BETWEEN: 1960 Apr. 11, 12 — 1961 July 13

HARRY GRAVES CURLETT ....APPELLANT;

AND

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

Revenue—Income tax—Income Tax Act, S. of C. 1948, c. 52, ss. 3, 4 and 127(1)(e)—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, and 139(1)(e)—Capital gain or income—"Venture or concern in the nature of trade"—Pursuit of a scheme for profit making—Appeal dismissed.

Appellant held 98 per cent of a company engaged in the sale of investment contracts. He loaned his own personal money at 8 per cent interest and a further consideration of a 15 per cent discount, the loans being secured by mortgages which were assigned to the company at face value. The bonuses thus realized by him during the taxation years in question amounted to $390,000. He also realized a profit of $12,489 on the sale of land in a town which he had acquired when mayor. He contended that this land had been subdivided and sold as lots at the request of the ratepayers of the town to meet the requirements of the town for increased expansion.

The respondent re-assessed appellant for income tax purposes by adding to his income those amounts mentioned. An appeal to the Income Tax Appeal Board was dismissed and appellant appealed to this Court.

Held: That the difference between the amounts advanced by the appellant on the mortgages and other investments and the amounts which he received on their assignment to the company constitutes income from a business in virtue of sections 3 and 4 and paragraph (*e*) of subsection (1) of section 139 of the *Income Tax Act,* Statutes of Canada 1948, c. 52 and R.S.C. 1952, c. 148.

2. That the gains realized on the sale of the lots resulted from an "adventure or concern in the nature of trade" or in the pursuit of a scheme for profit making and are taxable as income.

APPEAL under the *Income Tax Act.*

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

B. V. Massie, Q.C. and *A. F. Moir, Q.C.* for appellant.

H. L. Irving and *T. E. Jackson* for respondent.

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

DUMOULIN J. now (July 13, 1961) delivered the following judgment:

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Dumoulin J.

This is an appeal from a decision of the Income Tax Appeal Board, dated April 2, 1958, which affirmed a re-assessment, in respect of the appellant's income tax assessment for taxation years 1949 to 1954, inclusive.

Harry Graves Curlett, of Edmonton, Province of Alberta, is an aggressive and highly successful businessman, whose "principal occupation . . . during the period was General Manager (also President) of Associated Investors of Canada Ltd. (hereinafter referred to as the Company), a private Company of which the taxpayer was a director and the holder of 98 percent of the initially issued share capital of $100,000 subscribed by the taxpayer in cash". This absolute control and undisputed ownership of the enterprise are reflected in the possessive form "my company" constantly resorted to by the appellant in designating Associated Investors of Canada Ltd.

Section 3 of the Statement of Fact mentions 1948 as the year of incorporation under the Companies Act of Alberta, adding that this Company "since incorporation has been engaged in the sale of investment contracts by which the Company, in consideration of periodic payments by contract holders, agrees to pay the holders a stated sum in one or more periodic payments . . .".

Section 4 outlines in extenuating tones the crux of the matter. Though by no means concise, it may save time to cite it at length. I quote:

> 4. A considerable proportion of the investments of the Company consisted of mortgages of real property. From the commencement of its operations, the Company has been required by the Alberta Administrative Board to file monthly statements indicating the liability to contract holders and indicating the deposit with the Trustee of the required investments. To assist the Company in fulfilling these investment requirements and to avoid the delay in investment occasioned by loan negotiation and registration requirements, the taxpayer provided funds with which he acquired and held in his own name mortgages and other qualified investments, selling them to the Company when required by it from time to time.

Section 5 next tells us that the loans or mortgages aforesaid were subject to payment by the borrower of a bonus or discount to the lender, no other than the actual appellant.

It so happened that Mr. Curlett during the six material years, 1949 to 1954, out of his own personal funds, would advance to a client the amount agreed upon, at an 8% rate

of interest and, above all, in consideration of a 15% discount. In other words the debtor, on a $5,000 mortgage, received from Curlett no more than $4,250. Usually, these mortgages were passed on by the appellant to his Company at the end of each month and, of course, for their total face value of one hundred per cent, i.e., the full amount of the principal secured by the mortgage. Since Mr. Curlett undeniably possessed tremendous activity and a very keen sense of salesmanship, "these bonuses, reveals Section 6 of the Statement of Fact, account for approximately $390,000 of the subsequent re-assessment of $402,367.

A second ground of appeal, that might slip off undetected, so picayune does it seem in the wake of the impressive sum above, consists in a gain of $12,419 realized by Curlett on the resale of land acquired while he was Mayor of the Town of Westlock. We are told in s. 7 by the appellant himself, that "... at the request of the ratepayers of that Town, (he) had subdivided the land and sold it in lots to meet the requirements of the Town for increased expansion".

A few excerpts from the appellant's cross-examination paint a convincing summary of Curlett's dealings in the relevant connection.

Counsel for respondent, Mr. Howard L. Irving, puts the following questions:

Q. Mr. Curlett, you have told us that from time to time when the Company was incorporated and . . . started to invest in these mortgages, that you obtained 15 per cent of the amounts of the mortgages by actually making loans with your own money, and at a later time assigning the mortgage to the Company?

The witness replies:

A. That is correct.

Q. And with your own money you would loan out to the borrower at 85 per cent and the company would repay you 100 per cent?

A. That is correct. (cf. pages 34-35 of the transcript). Previously asked by his counsel, Mr. A. T. Moir, Q.C. (bottom lines on p. 19):

Q. And you treated that money as your own?

The answer was:

A. Yes Sir.

At the top of page 20:

Q. And did you report that in your Income Tax returns for the years in question?

A. No, I did not, Sir.

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The exculpating argument on which this taxpayer predicates his defense would indeed be unanswerable if only its legal persuasion were on a level with its imaginative originality. Sections 1 and 2 of the "Statutory Provisions upon which the Appellant relies", hereunder recited, may afford another instance of one jumping into the fountain to escape the rain. Now, Mr. Curlett did not report these $390,000 bonuses or discounts, because:

> 1. At the time the taxpayer assigned the discounted mortgages to the Company, he was a director and officer of the Company. The fiduciary relationship thus existing between the taxpayer and the Company prevents the taxpayer from making any profit under a contractual relationship between himself and the Company, and the taxpayer is bound to account to the Company for any profit made by him on the sale of the mortgages . . .
>
> 2. Thus, the proceeds of the mortgage discounts in the hands of the taxpayer do not possess the essential quality of income in his hands as his right to them was not absolute and he was under a duty to account for and to pay the same to the Company.

As a basic principle of company law the proposition above, especially in the wording of s. 1, remains unassailable. Unfortunately, the evidence adduced points to a glaring discrepancy between so orthodox a tenet of law and the recorded facts. I do not question but that the appellant might have had to perform the duty so clearly expounded in the lines preceding.

However, there lies quite a stretch between a duty and its accomplishment. In this line of thought the appellant so late as March 26, 1956, date of his re-assessment, had not evinced discernible signs of being prompted by any lurking urge to discharge such a belatedly invoked obligation to refund the Associated Investors of Canada Ltd. For all I know he still retains these accumulated profits or, at the very least has failed to account for them with the Company.

The allegation made in s. 8 of the Statement of Fact that, in 1958, pursuant to a report of the Saskatchewan Superintendent of Insurance, "the taxpayer caused a company of which he was the majority shareholder, to subscribe and pay for an additional $300,000 of the capital stock of the Company", is alien to the issue, unconnected with Curlett's transactions herein reviewed and, moreover, pleaded *ex post facto*.

The one and only possible conclusion flowing from appellant's acts, from his written and oral statements, is that during the material period, 1949 to 1954 inclusive, he considered this practice of discounting loans and mortgages in the light of a personal venture, completely separate from that pursued by Associated Investors of Canada Ltd.

Under such circumstances, I readily concur with the Respondent's interpretation, as formulated in paragraph 11 of his Reply to Notice of Appeal, that:

> . . . the difference between the amounts advanced by the Appellant on the mortgages and other investments and the amounts which he received on the assignment of the mortgages and other investments to Associated Investors of Canada Limited constitutes income from a business in virtue of sections 3 and 4 and paragraph (*e*) of subsection (1) of section 127 of *The Income Tax Act* and sections 3 and 4 and paragraph (*e*) of subsection (1) of section 139 of *The Income Tax Act.*

All of these sections are so familiar to the parties concerned that it would be purportless to reproduce them. Suffice it to say that, effectively, the profits herein discussed, totalling $390,000, were the direct returns from a business carried on by appellant and therefore taxable.

On a much smaller scale but in a similar trend of fact and law, an assessment of $12,419 pertaining to gains realized by the taxpayer on the sale of subdivided lots in Westlock, bears, *prima facie*, the characteristic traits of "an adventure or concern in the nature of trade" or the pursuit of a scheme for profit making, and retains them throughout the case, since no attempt was made at trial to refute the statutory presumption.

For the reasons given this Court doth adjudge and decide that the appellant, Harry Graves Curlett, was taxed in the total sum of $283,571.08 for taxation years 1949 to 1954 inclusive, conformably to the pertinent law. The appeal is therefore dismissed with taxable costs allowed to Respondent.

Judgment accordingly.