1960
June 9
1961
Mar. 30

BETWEEN:

IRA D. ARCHIBALD .....APPELLANT;

AND

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

Revenue—Income or capital profits—Income Tax Act R.S.C. 1952, c. 148, s. 139(1)(e)—"Business"—Taxability of profits made on disposal of land acquired in exchange for a capital asset instead of cash—Appeal dismissed.

Appellant, a lumberman, in 1954 traded a tractor used by him in his lumbering operations for a tract of land situated in a newly opened district on the outskirts of a town, which was held until it increased in value four-fold. In 1956 he subdivided the land and sold one lot, the proceeds of which sale were added to his taxable income for the year 1956 by a reassessment made by the Minister. An appeal to the Tax Appeal Board from such reassessment was dismissed from which decision appellant now appeals to this Court.

Held: That the appellant had the realisation of profits in mind when he acquired the property and at the time of acquisition he had the intention of subdividing it and selling the lots.

2. That the appellant exchanged a piece of machinery forming part of his working capital for land which had no relation to his regular business and could not be used for the purpose of producing income by any other means than sale, and the transaction, while outside the scope of appellant's regular business, nevertheless constituted an adventure in the nature of trade.

3. That the fact that appellant instead of paying cash for the land gave a tractor in exchange for it does not constitute the resultant profit a capital gain not subject to taxation.

4. That the appeal must be dismissed.

APPEAL from the Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Kearney at Halifax.

H. B. Rhude for appellant.

E. S. MacLatchy for respondent.

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

KEARNEY J. now (March 30, 1961) delivered the following judgment:

This is an appeal from a decision of the Tax Appeal Board dated June 18, 1959[1] which affirmed a reassessment made by the respondent dated October 7, 1957, whereby

[1] (1959) 22 Tax A.B.C. 196.

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the appellant was required to add to his taxable income for the year 1956 the proceeds from a sale of land amounting to $3,000 which he had failed to include therein.

The appellant submits that the amount in question constitutes a capital gain and is consequently non-taxable and the respondent contends that it is taxable income under ss. 3 and 4 of the *Income Tax Act*, R.S.C. 1952, c. 148, because it was derived from a "business" within the meaning of s. 139(1)(*e*) which states:

> In this Act,
> "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment.

The facts are not in controversy and the issue depends upon the manner of their appreciation and the inferences to be drawn from them. The appellant for more than fifteen years has carried on his business for his own account as a lumberman and a lumber manufacturer. In 1951 he purchased an Allis-Chalmers HD-5 tractor for $11,599, mainly for the purpose of road building and logging operations. In 1954 he traded the tractor for a piece of property which was susceptible of being divided into about a dozen ordinary lots, forming part of a new residential development project on the outskirts of the town of Dartmouth, N.S., which was being undertaken by Frank M. Leaman Limited.

According to the appellant he wanted to quickly realize cash and, as there was no ready market for his tractor on a cash price basis and he no longer required it in his business, he thought it advisable to trade it for the lots. The cash value of the tractor was $4,000 and the appellant's auditor, who was also the auditor of Frank M. Leaman Limited, placed the same value in the appellant's balance sheet on the lots acquired in exchange. According to the appellant's evidence, he made no effort through advertising, or listing the property with a real estate broker, or otherwise, to dispose of it.

In the spring of 1956 the appellant received an offer of $16,000 for the entire tract of land payable according to his own statement $5,000 or $6,000 in cash and the balance prorated over an unspecified term. The offer was refused because the purchaser was unable or unwilling to pay the entire purchase price in cash. In the summer of 1956 the

appellant engaged a surveyor to subdivide part of the property into three residential building lots and procured the approval thereto from the Planning Board of the town of Dartmouth. The appellant in effecting the above subdivision declared that he had the following facts in mind: his land was in the centre of the Leaman Company's subdivision; the Leaman Company was developing and selling the lots in its subdivision as residential building lots; the appellant had agreed with the Leaman Company to sell the land for residential purposes only; the best method of disposing of his land was to subdivide and sell it as residential building lots. The last mentioned state of mind is the only one in which the appellant makes any inferential reference to the profit motive.

In 1956 the appellant received an unsolicited offer from his brother-in-law to purchase one of the building lots for $3,000 cash, on which he made a profit of $2,629.67, and it is the above transaction which forms the basis of this appeal. It is also in evidence that in 1957 he sold the two remaining lots for $3,500.

Counsel agreed that the evidence taken before the Tax Appeal Board would form part of the record in the present appeal, subject to the appellant's right to offer further evidence during the hearing. On June 9, 1960, the appellant testified before me that he had decided not to subdivide the remaining portion of his lands and had arranged to dispose of them *en bloc* for an undisclosed figure.

A somewhat new issue is raised in this case inasmuch as the appellant acquired the instant land by exchange instead of purchase, but otherwise, except perhaps in degree, it is much like other cases involving speculation in real estate which have come before this court with increasing frequency.

Counsel for the appellant in argument realized that in a case of this type, in order to succeed, the appellant must discharge the burden of proof which the assessment or reassessment made by the Minister casts upon him. He also recognized that to do so he must first convince the court that it was not the appellant's original intention to acquire the property in order to dispose of it at a profit; secondly,

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regardless of his original intention, that he did not in fact do those things which in themselves constitute carrying on a business.

Dealing first with the profit motive, it is true that at no time did the appellant declare or admit that he acquired the property with the intention of realizing a profit on it quickly or otherwise.

The appellant testified that his main if not his only purpose in acquiring the land was to realize cash and to put himself in the same position as if he had sold the tractor for cash in the first place. Actions speak louder than words, and it has frequently been held that in circumstances similar to those with which we are concerned the initial declaration of intent should be accepted with caution and close scrutiny made of how far the subsequent deeds of the taxpayer were consistent with such declaration. See the judgment of the learned President of this court in *Minister of National Revenue v. Louis W. Spencer*[1]. One would expect that the appellant, when he apparently thought that his chances of securing cash for vacant land in a new development were brighter than by attempting to sell his tractor, would have taken all reasonable means at his command to effect such a sale. The proof shows he made no effort whatsoever to do so and that apparently with deliberation he refrained from soliciting sales and declined to advertise the property or put it in the hands of real estate agents for disposal.

The offer of $16,000 for his property *en bloc,* which he received in 1956, if he had accepted it, would have placed him in a position to realize eventually four times the value of the tractor and to obtain immediately $1,000 more than if he had sold it for $4,000 cash. His reason for declining the above offer was that the subdivision of his lots, or some of them, allowed him to sell his property to still better advantage. In my opinion, the circumstances described indicated that, far from being indifferent to a realization of profits, the appellant had this purpose in mind when he acquired the property, and at the time of acquisition he had the intention of subdividing it and selling the lots.

[1](1961) 61 D.T.C. 1079; [1961] C.T.C. 109.

The appellant admittedly never had any intention of keeping the lots which yielded no revenue and were certainly not an ordinary investment. The speculative nature of the transatcion appears from the fact that the land was situated in a newly opened district on the outskirts of a town and, if the subdivision met with public favour, afforded prospects of extraordinary profit.

The next and, I think, the most difficult aspect of the case is to determine whether the transaction bore sufficient of what Ritchie J., in *Chutter v. Minister of National Revenue*[1], quoting Lord Radcliffe, described as "the badges of trade." If, instead of going through the process necessary to create a subdivision, the appellant, figuratively speaking without lifting a finger, had accepted the $16,000 offer for his property, the transaction in my opinion would have been shorn, to say the least, of an important "badge of trade."

It would be exaggeration to say that, when the definition of "business" was extended to include "an adventure or concern *in the nature* (emphasis mine) of trade," it provided a catch-all clause but it certainly encroached on the field of tax free capital gains. See *Minister of National Revenue* v. *Louis W. Spencer* (*supra*), p. 16; also *Minister of National Revenue v. Taylor*[2]. It is also a well established principle that, in endeavouring to determine whether a transaction constitutes a non-taxable realization or change of investment, or is taxable gain made in carrying out a scheme of profit-making, each case must be considered according to its facts and that it is impossible to lay down a test to meet all circumstances. See the *Spencer* case (*supra*), pp. 22 and 23 and the other cases therein cited.

I think the instant transaction can be regarded in respect of *previous* transactions as an isolated one. It is true that on two or three previous occasions the appellant had engaged in real estate transactions. In 1956 he sold his farm which he had owned and operated for fifteen years. In 1954, in the course of his lumbering business, he acquired a piece of land for the purpose of cutting Christmas trees. When the cut was completed he deeded it to a man who had helped with the cutting in exchange for his services.

[1] [1956] Ex. C.R. 89, 92.
[2] [1956] C.T.C. 189, 210.

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He observed that in 1953 he acquired some other timber lands which he retained after the trees had been removed. It would be futile to suggest that these transactions were in the nature of a real estate speculation or did not occur in the ordinary course of the appellant's lumbering operations.

As stated by Ritchie J. in *Rosenblat v. Minister of National Revenue*[1], in judging the appellant's course of action, transactions subsequent to the one in issue may be considered. The evidence shows that a subsequent sale similar to the one made in 1956 took place in 1957. Hence the instant sale is removed from the single case category. The appellant was asked before the Tax Appeal Board if, apart from the subdivision he had made of three lots, he intended to subdivide the balance of the property; and he stated that before deciding he would have to reconsider the question. The fact that in 1960, after his transaction in 1956 had been made subject to tax, he decided not to subdivide the remainder but sell *en bloc,* in my opinion occurred too long after the transaction in issue to have any bearing on the present case.

It can be said in favour of the appellant that there is no evidence which proves that he himself built roads, installed water service and sewers, or built and sold finished houses; and there is proof that, instead of initially subdividing the whole of the property, two years after he bought it he made a subdivision of only three lots, and in 1960 arranged to sell the remainder unsubdivided and *en bloc.* On the other hand the proof shows that, just prior to the time the three lots were municipalized, the Leaman Company had installed water and sewage pipes close to three of the appellant's lots, which made it practical for him to subdivide them, and no doubt the piping and cost of connecting-up these and like facilities were included in the price paid by the appellant for the lots, or in taxes, or in both.

The appellant himself arranged for the preparation of a plan of subdivision and had three lots staked out by a surveyor and procured the necessary approval thereof from the municipal authorities. I might add that the appellant's inconsistent and unconvincing explanation of why he made no effort to sell his properties prompts me to examine the

[1] [1956] Ex. C.R. 4, 12.

circumstances with a view to ascertaining if they gave rise to a reasonable presumption which would explain this apparent inconsistency. The circumstances are such as one might reasonably presume that there was little need for the appellant to spend money in advertising. The Leaman Company owned hundreds of lots in the neighbourhood of the appellant's property and carried on an extensive sales campaign by advertising and the appellant received benefit from it because the greater the sales made by the company, the fewer were the lots remaining available to purchasers, and the appellant's chances of effecting a sale were improved.

If the appellant had a tacit understanding with the Leaman Company, not to put his lots on the market while the company had hundreds of its own for sale, which seems logical, this presumption would furnish a likely explanation for what otherwise appears to be an incongruity, namely, that the appellant while needing cash refused to make any effort to raise it by selling his property.

The appellant placed a good deal of reliance on the judgment of Hyndman J. in the case of *McGuire* v. *Minister of National Revenue*[1], wherein the learned trial judge held that it did not matter whether the appellant sold his property as a whole or as a half in fifty pieces because in any event the transaction was not subject to tax. It should be noted, however, that McGuire had purchased the property for a home, had lived there nine years and, while continuing to live on it, decided to sell a corner of his property which he did not need, only to find that the municipality would not permit the sale unless the piece to be sold was subdivided. Hyndman J. clearly stated he was satisfied that when McGuire purchased the property, it was for his own use and benefit, and not as a venture or a speculation, and consequently constituted a capital gain. If the appellant in the instant case had subdivided a portion of the farm where he was born and which he had operated for fifteen years, the McGuire case might possibly have some application. Fournier J., in the recent case of *Algoma Central and Hudson Bay Railway Co.* v. *Minister of National Revenue*[2] held that certain governmental land

[1] [1956] Ex. C.R. 264, 266. [2] [1961] C.T.C. 9.

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grants received by the appellant should be considered as income and not as true capital gain. I consider that his reasons for judgment are in many respects herein applicable.

The Act does not define a capital gain but I do not think that, because the appellant instead of paying cash for the block of land, which he later sold at a profit, gave a tractor in exchange for it, the resultant profit was a capital gain and not subject to taxation. The appellant exchanged a piece of machinery forming part of his working capital for land which had no relation to his regular business and could not be used for the purpose of producing income by any other means than sale. The appellant declared that he never intended to retain the vacant property and it was not acquired simply as a realization of or change in investment, which could characterize it as a capital gain. Because of the manner already described in which he disposed of the property, the transaction, although outside the scope of the appellant's regular business, nevertheless constituted an adventure in the nature of trade.

In order to succeed, the appellant must bring the evidence which will nullify the assessment made by the Minister, as Rand J. said in *Johnston v. Minister of National Revenue*[1] ". . . the onus was his to demolish the basic fact on which the taxation rested" and this together with the inconsistency of his own explanation of intention, leaves me far from satisfied that he has done so.

For the foregoing reasons I consider that this appeal should be dismissed with costs.

Judgment accordingly.

[1] [1948] S.C.R. 486, 489