to be noted that the evidence of the appellants, particularly that of Georges Lagacé, shows that it was common practice for the appellants so to use E. & G. Lagacé Inc In his evidence before the Board, after he said that the options belonged to the three individuals (Fortin, his brother and himself), he was asked why E. & G. Lagacé Inc had paid for them and he replied: «Bien, mon Dieu, on a toujours fait nos affaires par la compagnie ou par la compagnie E & G Lagacé Inc.»

alternative, if it were correct, each of the appellants was, of course, properly taxed on his share of the total profit (assuming it was a profit from a "business" within the meaning of the *Income Tax Act*) just as any trader would be if, for some reason, his trading transactions were carried out through, and in the name of, a trust company, bank or other nominee acting as his agent or trustee.

Apparently, after hearing the evidence adduced before him, Mr. Boivert, the member of the Tax Appeal Board by whom the appeal was heard, took that view of the transactions because he said:

> Les faits, à première vue, semblent bien enchevêtrés A les examiner de près, il est facile de se rendre compte qu'ils ont été agencés de façon à constituer un trompe-l'œil pour le répartiteur pensant sans doute qu'il était atteint de myopie, ce qui n'était pas le cas.

Whether or not the appellants thought that the assessor "était atteint de myopie", the basis upon which the appeal to the Tax Appeal Board was launched appears to have been a view that a trader may reduce the profits from his trading transactions (at least for purposes of income tax) by merely substituting for a straightforward conveyance between himself and the person with whom he has negotiated a transaction a complicated series of conveyances involving companies under his control, even though such conveyances do not represent *bona fide* business transactions. This seems clear from the fact that, while the assessments appealed from were obviously based on transactions in the names of companies under the control of the appellants, the appellants did not consider it necessary for their case, that they, by the various documents in which they were required to state the material facts or by the evidence before the Board, inform the Minister or the Board of the various transactions and establish that each of them was an actual *bona fide* contract that was in fact negotiated, by or on behalf of the persons named as parties, at the time of the negotiation of the business bargain. (Indeed, there is no suggestion anywhere in the documents or the evidence before the Board or in this Court[3] that either of the

[3] It is particularly significant that, after the clear findings of fact by the Board that the profits were profits from a business carried on by the appellants and were not profits from a business carried on by one of their companies, the appellants refrained from bringing any evidence in this Court to show actual trading transactions by either of the companies.

1968

LAGACÉ v. MINISTER OF NATIONAL REVENUE

Jackett P.

controlled companies in question—E. & G. Lagacé Inc. and Adrien Lagacé Inc.—was engaged at the relevant time in a business of trading in land or that the appellants, in negotiating the various acquisition and disposition transactions with the third parties, were doing so as agents or employees of one or other of the companies controlled by them.)

The view to which I have referred, upon which the appeal appears to have been launched to the Tax Appeal Board, appears to me to be so clearly wrong that there is no need to give any reasons for so holding. As will appear subsequently, the appellants, in attempting to support their position, brought in additional evidence before the Tax Appeal Board on the basis of which the Board held, in a judgment with which I agree, that the profits in question were in fact profits from the appellants' own business transactions and that they had, in effect, received them and used them for their own purposes.

(The alternative position, to be found in the Notice of Objection and in the Notice of Appeal to the Tax Appeal Board, that the transactions in question were not trading transactions and that the appellants are even entitled to a return of the tax paid on the lesser amounts shown in their tax returns, was not pressed before the Tax Appeal Board and was expressly dropped before me by counsel for the appellants.)

However, according to counsel for the appellants, a new element in the story appeared for the first time in evidence presented to the Tax Appeal Board. On that occasion, for the first time, the appellants put forward a contract that they had made with Fortin in December 1957, which, they said, explained why one of the companies controlled by the appellants had been introduced into the transactions in question.

To understand the contract of December, 1957, it becomes necessary to refer to some facts that were not otherwise material.

The appellants, who are brothers, had three other brothers who, prior to 1953, owned the shares in the company known as Adrien Lagacé Inc., which company had carried on a substantial housebuilding business at Beaconsfield, Quebec. Early in 1957, Adrien Lagacé Inc. having got into financial difficulties, Fortin (the man who had joined with

the appellants in acquiring the Fabreville options) had guaranteed that company's indebtedness at the Bank up to an amount of $136,000. Shortly thereafter, Fortin took a conveyance of substantially all the assets of Adrien Lagacé Inc., which were at Beaconsfield, and undertook the task of liquidating them and using the proceeds to pay the company's creditors, who, of course, included the Bank. When he entered into this affair, Fortin seems to have thought that the company's problem was a temporary shortage of ready cash and there is no suggestion that he had any idea, at the commencement of his involvement in the affair, that the company's assets were not sufficient to pay all of its debts.[4] However, after working at the task for several months, Fortin found that it was taking longer, and involved more work, than he had expected. (He probably began to be concerned as to whether the proceeds of liquidation would be sufficient.) Having regard to his age and other responsibilities, he decided to try to get free of the matter. It was in these circumstances that he negotiated the contract of December 1957 with the appellants. That contract reads as follows:

> Entente entre Georges & Eugène Lagacé et J. M. E. Fortin tous de Dorval. Il est convenu entre les trois parties, ci-haut mentionné, que J. M. E. Fortin consent à céder tous ces droits dans huit options d'achat de terres situé à Fabreville, paroisse de Ste-Rose pour le prix de 1.00 dollar aux conditions suivantes.
>
> Étant donné que J. M. E Fortin est engagé envers la Banque Canadienne Nationale à Pointe Claire pour la Co. Adrien Lagacé Inc.
>
> Il est explicite que les dite options, lorsqu'ils seront exercer soit acheter en faveur d'Adrien Lagacé Inc. de maniere à libérer totalement J. M. E. Fortin de la Co. Adrien Lagacé Inc. que ce soit la banque ou toute autres créditeurs de la dite Co. Il est entendu que la balance des terrains de Beaconsfield appartenant à J. M. E. Fortin pour cause d'endossement envers Adrien Lagacé Inc. soit transférer par contrat notarié à Eugène ou Georges Lagacé ou tout autre Co. désigné par eux. Cette entente deviendra nul et sans effet si les obligations ci-haut mentionés ne sont pas respectées dans les douze mois de cette date.

---

[4] Fortin said before the Tax Appeal Board:

«Après avoir fait 'rechecker' l'audition de leurs livres, je vois que leur position n'est pas très bonne. Il y avait du danger pour eux de faire banqueroute à moins qu'ils aient un peu de 'cash'. J'ai été voir la banque Canadienne Nationale de Pointe-Claire, Adrien Lagacé Inc. devait déjà à la banque Canadienne Nationale cent mille dollars ($100,000.00). Pour pouvoir passer à travers, ça prenait un autre quarante mille dollars ($40,000 00). J'ai vu un agent à la banque, j'ai dit: 'Donnez à Adrien Lagacé Inc. quarante mille dollars ($40,000.00) je vais endosser'.»

1968

LAGACÉ v. MINISTER OF NATIONAL REVENUE

Jackett P.

By the contract of December, 1957, between Fortin and the appellants, as I understand it, Fortin agreed

(a) to turn over to the appellants or their nominee the company's Beaconsfield assets, which were, of course, dedicated to payment of the debts of Adrien Lagacé Inc.,[5] and

(b) to transfer to the appellants his one-third interest in the Fabreville options[6] on terms that the options should be taken up in the name of Adrien Lagacé Inc. to the extent necessary to vest in that company such part of the profits arising from turning the options to account as might be necessary to enable it to pay any part of its debt to the Bank that would not otherwise be paid and which, if not paid otherwise, would be payable by Fortin as a result of his guarantee.

Quite apart from the very substantial consideration (Fortin's one-third interest), the appellants were motivated to some extent in entering into this agreement by the fact that, while they profess to have had no legal obligation to stand behind their brother's company, and while Fortin was legally liable to do so, they recognized some moral responsibility because the company was their brother's company.

As I have already indicated, as I view the contract of December 1957, Fortin agreed to turn over to the appellants his share in the Fabreville options (which, as is conceded in this Court, had been acquired for the purpose of turning them to account at a profit in one way or another and which had substantially increased in value between the time of their acquisition in 1956 and December 1957) in return for a covenant by the appellants that they would utilize such part of the profits to be realized

---

[5] The notarial deed under which Fortin acquired these assets from Adrien Lagacé Inc. and the notarial deed whereby he transferred them to the appellants' nominee, E. & G. Lagacé Inc., each purport to be purchase transactions involving the payments of large sums of money. The evidence would indicate that no such amounts were paid or contemplated. No explanation that I can understand was offered for this anomaly.

[6] According to Fortin's evidence, he was at the same time freed from reimbursing E. & G. Lagacé Inc. for his share of the cost of the options, which had been paid by that company for Fortin and the appellants.

from the options as might be necessary to ensure that the company's debt to the Bank would be paid without Fortin being liable on his guarantee. (This might be an appropriate place to interject that, as it appears to me, the covenant to have the options taken up in the name of the company was merely the method adopted to carry out the obligation of turning over some part of the profits to the company.)

About the end of 1957, and before any steps were taken to turn the options to account, the three Lagacé brothers who had owned the shares in Adrien Lagacé Inc. transferred such shares to the two appellants and their wives or to one or more of them.[7] The result was that, while the company had been controlled up to December 1957 by the three Lagacé brothers who are strangers to these appeals, it was, during the course of the 1958 transactions that gave rise to the profits that are the subject of these appeals, a company all the shares of which belonged to one or other of the appellants or their wives.

In this Court, in the light of the December 1957 contract, it was contended on behalf of the appellants, in effect, as I understand it, that the profits in dispute were not the appellants' profits because the appellants were required by that agreement so to arrange the transactions that the profits would vest in Adrien Lagacé Inc. and that they had in fact done so with the result that the profits vested in the company and not in the appellants.

I reject this contention for two reasons, *viz*:

(a) the onus was on the appellants to establish, as a factual basis for this contention, that the profits in dispute had, in fact, been used, as contemplated by the agreement, to pay such part of the debt of Adrien Lagacé Inc. to the Bank as could not be paid out of the company's own assets (the Beaconsfield assets) and the appellants have completely failed to prove that any part of such assets were so used, and

[7] According to an assessor's reports that are part of the evidence by consent of counsel, Mrs. Georges Lagacé became owner of all of the ordinary shares and the two appellants received preferred shares, the only consideration being Mr. Lagacé's guarantee of company debts in the amounts of $8,000. The same reports say that the company re-acquired the preferred shares from the appellants for cash after the company had received some of the proceeds from the Fabreville transactions.

1968

LAGACÉ v. MINISTER OF NATIONAL REVENUE

Jackett P.

(b) even if the whole of the profits in dispute had been so used, that would not change their character as profits arising directly from the appellants' business operations.

I shall deal first with the appellants' failure to establish the factual basis for their contention.

In that connection it is important to consider first what had to be proved. As I understand the December 1957 contract, Fortin agreed to turn over to the appellants or to their nominee the balance of the Beaconsfield assets of the company that he had been in the process of liquidating so that he might use the proceeds to pay the company's debts.[8] Obviously, under the arrangement, the appellants were to continue this process and they were only bound by the contract to use the profits from the Fabreville options to pay the company's debts if, and to the extent that, the proceeds of the Beaconsfield properties were inadequate for the purpose. What the appellants had to prove, therefore, was

(a) that the proceeds of disposition of the Beaconsfield property had been insufficient to pay some part of the company's debt to the Bank,

(b) the amount that had been left owing to the Bank after all the monies available from the Beaconsfield assets of the company had been paid to the Bank, and

(c) that that amount had been paid to the Bank out of the Fabreville profits.

Having regard to the manner in which the question arises and the substantial amounts involved, it was not in my view sufficient for the appellants to testify simply that they knew that all the Fabreville profits had been used to pay off the company's debt at the Bank and that there had been a loss on the liquidation of the Beaconsfield assets, but that they really had no knowledge of just what was done in respect of either matter, or who did it or how it was done. That, however, is in reality the gist of their

[8] I accept it that this was the intent notwithstanding the unexplained form of the notarial conveyances, which were so framed as to indicate sales for substantial prices.

evidence. Indeed, in the first place, no evidence was put forth on behalf of the appellants on either matter; and, when asked about some aspects of the matters on cross-examination, they indicated a lack of any knowledge of what had really happened.

The very simple position put forward on behalf of the appellants during the hearing in this Court was that there was, at the relevant time, $136,000 owing to the Bank, that there was approximately the same amount of profits from the Fabreville transactions (apart from the amounts that they showed as having been received by them personally), and that, while there was no direct evidence as to what had actually happened, it should be inferred that such profits were used to pay the debt to the Bank.

Even if such an inference would be a fair inference to draw from those facts if they had been established and everything else had been left untold, that is not the state of the record. It is quite clear from the evidence that, while the Bank debt had been $136,000 on February 8, 1957 (paragraph 2(d) of the agreement of facts), it was, according to the Bank statements that were put in evidence, reduced to $109,000 by March 1958, which was long before the transactions giving rise to the profits in question. Apart entirely from this substantial difference between the facts on which the appellants' contention is based and the evidence, where there is evidence, a comparison of the payments to the Bank, as shown by the Bank statement, with the payments to the companies controlled by the appellants as shown by the various conveyances, which show the payments very precisely indeed, not only fails to lend any support for the appellants' contention, but suggests strongly that a large part of the monies from the Fabreville transactions did not go directly to the Bank and that the monies that were used to pay the Bank must have come, immediately at least, from somewhere else.

When one turns to consider what happened in connection with the liquidation of the company's own assets at Beaconsfield, there is simply no information except bald assertions that they gave rise to a loss. I find it impossible to accept these assertions without something more specific by way of explanation. A comparison of the figures in the conveyance of these properties from the company to Fortin with the figures in the conveyance from Fortin to the

1968

LAGACÉ v. MINISTER OF NATIONAL REVENUE

Jackett P.

company controlled by the appellants, as well as an examination of the record of payments to the Bank would suggest that liquidation of the company's own assets had been resulting, during Fortin's administration and during the administration by the appellants prior to the realization of the Fabreville profits, in substantial payments on the company's debts. I know of no reason to think that the process of liquidation had been completed before the Fabreville transaction and I am not prepared to make a finding on the evidence before me that it had ceased to yield anything for payment of debts some time in the early part of 1958. If that had been so, I should have thought that the appellants could have shown, by evidence in the Tax Appeal Board or in this Court, what actually happened.

I am, therefore, not able to make a finding that any part or all of the profits arising from the Fabreville properties were used to pay the debt to the Bank in accordance with the terms of the agreement of December 1957.

Before parting with this branch of the case, I might make the comment that, where the onus is on a party to prove something within his knowledge or concerning his own business affairs, it is incumbent on him either to put a reasonably complete, and completely documented, story before the Court, so that it may be tested by cross-examination, or to explain to the Court why such evidence is not available. The failure to take one or other of those steps must always weigh heavily in the balance against such a party when the party contents himself, as the appellants did here, with a submission that an inference should be drawn from certain very sketchy facts as to what the party himself actually did. Here, of course, I have held that the facts on the basis of which I was asked to draw the inferences have not been established. However, even if they were established, I should have had to consider where the balance of probability lay when the parties had seen fit not to give the full story with appropriate documentation or to show that they could not do so.[9] I am inclined to think

[9] Even if the appellants did not personally handle the Beaconsfield transactions or the Fabreville transactions in sufficient detail to be able, by reference to the records, to show what happened, their bookkeeper, or other person who handled the matters on their behalf, must have been able, if available, to do so.

that, ordinarily, my conclusion would be that the full story was withheld because it was unfavourable to the party who withheld it.

I turn now to my second reason for rejecting the contention put forward on behalf of the appellants, which I repeat here for convenience. It is that, even if the whole of the profits in dispute had been used to pay the debt of Adrien Lagacé Inc. to the Bank because the appellants were required by their agreement with Fortin so to use them, that would not change their character as profits from the appellants' business operations.

The most significant feature of the appellants' contention in this Court, as it strikes me, is that it is inherent in the contention that profits that would otherwise have accrued to the appellants have ended up in the name of a company controlled by them, not because of *bona fide* business transactions between the appellants and such company, but because of transactions that have been arranged between them to implement a contract between the appellants and a third person to accomplish objects desired by the third person. In other words, the contention is based on the assumption that profits of the appellants' business operations were put into the hands of the company by a device and that the profits were not the result of the company having embarked on business transactions. In my view, therefore, the short answer to the contention, even assuming the facts to have been established, is that, for purposes of Part I of the *Income Tax Act,* profits from a business are income of the person who carries on the business and are not, as such, income of a third person into whose hands they may come. This to me is the obvious import of sections 3 and 4 of the *Income Tax Act* and is in accord with my understanding of the relevant judicial decisions.

Having regard to my conclusion, as indicated above, that there were no *bona fide* business transactions between the appellants and the companies controlled by them, there is no occasion to deal with the respondent's alternative arguments based on sections 16, 17 and 137 of the *Income Tax Act.*

Another argument was made before me on behalf of the appellants to which I should make reference. It was argued

1968

LAGACÉ v. MINISTER OF NATIONAL REVENUE

Jackett P.

that, even if the profits in question were income of the appellants, the amounts of the assessments are excessive in that no allowance has been made in their computation for the cost to the appellants of acquiring Fortin's share in the options. Superficially, there would appear to be merit in the contention. I cannot, however, find that the appellants put forward any evidence on the basis of which any such allowance can be made. On the one hand, such allowance might have been an amount equal to all or one-third (I need not decide which) of the amount paid out of the profits in question to the Bank under the December 1957 agreement but, as I have decided, the appellants have failed to prove that there was any such amount. On the other hand, if one could put a value on the consideration passing from the appellants to Fortin for his interest in the options, that amount might be allowed. There is, however, no evidence before me on which such value can be determined and I doubt whether it would be commercially practical to evaluate such a consideration. That being so, I am inclined to the view that the only allowance that could be made is the actual disbursements made as a result of the agreement.[10] The appellants have, as it seems to me, had full opportunity to establish such amounts and have chosen not to do so.

One other point taken by the appellants throughout the proceedings may also call for some mention. That is the suggestion that the appellants should not be required to pay income tax on the profits from the Fabreville transactions of 1958 because Fortin had not been assessed in respect of any part of them. There is, in my view, no substance in the point. Even if there were an omission by the respondent to assess a third party for income tax on his profits arising from the same facts, that is no ground for invalidating an assessment that is otherwise valid. Here, of course, Fortin was no party to the transactions of 1958 giving rise to the profits in question as he had parted with all his interest in the options in 1957. Whether or not he made a profit in respect of which he should have been taxed by reason of his acquisition in 1956 and disposition in 1957 is a completely different question.

---

[10] Compare *Harrison v John Cronk & Sons, Limited,* [1937] A.C. 185, and *Absalom v. Talbot,* [1944] A.C. 204, where similar problems concerning revenue items are discussed.

I have not overlooked the argument based on section 85B of the *Income Tax Act*. Although no reference is made to a claim under that section in the Notice of Appeal, and there is no evidence before me on which I could direct an allowance under that section, I would be prepared to entertain a motion to amend the notice of appeal so as to provide a basis for a judgment referring the assessments back for re-assessment on this point. It may be however that, having regard to section 85B(1)(*e*), such a motion should not be allowed.

If no such motion is made within three weeks from the date of these reasons, judgment will be pronounced dismissing the appeals with costs.

APPENDIX

So that there may be no misunderstanding as to the view upon which I have acted in deciding this case, I should like to make it clear that, as I see it, there is a clear distinction in principle between

(a) the case where a trader carries out business transactions of his business in the name of some other person who is agent, trustee or "nominee", in which case, the profits from selling his "stock-in-trade" are profits of his business even though the transactions are carried out in the name of somebody else, and

(b) the case where a trader takes stock-in-trade out of his business and uses it himself or gives it to somebody else so that there is no sale of it in the course of the business and can therefore be no profit from a sale of it in the course of his business.

In this case, I came to the conclusion, after examining with care a very confused record, that the business transactions giving rise to the profits in question were really those of the appellants.

If this had been a case where the stock-in-trade (the options) had been taken out of the appellants' business and given away to somebody else, such cases as *Sharkey v. Wernher*[11], *Petrotim Securities, Ltd. v. Ayres*[12], and *Mason v. Innes*[13] would have had to be considered. If the principles

[11] [1956] A C. 58.
[12] (1964) 41 T C. 389
[13] [1967] 1 Ch. 1079.

1968

LAGACÉ
v.
MINISTER OF
NATIONAL
REVENUE

Jackett P.

applied in such cases apply to matters arising under the Canadian *Income Tax Act,* it would appear, strangely enough, that the result would depend on whether the taxpayer kept his accounts on a cash or accrual basis.

If he kept his accounts on a cash basis, he would not bring in any amount on the revenue side of the accounts of the business in respect of the stock-in-trade removed from the business even though the cost of acquiring it was reflected in the accounts of the business. If he kept his accounts on an accrual basis, he would bring in, as revenue, the value of the stock-in-trade so removed as that value was at the time of removal.

I express no opinion as to the principles applicable in similar cases under the Canadian statute. (See *Frankel Corpn. Ltd. v. M.N.R.*[14] for a limitation on the application of the English cases.) I merely make the comment that, if the English cases apply, it would appear that, if the appellants, who have been assessed without complaint on the basis that they kept their accounts on an accrual basis, had taken the options out of their business and given them to Adrien Lagacé Inc., or used them for some purpose that had nothing to do with their business (e.g., to pay off the debt of Adrien Lagacé Inc. to the Bank pursuant to their contract with Fortin), they would have had to bring into their business revenues the value of the options as of that time, which would have been, I should have thought, more or less the amount of the profit that was made by the immediate turning of the options to account.

[14] [1959] S.C.R. 713.