BETWEEN:

BENABY REALTIES LIMITED .....APPELLANT;

AND

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

Montreal 1964 Nov. 9-10

Ottawa 1965 June 7

(No. 1)

Income tax—Profit from disposition of company's land—Whether taxable —Expropriation of land—Taxability of profit—In what year taxable— Taxpayer's accounts on accrual basis.

When one of a company's motives for acquiring a large quantity of land is its hope and expectation of disposing of it at a profit, a profit made upon a subsequent expropriation of part of the land is taxable. When the company's accounts are kept on an accrual basis the profit made on such expropriation is taxable in the year in which notice of expropriation is given, that being the year in which the debt becomes receivable, even though the compensation is not received until the following year. It is immaterial that s. 24 of the *Expropriation Act*, R.S.C. 1952, c. 106, permits the Crown to abandon part or all of the land expropriated before paying compensation therefor and that the

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Regulations Relating to the Acquisition of Land by Government Departments, P.C. 4253 of October 9th 1952, require Treasury Board authorization when the compensation exceeds $15,000 (as in this case).

Lechter v. M.N.R. [1965] 1 Ex C.R. 413, followed; *C.I.R. v. Newcastle Breweries Ltd* (1925) 12 T.C. 927; *Kennedy v. M.N.R.* [1952] Ex C.R. 258; *Regal Heights Ltd v. M.N.R.* [1960] S.C.R. 902; *Income Tax Act*, R.S.C. 1952, c. 148, 85B(1)(*b*), applied.

APPEAL from Tax Appeal Board.

N. N. Genser, Q.C. and *Sydney Phillips, Q.C.* for appellant.

Paul Boivin, Q.C. for respondent.

NOËL J.:—This is an appeal from a decision of the Tax Appeal Board[1] in respect of the assessment of the appellant under Part I of the *Income Tax Act* for the taxation years 1954 and 1955. The Tax Appeal Board rejected all the appellant's complaints against its assessment for the 1954 taxation year and, while it referred the 1955 assessment back to the Minister for re-assessment in respect of some of the relief claimed by the appellant, the Board rejected the appellant's complaints against its 1955 assessment in other respects. There is no cross-appeal by the respondent.

While other complaints are made against the assessment in the notice of appeal, during the course of the argument in this Court, all grounds of appeal were dropped except those set out in the following portions of the notice of appeal:

FACTS:

. . .

2 THAT on or about the 31st day of March 1953, the Appellant acquired a property bearing civic number 304-310 Craig St. West, for the purpose of producing rental income. In order for the Appellant to gain income from the above mentioned property, it was necessary to refreshen same to induce tenants to lease the premises, the whole at a cost of some $53,842.66 out of which sum, an amount of $25,000.00 was capitalized and the balance was charged by the Appellant to expenses incurred for the purpose of gaining income which the Respondent disallowed to the extent of $25,000.00 The said expenditures were made from time to time during the fiscal year ending April 30th 1954, the whole as appears from a detailed statement hereto attached;

[1] 28 Tax A.B.C. 176.

3. THAT the Appellant is in the business of Real Estate rentals as will be evidenced by its past financial statements together with those up to the present fiscal year;

4. THAT in the later part of the year 1952, the Appellant assessing the economical growth of the City of Montreal, decided that it would be in the best interest of the Appellant to obtain and make investments in land in or near the City of Montreal. Towards this end, on October the 31st 1952, the Appellant purchased Lot Nos. 525-527 in the Parish of St. Laurent. Furthermore, on January the 24th 1954 the Appellant purchased Lot No. 196 in the Parish of St. Laurent;

5. THAT upon said lots so acquired there were farm buildings which the Appellant obtained tenants for in that they were in the business of real estate rentals;

6. THAT the said Appellant realized its investment, at such time and such prices as appear in a schedule hereto attached:

. . .

STATUTORY PROVISIONS & REASONS WHICH THE APPELLANT PRESENTLY SUBMITS:

. . .

2. THAT the repairs of $25,000 00 capitalized by the department are in addition to the improvements of $25,000.00 already capitalized by the Company, the latter being made once and for all and enhancing the value of the building, whereas the former are such repairs as are necessary with each change in tenancy as will be noted in the Appellant's financial statements in the subsequent years. The assessors did arbitrarily permit an amount of approximately $3,842.66 to be charged off as an expense by the Company without stating what items this should be applied in these schedules hereto attached;

3. . . . In any case the Company considers the entire profit on the sale of land as a capital gain. Land was not bought for immediate resale. The Company had considered future development of the land which it held. Furthermore the indemnity received from the Federal Government of land in the amount of $371,260.00 and producing a profit of $263,864 03 according to the Department constitutes in the opinion of the Company a capital gain. In any event the Company is in the business of real estate rentals and all profits on the sale of land constitute a capital gain;

. . .

5. THAT the Appellant Company was not in the business of dealing in real estate and the gain resulting from the sale of lands was a gain made in carrying out a policy of investments;

The grounds of appeal set out in the notice of appeal, upon which the appellant relied in this Court may, therefore, be summarized as follows:

(a) that the respondent wrongfully refused to allow $25,000 of an amount of $53,842.66 expended by the appellant "to refreshen" certain property which had just

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been acquired by the appellant "to induce tenants to lease the premises" as current expenses of earning the income from the property;

(b) that the respondent wrongfully taxed the appellant on profits made from the resale of land that had not been bought "for immediate resale" and from the expropriation of other such property.

In addition, the appellant urged a further ground of appeal, not set out in the notice of appeal, in respect of the profit realized from the expropriation transaction. The appellant urged that, if this profit was taxable at all, it was taxable in the taxation year in which the expropriation took place and not in the taxation year in which it reached an agreement with the expropriating authority as to the amount of the compensation and actually received the amount of the compensation, which is the year in respect of which the respondent has assessed it.

With reference to the sum of $25,000, which the appellant claims should have been allowed to it as a current cost of maintenance and repairs, it became clear during the course of argument that no evidence had been adduced to show how any part of the total amount of $53,842.66 had actually been expended. The only evidence given with reference to these expenditures was that of the company's auditor who did not pretend to have any personal knowledge of the reason for the expenditures and, indeed, gave no evidence upon which I could make any finding as to whether any part of the expenditures were in respect of current maintenance or repairs. A statement of the details making up the expenditures was filed as an exhibit and I have examined this with a view to the possibility of drawing some conclusion from it with regard to the appellant's contention, but I find it quite impossible to draw any conclusion favourable to the appellant based on that statement. The respondent did allow, out of the total amount of $53,842.66, an amount of $3,842.66 as representing current expenses and I cannot find as a fact that any more than this amount represents expenditures having to do with current maintenance or repairs.

With reference to the appellant's appeal against the assessment of the profits which it made from the acquisition and disposition of certain vacant lands, it appears that the appellant, which was incorporated in 1949, did acquire certain revenue producing properties which, for the purposes of this appeal it may be assumed, were acquired for the purpose of obtaining a rental revenue from them and, in addition, in 1953, it started acquiring farm properties near the Côte-de-Liesse Road on Montreal Island, some of which properties were disposed of by it in a manner that is sufficiently indicated by a statement entitled "Reconciliation of Net Profit Re Sale of Land", which is attached to the notice of appeal and which reads as follows:

RECONCILIATION OF NET PROFIT RE SALE OF LAND

Re: Expropriation by the Federal Government—Deed 1106499

Date—Nov. 9/54

Expropriation Price		371,260.00	
Cost of Land Sold—Purchased Oct. 21/52	75,391.60		
Cost of Land Sold—Purchased Oct. 31/52	32,004.37	107,395 97	
Net Profit			263,864 03

½ Time held re lot 525 as per deed 1106499—one year, 1 month & 28 days
½ Time held re lot 527 as per deed 1106499—one year, 2 months & 7 days

Re Sale to Innes Equipment Ltd.—Deed 1109955

Date—Nov. 17/54

Selling Price		50,180 20	
Cost of Land Sold—Purchased Oct 21/52	5,206 23		
Commission-Westmount Realties	2,509 00		
Notarial Fees	25.00	7,740 23	
Net Profit			$42,439.97

Time held as per Deed 1109955—2 years, 27 days
Lot 525

Re Sale to Relative Realty Corp.—Deed 1128590

Date—April 1/55

Selling Price		475,000 00	
Cost of Land Sold—Purchased Jan 28/54	346,908.14		
Commission	9,829 00	356,737 14	
Net Profit			$118,262.86

Time held as per Deed 1128590—1 year, 2 months, 3 days
Lot 196

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Re Sale to Studebaker Corp. of Canada—Deed 1007182

Date—May 7, 1953

Selling Price		67,475.70	
Cost of Land Sold—Purchased Oct. 31/52	11,166.88		
Commission to Morgan Realties Inc.	3,373.78		
Notaries Fees	75.00		
Adjustment of Taxes	24.75	16,640.41	
Net Profit			$52,835.29

Time held as per deed 1007182—6 months & 7 days
Lot 525

Re Sale to Canadian Comstock Co. Ltd.—Deed 1091288

Date—Aug. 18/54

Selling Price		122,500.00	
Cost of Land Sold—Purchased Oct. 21/52	31,833.99		
Commission to Ernest Pitt	4,625.00		
Notarial Fees	79.50		
Notarial Fees	250.00	36,788.49	
Net Profit			$85,711.51

Time held as per deed 1091288—1 year, 9 months, 18 days
Lot 527

Re Sale to William James Langill—Deed 1097138

Date—Sept. 15/54

Selling Price		20,000 00	
Cost of Land Sold—Purchased Oct. 21/52	3,506.47		
Commission	1,000.00		
Notarial Fees	75 00	4,581.47	
Net Profit			$15,418.53

Time held as per Deed 1097138—1 year, 10 mos., & 15 days
Lot 527

As appears from the statement above quoted, the appellant invested very substantial amounts of money in large areas of land which, for all practical purposes, it is admitted by counsel for the appellant, must be regarded as having been vacant land.

The sole issue, as far as these profits are concerned, is whether the lands in question were acquired for the purpose of resale at a profit. The only evidence adduced by the appellant with reference to that question is the evidence of the person who was president of the appellant at the time

of the trial and who, according to his own evidence, had no personal knowledge of what was in the mind of those who were guiding the fortunes of the company at the time that the land was purchased. The relevant part of his evidence reads as follows (p. 97 of transcript):

> A. Well, the policy, from what I can remember, was that we had bought large blocks of land and subsequently, there was some trouble with some zoning restrictions for the airplanes or something like that and we had thought that we would use it for development, we would hold it for investment.
>
> But after the expropriation, such a large chunk was taken away that we finally decided that perhaps we should change our attitude. And at that time, through the foresight of the officers of the company, when the purchase was made, the investment had realized nicely in value and it was decided that since the expropriation took place and they took . . . I don't remember how much land away . . . but it would probably be advisable to sell out and take a profit and that would be that.

In my opinion, this evidence is not sufficient to rebut the obvious inference from all the circumstances that at least one of the motivating reasons for the appellant to acquire the vacant land in question was its hope and expectation that it would be able to dispose of it at a profit.

If that was one of the motivating reasons, profits made upon subsequent disposition of the property are taxable in accordance with *Regal Heights Ltd. v. M.N.R.*[1]. It also follows, as decided in *Byron B. Kennedy v. M.N.R.*[2], that a profit realized upon the expropriation of properties so acquired is taxable. (An appeal to the Supreme Court of Canada from this decision was dismissed without reasons. Cf. p. viii of [1953] 1 S.C.R.).

As indicated earlier, although it is not raised by the notice of appeal, the appellant took the position on the argument in this Court that it ought to succeed with reference to the profit from the expropriation because that profit, if it was taxable, was taxable in the year in which the expropriation took place and not in the year in which it received the compensation. The expropriation took place on January 7, 1954, and the company's fiscal year ending on April 30, 1954, the offer of payment, its acceptance and the authorization to pay took place in the fall of 1954, i.e., during the 1955 fiscal period. The profit from the expro-

[1] [1960] S.C.R. 902. [2] [1952] Ex. C.R. 258.

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priation was then assessed for the 1955 instead of the 1954 taxation year. Having regard to the principle laid down by the House of Lords in *Commissioners of Inland Revenue v. Newcastle Breweries Limited*[1] and section 85B(1)(*b*) of the *Income Tax Act* which sets down that for taxpayers keeping accounts on an accrual basis (which is the case of the present appellant) every amount receivable in respect of property sold or services rendered in the course of the business in the year must be included in computing their income, I am of opinion that, if the issue that the assessment had been made in the wrong year had been properly raised, the appellant would be entitled to succeed with regard thereto.

In *Ben Lechter v. M.N.R.*[2] my brother Dumoulin rendered a decision to the effect that a profit from an expropriation under the *Expropriation Act* (1952 R.S.C. c. 106) for a taxpayer who is on an accrual basis is taxable in the year in which the expropriation took place and not in the year in which the compensation was received on the basis that "the relevant taxation year must coincide with that during which a debt or an obligation to pay legally enforceable originated between respondent and appellant" as a result of section 9 of the *Expropriation Act* whereby the land covered by the notice of expropriation is expressly vested in Her Majesty from the day a plan and description are deposited on record in the Registration office and the expropriated party, because of such deposit and in view of section 23 of the *Expropriation Act,* loses the ownership of the land so expropriated which passes to the Crown, and is then left with a claim to whatever compensation money is agreed upon or is adjudged.

I agree with this decision and in my view there is in principle no difference between the case of *Ben Lechter v. M.N.R.* (*supra*) and the present one as the fact relied upon by counsel for the respondent that here, contrary to the *Lechter case,* the notice of expropriation, the offer of settlement and its acceptance and payment, all took place in the same calendar year although not within the same fiscal year (as the appellant's fiscal year ended on April 30 of each year, the expropriation took place on January 7, 1954 and

[1] (1925) 12 T.C. 927. [2] [1964] C.T.C. 510.

the compensation was received in November 1954) whereas in the *Lechter* case the notice of expropriation took place in one calendar year (January 7, 1954) the offer of settlement and acceptance took place in July of that year and the payment was authorized on February 11, 1955, i.e. in the 1956 fiscal period as the taxpayer's fiscal year ended on January 30 of each year, does not in my view distinguish this case from that of *Lechter,* the main and important fact being that in both cases the taxpayer was not taxed, as it should have been, in the fiscal year in which the expropriation took place (and the debt became receivable) but in the fiscal year in which the compensation or payment was made and received.

I have also considered the "receivability" of the compensation money from the expropriation as the submission of counsel for the respondent appears to be, in regard to both section 24 of the *Expropriation Act* and Order-in-Council No. 4253 and the "Regulations Relating to the Acquisition of Land by Government Departments". Section 24 enables the Crown to abandon the totality or part of the land which was vested in the Crown by the registration of the plan and description of the land at the Registry of Deeds for the county or registration division in which the land is situate before the compensation money has been actually paid by registering a written declaration of abandonment in the same registry office whereby such land then revests in the person from whom it was taken or in those entitled to claim under him.

Order-in-Council No. 4253 and "Regulations Relating to the Acquisition of Land by Government Departments" provide that the authorization of the Treasury Board is required in all cases where compensation for the acquisition of land by the Government exceeds the sum of $15,000 (which of course applies to the present case). I am of the view that the matter of possible abandonment of the land expropriated or of the required authorization of the Treasury Board would not make the amount receivable for the taking of the land by expropriation a claim of such a precarious nature that it could not be included in the year in which the expropriation took place. Indeed, it appears to

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me that notwithstanding section 24 of the *Expropriation Act* or the required authorization of the Treasury Board, registration of the plan and description of the land on January 14, 1954, operated as a compulsory sale of the land and as there is no question but that a compulsory sale is any the less a sale and that, consequently, the owner was, as and from then, entitled to claim compensation for this sale, such compensation money became an unquestionable receivable at that date.

Having reached the conclusion that the appeal should be allowed in respect of the profit from the expropriation if this point had been properly raised, I must now consider whether the appeal should be allowed in respect of that profit notwithstanding that it was not so raised. Section 98(3) of the *Income Tax Act* requires the appellant to "set out" in the notice of appeal "a statement" of *inter alia* the "reasons which the appellant intends to submit in support of his appeal". This particular reason was not included in the notice of appeal. Indeed, it was raised for the first time during the course of final argument by counsel for the appellant. Had the respondent at that time objected to the point being taken by the appellant, I am inclined to the view that I would have put the appellant to a choice of taking leave to amend his notice of appeal under section 99(2) of the *Income Tax Act* upon terms as to costs or of abandoning the point. Counsel for the respondent did not however make such an objection and, indeed, having regard to the manner in which he strove to avoid the decision of Dumoulin J. in the related appeal of *Ben Lechter* which decision had been delivered some five days before the argument in this case, I can only assume that he anticipated that the point would be taken. I therefore order that the appellant be permitted to make an amendment to the notice of appeal raising this point in an appropriate way.

In reaching the above conclusion with regard to the taxability of the profits from the disposition of the vacant lands, I have not taken into account the evidence concerning the transactions in land of the shareholders in the appellant company, which was admitted subject to the appellant's very strong objections and in view of the conclu-

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sion which I have reached without reference to this evidence, it therefore becomes unnecessary for me to rule with regard to its admissibility.

Consequently, upon the appellant amending its notice of appeal pursuant to the leave herein granted, there will be judgment allowing the appeal and referring the assessment back to the Minister for re-assessment by excluding the profit from the expropriation from the appellant's income for the 1955 taxation year and dismissing the appeal in all other respects. In the circumstances, there will be no costs.