
1959
Nov. 24
1960
Jan. 29

BETWEEN:

LEON ADLER ..... APPELLANT;

AND

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

Revenue—Income—Income Tax Act, R.S.C. 1952, c. 148, ss. 3 and 4—Capital or income—Purchase of land in excess of requirement—Profit on sale of excess land held to be income—Appeal dismissed.

[1] [1955] Ex.C.R. 1 [2] [1913] P. 130

Appellant, a successful general building contractor, purchased a large tract of unoccupied land for the purpose of providing himself with a long term home for his business. The area purchased far exceeded his needs and after utilizing or retaining a portion of it at the rear of the property the remainder was disposed of by him at prices which netted him a profit.

This profit was added to appellant's income for taxation purposes for the year 1954. An appeal from that assessment was dismissed by the Income Tax Appeal Board and a further appeal was taken to this Court.

Held: That the appellant having entered into the business of a subdivider in exactly the same way as one engaged in that business would do and having retained a qualified surveyor to subdivide four lots the profit from the sale of the excess land constitutes income to the appellant for the taxation year in question, and was not the realization of a capital asset.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Dumoulin at Montreal.

Philip F. Vineberg for appellant.

B. Robinson, Q.C. and *Paul Boivin, Q.C.* for respondent.

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

DUMOULIN J. now (January 29, 1960) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board, dated August 22, 1957[1], dismissing appellant's prior appeal in respect of his income tax assessment for taxation year 1954.

In connection with this taxation period, the respondent increased appellant's assessable returns by adding $6,201.23 as net profit on the resale of a parcel of land in Ville St-Laurent, now the City of St-Laurent, one of the most thriving and progressive municipalities constituting the greater Montreal.

In his exception to this revised assessment, appellant counters that: (See Statement of Facts)

> 6. The purchase was motivated solely and exclusively in order to provide the appellant [a very successful general building contractor] with a long term home for his business.
>
> * * *

[1] (1957) 17 Tax A.B.C. 419.

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11. The said gain constitutes a capital gain and not taxable income.

12. Acquisition of the land which gave rise to the said gain was not in any way an adventure in the nature of trade.

13. The sale of the said land constituted the realization of a capital asset.

In law, the respondent merely replies that: (Cf. Reply to Notice of Appeal, para. 7)

7. The amount of $6201.23, net profit on the sale of the above-mentioned parcel of land, constitutes income of the appellant for the taxation year 1954 and the tax thereon has been properly and accurately determined and assessed by the Respondent within the meaning of Sections 3 and 4 of the Income Tax Act.

Intrinsically considered, the facts leading up to this litigation remain largely uncontested, the moot question arising from the legal connotation attached to them by each of the contending parties.

As already said, the appellant, Leon Adler, carries on the business of general building contractor, presently occupying a rather spacious office in Ville St-Laurent, now the City of St-Laurent, off Authier Street, north of Côte-de-Liesse. It is a matter of general knowledge, I believe, that Ville St-Laurent is a rapidly expanding municipality on the Island of Montreal.

In 1953, Mr. Adler felt that his office space, on Manseau Street, in Outremont, no longer sufficed to the requirements of his trade which, according to the customary expression, had increased "by leaps and bounds".

He began inquiring about some suitable location in August of 1953, his attention being drawn, initially, to a vacant lot of some 10,000 feet on Davaar Street, Outremont, owned by a Mrs. Bessette.

This tentative deal did not eventuate, as Mrs. Bessette's title to the property was, in virtue of her late husband's will, subject to certain conditions of avoidance. Adler's second attempt, a 26,000 feet lot along Laurentian Boulevard, also proved unsuccessful, because a railway company held a servitude of passage over the land (Cf. Ex. A-3).

The appellant, who had agreed to vacate by May 1 his former premises, sold to Thrift Stores Inc., was under some pressure, when Notary Hart, his agent, got in touch with

Messrs. Scott and Paradis, or more precisely their representative, Federation Realties, entrusted with the bulk disposal of an unoccupied area, measuring exactly 196,847 square feet (Cf. Ex. A-4). This land was an unsubdivided portion of lot number 478 (Pt. 478) of St-Laurent Parish.

In his evidence, the only one adduced, Mr. Adler is quite explicit on the topic that a space of the above given dimensions far exceeded his needs, which some ten thousand feet or thereabouts would have met.

The explanation vouchsafed is that he tried to acquire the "smallest part they [i.e. Messrs. Scott and Paradis] would sell", but since this land could not be obtained piecemeal, he resolved to buy the entire lot, at a price of $0.40 per square foot, a total sum of $78,738.80 (Cf. Ex. A-4).

The purchase was duly executed on January 18, 1954, but Adler started building, before actually obtaining a legal right to the land, an office completed in June of that year.

The structure itself covers nine thousand (9,000) square feet, half of which is offices, and half warehouse and garage. A global space of twenty-seven thousand (27,000) square feet, roughly sixteen percent (16%) of the total ground, remains unsold and occupied by Adler, who also ceded to Ville St-Laurent "an area of about four hundred and fifty (450) feet by sixty-six (66)" for the opening of a road throughout the length of this property.

Four separate lots were subsequently included in a subdivision of the excess land and parcelled off to four purchasers, netting a profit of $34,748.88, although an item of $6,201.23 only is at stake in this appeal.

Regarding the portion of 27,000 feet utilized or retained by appellant, it lies at the rear of the property, and could be reached only by a road built for that purpose. Appellant, on cross-examination, refused to concede that this back section constituted a less valuable part. The fact remains, however, that, usually, the front portion of a piece of land, abutting on a street or roadway, is more saleable.

It would appear, and no blame attaches, that Mr. Adler surely does not belong to the hesitant type. In business matters, if the instant case offers a fair sample, his decisions are prompt and pertinent.

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He initiated constructional operations, we know, without waiting for due completion of the conveying instrument, and went one better in disposing of the unneeded ground. The following excerpts, taken from the transcript of his testimony at pages 24 and 25, bear out this impression. He is examined by his counsel.

Page 24—

Q. In connection with the property that you acquired under Exhibit A4, did you need that much land for purposes of your own construction?

A. No sir.

Q. What was your intention with respect to the excess land that you did not need?

A. I wanted to dispose of it.

Q. And did you want to dispose of it on a commercial basis or profit basis, or any other basis?

Page 25—

A. I just wanted to dispose of it. I did not care one way or another.

Q. What effort did you make to dispose of it?

A. Well, I almost disposed of half of it before I bought it.

We are aware that four purchasers bought the corresponding newly subdivided lots.

Reverting to the appellant's assertion (Statement of Facts, s. 6) that "the purchase was motivated solely and exclusively in order to provide . . . a long term home for his business", the admitted facts disclose a complete misconception of the matter. There may be in store, future alone will tell, "a long term" occupancy of the office and the land it rests on, and no dispute arises on this score, but the "long term" notion is patently missing in the lightning quick sale of those 170,000 odd feet of land, transacted even before Adler's ownership of them. Should time and continued retention of a property be, to a degree, a qualifying factor of an investment, and there is no dearth of authorities to that effect, then we might delete this element from the case without further ado. Even so, a brief reference will be had, particularly on the score of retention, to recent cases wherein its significance was attested.

Mr. Justice Hyndman, D.J. as he then was, wrote in re: *Minister of National Revenue v. McIntosh*[1], that:

> [McIntosh] Having acquired the property there was no intention in his mind to retain it as an investment, but to dispose of the lots, if and when suitable prices could be obtained.

[1] [1956] Ex.C.R. 127 at 130.

McIntosh had contended the profit made on the sale of the 20 lots constituted a capital accretion out of an investment in the ordinary sense.

The lines immediately following, albeit dealing with another aspect, strangely enough dispose of a point raised on Adler's behalf, when he casually mentioned a loss of less than three hundred dollars on the resale of one of the four lots.

> It was said that the price received by him [McIntosh] was one or two hundred dollars less than the real value, and that this fact in some way negatived an intention of entering into a scheme to make a profit on the venture. I am unable to see any force in this argument. In view of all the circumstances, his insistence in obtaining the property could unquestionably only have been with the object of making a gain or profit.

Mr. Justice Hyndman's decision was unanimously affirmed by the Supreme Court of Canada[1].

Chief Justice Kerwin, delivering judgment for the Court, concluded his remarks by stating:

> In the present case I agree with Mr. Justice Hyndman's findings with reference to the appellant that:
>
> > "Having acquired the said property there was no intention in his mind to retain it as an investment, but to dispose of the lots, if and when suitable prices could be obtained."

I do not question in the least Mr. Adler's assertion that he, or rather his business, required larger and more up-to-date facilities than those formerly obtaining. On the other hand, his claim that he positively could not find, in and about Ville St-Laurent, a smaller space, from the time he decided to move and January 18, 1954, sounds somewhat unconvincing. Even if that mild scepticism of mine be unfounded, the legal situation would remain unaltered. The pertinent facts: quick disposal, profit-taking, are proved; they stand as convincing witnesses, and as the Scots say: "So the facts go, so goes the law".

Now, in order that no confusion should, if possible, becloud this analysis, I repeat it was a perfectly legitimate and reasonable thing for the appellant to amortize, through some profitable disposal of unnecessary land, the cost of his new installation. Neither am I asked to pass judgment upon so natural and sound a venture, but to decide whether or not it falls within the purview of our income tax law.

[1] [1958] S.C.R. 119 at 121.

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The other case: *Day v. Minister of National Revenue*[1], dealt with a situation which, for all practical ends, may be fairly likened to the instant one. Mr. Justice Cameron cited at some length from Justice Hyndman's pronouncement in *McIntosh v. Minister of National Revenue* (*supra*), emphasizing the passage about the lack of intention to retain the property at issue. The learned judge wrote:

> I am unable to distinguish that case [*McIntosh v. M.N.R.*] from the one before me. Here Day had no intention of retaining the property as an investment, but did intend to sell it if and when a suitable price could be obtained. Having entered into the business of a subdivider in exactly the same way as one engaged in that business would do, and having been frustrated in completing his arrangements for disposing of it in one way—namely, in lots—he did sell it in another way—namely, en bloc.

It could go without mention that here the "frustration" angle is noticeably absent since the appellant is clear as to his decision of selling the excess land. I have already quoted on this topic from page 25 of the transcripted evidence, and might add to it replies appearing on page 58; Adler is under cross-examination.

> Q. And you built a road?
>
> A. That's correct.
>
> Q. And you did so with a view of trying to find somebody to buy. Otherwise, they would not have bought, is that right?
>
> A. Obviously, I did not want it all. There is no question about it. *I was very happy to sell it off.*

The appellant is very actively and successfully engaged in the contracting-building line. He agrees that his annual turn-over runs to a million or two million dollars (Cf. Transcript, p. 48).

During the past decade or so, in the pursuit of his trade, he bought land in several sectors of metropolitan Montreal, and also in Dartmouth, Nova Scotia, for hundreds of thousands of dollars. In 1954, his income tax return, page 3, in the liability entry, shows an item of $148,281.30, listed "Accounts Payable—Land". I note that this latter document, extensively read from at the trial, does not appear to have been fyled.

On the grounds purchased, Adler erected individual apartments by the hundreds (Cf. Transcript, pages 34 to 45 inclusive). His explanation, that he never acquired "vacant

[1] [1958] Ex. C.R. 44 at 51.

land" before on a purely speculative venture, does not detract from his occupational capacity of building contractor regularly engaged in buying land.

Mr. Justice Cameron's words in the case above suit the present appellant, for manifest reasons, with yet greater precision, than they suited Day, Adler being ". . . one engaged in that business . . ." and having retained a qualified surveyor to subdivide four lots, although, through some involuntary confusion, I presume, this information was not readily elicited (Cf. Transcript, pages 61, 62, 63, 64).

For the reasons above, I have no doubt whatsoever that the amount of $6,201.23 added by the respondent to appellant's income, due for the year 1954, does accrue from a business profit and was properly assessed within the meaning, *inter alia,* of ss. 3 and 4 of the *Income Tax Act.*

Therefore the appeal is dismissed with taxed costs in favour of the respondent.

Judgment accordingly.