BETWEEN:

DAVID MILLER .....APPELLANT;

AND

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

1961
Nov. 21

1962
Sept. 11

Revenue—Income—Income tax—Payment to real estate trader to relinquish option—Capital or revenue—The Income Tax Act, R.S.C. 1952, c. 148, ss. 2(3), 3, 4, 139(1)(e)—Civil Code, arts. 1476, 1477.

Appellant obtained from G an option to purchase certain farm land. The option stipulated *inter alia* that it must be accepted not later than May 28, 1956, and be accompanied by a deposit of $25,000. G died a few days later and the appellant on May 25, 1956, forwarded his acceptance in writing together with a certified cheque of $25,000 payable to G's estate. G's personal representatives refused to honour the option and after negotiation appellant surrendered his rights thereunder on payment of $50,000 and the return of his deposit. In re-assessing the appellant for the year 1956 the Minister added $50,000 to the appellant's declared income. An appeal from the assessment was dismissed by the Tax Appeal Board. On a further appeal to this court the taxpayer submitted that the sum in question was paid for the surrender of a right separate and distinct from the land and was neither profit or income but a capital sum. The Minister contended that payment for breaches of contract are capital receipts when received as compensation for loss of capital assets but are income from a business when received

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in lieu of profits from a business. That the appellant was a trader in real estate and had he acquired the optioned land it would have constituted stock in trade and therefore what he received was compensation for loss of inventory.

Held: That the appellant was engaged in the real estate business in the widest sense of the term.

2. That transactions commonly called "options" in the Province of Quebec are governed by the provisions of the *Civil Code* and that, as provided by article 1471, G's estate was legally entitled to revoke the option by returning appellant his deposit and paying him double that amount.

3. That the resulting gain was one which any regular dealer in real estate would experience in the ordinary course of his business and, as the appellant failed to prove the instant transaction occurred outside the ordinary course of such business, the $50,000 payment constituted taxable income in his hands.

APPEAL from the Tax Appeal Board.

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

J. H. Blumenstein, Q.C. for appellant.

Paul Boivin, Q.C. for respondent.

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

KEARNEY J. now (September 11, 1962) delivered the following judgment:

The present appeal is from a decision of the Tax Appeal Board dated the 6th of April 1961[1], whereby a tax reassessment made against the appellant by the respondent, which added, *inter alia,* $50,000 to the taxpayer's taxable income for the year 1956, was confirmed and his appeal therefrom dismissed with costs.

Counsel for the parties agreed that the record of proceedings before the Tax Appeal Board, consisting of Exhibits A-1, A-2 and A-3 and a corrected transcription of the evidence given before the said Board, should constitute the case before this Court.

The case arose because the appellant, who was allegedly in the real estate business in Montreal, on May 16, 1956 obtained an option from the late Félix Goyer to purchase certain farm lands in Côte St-Luc, consisting of lot 101 and part of lot 99 on the Official Plan and Book of Reference

[1](1961) 26 Tax A.B.C. 243; 61 D.T.C. 224.

of the Parish of Montreal, measuring 1,213,987 square feet (approximately 28 acres), at a price of 55¢ a square foot, totalling $667,692.95.

The option contained the following stipulations.

It could not be registered against the property and it only became effective provided it was accepted by the appellant not later than May 28, 1956 and such acceptance was accompanied by a deposit of $25,000 subject to forfeiture if the appellant failed to pay the balance of price, to wit, $420,128.56, which became due in three months and the remaining $222,564.28 which was payable in two years. As security for the payment of the last-mentioned sum, a portion of the property located between the Côte St-Luc Road and the Railway was to be hypothecated in favour of Félix Goyer, and, until this amount had been liquidated, no subdivision could be made on such portion of the property (Ex. A-1).

A few days after having signed the document, Félix Goyer died, and, on May 25, 1956, the appellant accepted the option in writing and enclosed a certified cheque for $25,000, drawn on the Bank of Nova Scotia and payable to the estate of the late Félix Goyer (Ex. A-2). According to the appellant, who was the only witness heard, for reasons undisclosed the Goyer estate declined to honour the option, and, as a result of negotiations, the appellant surrendered his rights under it in consideration of the payment of $50,000 by the estate and the return of his deposit.

The question at issue is whether, as contended by the appellant, the receipt by the taxpayer of the aforesaid sum of $50,000 was of a capital nature and not a trading transaction or profit from a business subject to tax within the meaning of ss. 2(3), 3, 4 and 139(*e*) of the *Income Tax Act*.

In support of his objection to the reassessment in issue it was submitted, on behalf of the appellant, that his interest in real estate was for investment purposes and that he secured the option on the lands described therein for the purpose of constructing high rise apartment buildings thereon, which he intended to retain as an investment; that he did not trade in options and that the cancellation of the instant option was unforeseen and the payment received was fortuitous and outside the course of his business; that

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the option was a right different and distinct from ownership; and that the added reassessment of $50,000 was neither profit nor income and unfounded in fact and in law.

Apart from denying the appellant's allegations counsel submitted that the compensation was taxable as income received by the appellant in lieu of profits from a business and that had he acquired possession of the land under option it would have fallen into the category of stock-in-trade or inventory and therefore what he received was compensation for loss of inventory and was taxable accordingly.

Counsel for the appellant submitted with justification that an option or a promise of sale in respect of real estate only becomes the equivalent of sale when accompanied by tradition and possession: *Léo Perrault Ltée v. Blouin*[1]. He also recognized nevertheless that gain derived from option sources may constitute taxable profit or non-taxable capital increment, depending on the occupational activities of the taxpayer.

I think it is also true to say that our courts have usually held that gain resulting from an isolated transaction concerning a purchase or sale of real property by a non-trader therein constitutes a capital gain, but that the reverse is true where the taxpayer is an habitual trader in real estate, and the same reasoning, I think, is applicable in the present case. It follows that the outcome of this appeal may well depend on the answer to be given to two questions—Was the appellant really engaged in the real estate business and did dealing in options form part of such business? In respect of the first question, as appears by his 1956 income tax return, the appellant described himself as a commission salesman, and, in his evidence, he stated, "I am in investment realties" (Ex. A-2). The following is an extract from the notice of reassessment contained in the said exhibit:

ADJUSTMENTS TO DECLARED INCOME

Previous net income declared		$ 7,329.62
Add:		
Profits		
Lot 106 MTL.	$ 18,036.15	
Lot 101 & 99 MTL.	50,000.00	
St. Leonard Real. Commission	2,744.00	70,780.15
		$ 78,109.77

[1] [1959] R.J.Q., B.R. 764.

The reassessment shows that apart from the $50,000 in issue the Minister added thereto profits amounting to $18,036.15 and $2,744 in respect of two other real estate transactions. No exception was taken by the appellant to the addition of the above-mentioned amounts to his previously declared income. His acknowledgement that the two transactions were taxable is unmistakable proof that he was making profits on the sale of real estate.

Mr. Miller's testimony also discloses that, both prior and subsequent to the transactions in question, he had been dealing in various types of land, either alone, in partnership with others or through the incorporation of companies. He had bought and sold nearly every type of real estate. He had incorporated a company known as Westminster Gardens Limited and transferred to the company lands which he owned, built 700 homes thereon and sold them. According to the transcript (pp. 10-16), as early as 1951 he bought lots on Goyer Street in Montreal and sold them. His explanation for the transactions was that he was green in the trade at the time and disposed of the lots and bought a few apartment buildings with the proceeds. He stated that in 1955 he purchased lot No. 395 in St-Léonard de Port Maurice, sold it, and his reason for selling it in the same year was that "he could not develop it because there was no services there."

He made a similar acquisition and sale in respect of lot No. 63 in Pointe-Claire.

In the same year as he took the option on the instant property in Côte St-Luc he purchased a lot close by and sold it. His reason for doing so, he said, "was that the School Commission wanted to build a school, so rather than going through expropriation procedures and waste time, he decided to sell it (p. 19)."

Again in 1957, he sold part of lot 427 in St-Léonard de Port Maurice; lot 29 in Duvernay; lot 293 in St-Rémi; lots 429A and 430 in St-Léonard de Port Maurice, as well as a farm, No. 497 (p. 23).

In 1958, in the Côte St-Léonard area, the appellant purchased lot 100 and sold half of it in the same year because another group of people were interested in the lot. "So not to make bad feelings", he turned over to them half of it (p. 21).

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In 1958, he bought a property on Wellington Street in partnership with one Finestein and disposed of it at a loss; bought a farm in Rivière-des-Prairies, sold it at a profit, declared the profit as taxable in his income tax return and claimed the loss on the Wellington Street property as a deduction from income (p. 30).

It is quite true, as appears by his income tax return, that through the years, acting sometimes alone and sometimes with associates or through corporations in which he held an interest, he succeeded in acquiring and retaining as investments a considerable number of revenue-producing properties of various types from which his declared income amounted to some $7,000 in 1956 (Ex. A-2); but his trading operations constituted his main source of income. Looking at his dealings as a whole, the conclusion is inescapable that prior and subsequent to the option on the 28-acre farm in question the taxpayer habitually bought real estate of various kinds in diverse places and, afterwards, turned them to account in the most favourable way that circumstances permitted. I might add that the appellant also admitted, in his testimony, that at times he had recourse to the sale of some properties in order to realize the money to finance the acquisition of others. In connection with lot 101 and part of lot 99 the witness stated:

"We would probably have to develop and sell part of it, but we would have developed ourselves the apartment land for investment".

Although unnecessary for the purposes of this judgment, I consider it would be reasonable to assume that, since the optioned properties consisted of 28 acres of farm land, had the option been consummated, the taxpayer would have plied his trade by disposing of sufficient vacant land to make the financing and construction of an apartment building feasable.

As to the second question, transactions commonly called "options" in the Province of Quebec are governed by the provisions of the Civil Code under the title "OF SALE", where they are considered as a promise of sale—of which there are two kinds: simple and one accompanied by giving of earnest.

Article 1476 states:

A simple promise of sale is not equivalent to a sale, but the creditor may demand that the debtor shall execute a deed of sale in his favor according to the terms of the promise, and, in default of so doing, that

the judgment shall be equivalent to such deed and have all its legal effects; or he may recover damages according to the rules contained in the title "Of Obligations".

Article 1477 reads as follows:

If a promise of sale be accompanied by the giving of earnest, each of the contracting parties may recede from it; he who has given the earnest, by forfeiting it, and he who received it, by returning double the amount.

As appears from copy of the receipt A-3, signed by D. Miller, the payment of the $50,000 which he received represented double the amount of earnest given by him and, in my opinion, falls within the provisions of Art. 1477.

In argument, the $50,000 in issue was, I think, erroneously treated as if it were an amount which the taxpayer consented to accept as compensation for breach of contract. The action of Goyer Estate in making the payment it did was in no sense delictual; it was simply availing itself of its legal right to revoke the option on returning the deposit of the taxpayer and paying double the amount so deposited by the taxpayer. In my opinion, the appellant, instead of being faced with an unexpected breach of contract, obtained payment of a predetermined amount to which he was legally entitled. I consider that the transaction and the resulting gain must, on the evidence before me, be regarded as one which any regular dealer in real estate would experience in his ordinary course of business.

As mentioned earlier, the taxpayer declared that the Goyer option was the sole instance in which he dealt in options—but I do not think that this statement has been substantiated. Among the cases referred to at trial by the appellant was *No. 698 v. The Minister of National Revenue*[1], a decision in which it was held that money paid to obtain cancellation of an option was not income from a business but a capital gain and from which an appeal to this Court was then pending. Subsequently, the Minister's appeal therefrom was maintained (see *The Minister of National Revenue v. Bonaventure Investment Co. Ltd.*[2]). As appears by the judgment of Dumoulin J., Bonaventure Investment, which was engaged in the real estate business, offered to purchase from Messrs. Morris Schwartz, Harry

[1] (1960) 23 Tax A.B.C. 408; 60 D.T.C. 136.
[2] (1962) 62 D.T.C. 1083; 26 C.T.C. 160.

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Finestein and David Miller 50 lots in the Town of Dorval and agreed to give them an option or a simple promise of sale on a further 50 lots. The offer was accepted by the three associates and the sale of the first 50 lots was completed. Having apparently regretted giving the option, the three associates, following protracted discussions, paid Bonaventure Investment $7,500 to surrender its option rights and the Minister added this amount to the taxable income of the latter Company for the year 1956 and the learned trial judge confirmed the reassessment on the grounds that the $7,500 constituted income from a business. A glance at the appellant's balance sheet *re* Dorval Project (attached to his income tax return Ex. A-2) leaves no doubt that the present appellant and his two associates are the same persons referred to in the *Bonaventure* case. It is common knowledge that in the Province of Quebec the giving and taking of options in real estate transactions are by no means unusual occurrences, and, apart from reflecting generally on the appellant's credibility, the above evidence discloses that his option in the instant case was not to his own knowledge the unprecedented event which he claimed it to be.

For the foregoing reasons I find that the appellant was engaged in the real estate business in the widest sense of the term, that he has failed to prove that the instant transaction occurred outside the ordinary course of such business and that the $50,000 in issue constitutes taxable income in the appellant's hands.

In view of the above finding I consider it unnecessary to deal with any additional issues raised.

The present appeal will be dismissed with costs.

Judgment accordingly.