1963
June 4
Nov. 28

BETWEEN:

CLARA M. LLOYD .....APPELLANT;

AND

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

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 6(b), 24(1) and 139(1)(e)—Mortgage bonuses and discounts—Adventure or concern in the nature of trade—Scheme of profit making—Investment or speculation—Taxpayer's principal business.

This is an appeal by the administratrix of the Estate of Dr. William J. Lloyd, deceased, who carried on the practice of dentistry in Toronto from 1923 to the date of his death in 1960, from the income tax assessments for the taxation years 1958, 1959 and 1960. The evidence disclosed that the deceased had bought and sold large amounts of mining and industrial stock from time to time during the years 1923 to 1960. He had purchased some country property from which he derived no income, and between 1930 and 1944 he had purchased and rented a number of small houses. The deceased, in his later years, had also invested in bonds. During the years of his practice, the deceased had bought a large number of mortgages, most of which he had purchased between 1950 and 1960. All of these mortgages were held to maturity, a few of them being paid before maturity and many of them being renewed. Most of the mortgages acquired by the deceased between 1950 and 1960 were discount or bonus mortgages, and the effective rates of interest thereon ranged from about 5¾ per cent to as high as 26 per cent. Many of the mortgages, most of which were first mortgages, involved a considerable degree of risk. The evidence indicated that for the years 1952 to 1960 the vast bulk of the deceased's income was derived from mortgage interest and bonuses, his professional income being consistently well below the average for his profession. The deceased had borrowed substantial amounts of money from the bank during the years 1950 to 1960, most of which was used to purchase mortgages.

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The deceased had foreclosed on one property on which he had held a mortgage which had fallen in arrears, and, subsequently, in January 1959, he sold the property, the purchaser thereof, giving him a mortgage to secure a large part of the purchase price. The amount of the discount allowed the deceased on the original mortgage which subsequently went into default was included by the respondent in the assessment of the deceased's income for 1959.

Held: That the effective interest rates on the mortgages held by the deceased were so far above the conventional interest rate that, having regard to the true nature of the discounts in the light of the terms of the loans rates of interest, the nature of the capital risk, the extent to which the parties may be supposed to have taken the capital risk into account in fixing the terms of the mortgages, the discounts and bonuses are not in the nature of interest and are not taxable as such.

2. That the mortgage transactions under review constituted a business operation as must be inferred from the long and consistent history of mortgage discount transactions involving a considerable degree of risk in that in some cases the face value of the mortgage was too high and in others the mortgages were substandard or second mortgages indicating a speculation scheme for profits rather than a policy of investment. The inference is strengthened by the evidence of the deceased's experience in mortgages and real estate, the success of his dealings and of the fact that he borrowed money from the bank with which he purchased discounted mortgages. The deceased's profits from his mortgage discounts or bonuses constitute a gain made in the operation of a business in the carrying out of a scheme for profit making.

3. That the fact that the mortgages were held to maturity is not in itself sufficient to enable one to determine that these mortgage discounts were investments because the very essence of making a profit on these discounts involves the holding of the mortgages to maturity.

4. That the fact that the deceased's estate at the time of his death was composed almost entirely of holdings of discount mortgages so that they could not be said to be a mere incident in his investment program, leads to the inescapable inference that this was not a mere investing to get a good return but rather indicates that he was interested in the speculative aspect of profit making, and the reinvesting of the funds he had borrowed from the bank into other discount mortgages confirms this.

5. That the evidence given with regard to the deceased's net professional income and of his net mortgage interest and profits on bonuses or discounts conclusively show that his real occupation or activity was his dealings in the discounted or bonus mortgages.

6. That under the circumstances existing in this case the fact that most of the mortgages in question were first mortgages does not indicate that they were investments by the deceased.

7. That the amount of the discount on the foreclosed mortgage was properly included in the assessment for 1959 since the value of the new mortgage held by the deceased was sufficient to cover the full amount of the discount and he had therefore received as income the amount of the discount at the time he sold the foreclosed property and took back a mortgage from the purchaser. This result also follows from the application of s. 24(1) of the *Income Tax Act* since the mortgage assumed by the purchaser, including the amount of the discount on the foreclosed mortgage, was given in lieu of payment to which the deceased was

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entitled, which payment he voluntarily consented to postpone by accepting the new mortgage.

8. That the appeal is therefore dismissed.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Noël at Toronto.

Newton J. Powell, Q.C. and *F. E. LaBrie* for appellant.

D. Guthrie, Q.C. and *M. Barkin* for respondent.

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

NOËL J. now (November 28, 1963) delivered the following judgment:

This is an appeal by the estate of the late Dr. William J. Lloyd, of whom the appellant, his wife, is the administratrix from the doctor's income tax assessments for the 1958, 1959 and 1960 taxation years.

The Minister in reassessing for the taxation years 1958 to 1960 inclusive, added to the amounts of taxable income respectively reported by the late Dr. William J. Lloyd in income tax returns for the years in question, the following sums:

1958	$26,227.34
1959	$19,636.90
1960	$ 7,595.59

The above amounts, however, are subject to a number of deductions with which I will deal later.

In each of the above years, the respondent, in assessing the appellant, added to his declared income (which had included the interest received on the mortgages owned by the appellant) amounts corresponding to the discounts, namely the difference between the amounts paid for the said mortgages and the amounts received for principal upon payment of the mortgages. The main question to be determined is the liability of the appellant to pay income tax on the discount profits realized in those years on the mortgages purchased.

The Minister in his pleadings states that these discounts are income as interest on money advanced or/and as income

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from a source without naming any source, and that they are income from carrying on a business in its broadest sense, i.e., as a venture or concern in the nature of trade or a scheme of profit making within ss. 3 and 4 and the extended meaning of business in s. 139(1)(*e*) of the *Income Tax Act* 1952.

The only witness heard was Mrs. Clara M. Lloyd, the widow of the late Dr. William J. Lloyd, a dentist of the City of Toronto, Canada, and the administratrix of his estate. She stated that her husband practised as a dentist from the year 1923 till 1960 the year of his death. According to this witness, when her husband started out as a young man, he often worked at his office from eight o'clock in the morning right through until eleven at night and remained busy right up until the time of his death.

Mrs. Lloyd, who had obtained her junior matriculation at high school, had had some training at business college in bookkeeping and had worked as a secretary prior to her marriage to Dr. Lloyd in 1934. She started in 1938 to keep her husband's property book at home. In this book she made entries of anything that her husband wanted to put in, such as his property or his income from his bonds or his stocks.

From some old papers which she located in her husband's files she was able to prepare a list of his share transactions for the years 1927, 1928, 1929, 1930, 1942, 1949 up until 1950 and from the property book mentioned above, she managed to do the same for the years 1955, 1956, 1957, 1959 and 1960, which information produced as Ex. 1, indicates that Dr. Lloyd had purchased and sold substantial amounts of stock during those years in a variety of mining and industrial corporations. His investments, however, cease from the year 1930 to 1942 and the witness explains that during that period her husband began to buy some small houses with the intention of renting them, which he did for some time. He however found that there was too much work involved and sold them. The witness also produced as Ex. 2 a list of stock certificates of no value held by her husband, which shows that some were purchased in the year 1926, some in 1927, 1928, 1929 and 1930.

A further document, Ex. 3, was produced listing a number of stocks which the estate sold to pay death duties and indicating the gain or the loss on the shares bought or sold. Mrs. Lloyd also prepared from the property book, and pro-

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duced as Ex. 4, a document entitled "Transactions in Country Property" showing the country property of 100 acres her husband had and held through the years, starting from the year 1931 and going right down through the years 1933, 1952, 1955, 1957 and 1958 and on which he planted trees, with the purchase price and the time it was held thereon indicated. All these properties were merely held, her husband having never realized any income of any sort from them.

A further document, prepared and produced by the witness, Ex. 5, entitled "Houses bought by Dr. Lloyd" lists the houses her husband bought through the years and rented from 1937 through to 1944 inclusive. Dr. Lloyd, according to this witness, started buying these properties in the year 1937, when after purchasing second mortgages on No. 301-3-5-7-9-11 on Roselawn Avenue, in Toronto, the first foreclosed on him and having funds to redeem one second mortgage only, he lost the others because he did not have money to put into it.

The doctor and his father went in on shares on the Dundas Street West transactions 2281 to 2283 in 1938 and then rented them. The rest of the properties were all entered into by her husband alone and on his own behalf and they were all rented for the period shown.

A further document, Ex. 6, entitled "Bond Investments" prepared by the witness from the property book lists her husband's bond investments for the years 1952, 1959 and 1960.

A series of documents entitled "Mortgage Investments", prepared by the witness from the entries in the property book, was then produced as Ex. 7, showing all the mortgages her husband had bought in each particular year and had put money into starting in 1950 and going through 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959 and 1960. This exhibit shows the name of the mortgagor, the location of the mortgaged properties, their face value, their cost price when known, the date acquired, the date of maturity, the type of mortgage (first or second) and, finally, the date paid off.

A substantial number of mortgages was held by her husband prior to 1950.

She stated that mortgages were brought to the attention of her husband by a mortgage broker or one or two lawyers who would call him over the telephone. They would describe the nature of the property and if he felt he was interested, he would go out and visit the property. He would then, shortly after his return, tell them whether or not he was interested in the particular property he had seen. Cards found in her husband's file showed that as the latter viewed a property, he would take down the details such as whether the house was in good condition, if there was a full basement and how many rooms there were, and the type of heating system, i.e., a general report as to the house and its location.

Mrs. Lloyd admitted that in some cases her husband would bargain for a better deal.

Her husband also received calls from real estate brokers and stockbrokers as well as literature through the mail regarding stocks and bonds.

Asked by the Court where her husband got the money for his purchases, she replied at p. 22 of the transcript:

A. Quite often when he had a mortgage coming back he would be getting something lined up to make that investment.
Q. If he didn't, what?
A. He would get the loan from the bank.

She added, however, that sometimes he did turn down mortgages because he didn't have any money.

A statement of loans, (Ex. 9), from the bank covering the period 1950 to 1960 was made up by the witness from the property sheets, and shows all the money borrowed by Dr. Lloyd in that ten year period of which she had a record as her husband had but one bank account in which were deposited his professional earnings, his interest, dividends and bond interest, so that the fact there was a loan in this exhibit does not necessarily mean it was borrowed for the purpose of a mortgage.

Exhibit 9 shows that borrowing from the bank was very frequent during the years 1950 to 1960, and in some cases in substantial amounts, and although she pointed out that some of these were used for dental supplies, household and living expenses, and others may have been used by her husband for the purpose of purchasing a car or some dental equipment, or even country properties, including paying for the crew employed thereon, she had to finally admit that

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the major part of these bank loans were used to purchase mortgages.

At the date of his death, Dr. Lloyd owned his own home, his office building, his dental equipment and all his bonds and investments were paid for.

In his mortgage transactions, the witness states that she believes her husband had no partners, consulting no one for expert advice but relying on his own judgment.

Her husband retained all his mortgages until maturity, never selling one and in a good many cases, they were renewed and carried on for a further time without, however, a further bonus. In a few exceptional cases only some were paid before maturity.

The conventional interest rate at the relevant times for mortgages was as low as 5½ and as high as 7 per cent.

Her husband always used his dental office letterhead and never had any special letterhead for his mortgage transactions, nor did he advertise in any manner. He had no special business telephone outside of his office telephone for his dental practice.

In an affidavit obtained from Dr. Lloyd in 1958, he states that the practice of the profession of dentistry for thirty-five years has been a full time occupation for him and it is the only business he conducted during that period. That he never displayed any sign at his place of business indicating he loaned money nor that he was in any way dealing in mortgages; that the mortgages he purchased were for the purpose of investing his own personal funds and any mortgages purchased by him were held until maturity.

Although Mrs. Lloyd affirmed that her husband was actively engaged in the practice of dentistry right up until the time of his death, she had to admit in cross-examination that in the later years to the time of his death, he was utilizing the greater part of the monies he had available in mortgage transactions and as he grew older there was a gradual increase in the amount of his mortgage holdings. As a matter of fact the notice of appeal, second paragraph, reads as follows:

> As he grew older and wealthier, he increased his investment in such mortgages until at the time of his death, he held fifty-one mortgages having a face value of about $425,000 which comprised nearly his entire estate . . .

Counsel for the appellant at the hearing stated that the above figure of $425,000 had been mentioned in error and requested it be replaced by the figure of $356,370.52 as established by Ex. 15, his estate tax return. This request was granted.

She also admitted that most of the mortgages from 1950 to 1960 acquired by Dr. Lloyd were bonus or discount mortgages. As a matter of fact, paragraph 5 of the appellant's notice of appeal confirms this as it reads as follows:

> In recent inflationary years the deceased almost invariably demanded a discount or bonus when purchasing mortgages or lending on mortgage security and all of the mortgages held by him at death had been acquired or arranged in this way.

The parties agreed that the prevailing rates of interest for the years 1958, 1959 and 1960, where the amount of the loan did not exceed 60 per cent of the valuation of the mortgaged premises, were as follows: from August 1957 to February 1958, 7 per cent; from February 1958 to August 1959, 6½ per cent; from August 1959 to April 1960, 7 per cent; from April 1960 to September 1960, 7½ percent and thereafter, 7 per cent.

Mrs. Lloyd added, however, that on one or two occasions on renewals the rates of interest were higher than the above rates; indeed, in one instance it went up to 7½ per cent and in another to 8 per cent.

A computation of interest rates (Ex. 13) made by a chartered accountant, Mr. J. Gordon, of the mortgages here in dispute covering the years 1958, 1959 and down to Dr. Lloyd's death in 1960, as well as those held at his death, was produced as Ex. 13. This computation was arrived at algebraically, i.e., by taking into consideration the fact that the mortgages are purchased at a discount although the interest is calculated the first year on its face value, the second year the interest is on the balance, i.e., the face value less whatever amount paid and so on. On the above basis, it does appear from this exhibit that the interest rate for the various mortgages varied, to take only a few, from 5.78 per cent, 6.45 per cent, 7.37 per cent, 8.1 per cent, 9.05 per cent, 10.9 per cent, 11.2 per cent, 12.6 per cent, 13.9 per cent, 16.6 per cent, 17.3 per cent, 18.3 per cent, up to in one case 26 per cent.

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The witness admitted that the mortgages taken by her husband from 1950 to 1960 involved in some cases a considerable degree of risk as he experienced foreclosures on some of them and she agreed in cross-examination that they were also risky because the face value of the mortgage was too high with reference to the true value of the property or, in some cases, the properties were not in a very attractive district or the houses were not in a good state of repair and in a small number of cases they were second mortgages.

She was not able to say, however, how exactly the amount of the discount or bonus on these mortgages was arrived at.

She maintained that although her husband was engaged in his mortgage activities right up to the time of his death, this would not have taken up too much of his active time which was devoted to the practice of his profession, although admitting that during the years 1958, 1959 and 1960 her husband was getting older and was not booking his appointments as he used to when he was a younger man.

Exhibit A, which is a comparison of professional and mortgage income of the late Dr. William J. M. Lloyd, reproduced hereunder, indicates however that his income from professional fees compared to his mortgage interest and bonuses realized is of a minor nature and the same applies to his investments in stocks and bonds.

WILLIAM J. M. LLOYD

Comparison of Professional and Mortgage Income

Year	*Professional Fees (net)*	*Mortgage Interest*	*Bonuses Realized*
1952	$ 6,455 91	$ 11,118.60	$ 785 00
1953	2,723 17	13,578 83	1,254.28
1954	2,755 01	16,955 86	7,307.30
1955	2,757.24	19,327 09	6,831 50
1956	2,285.68	20,902.03	7,767.00
1957	3.390 55	21,517.88	13,680 30
1958	2,500 62	20,496.28	25,309 94
1959	5,389.97	23,725.73	18,533 60
1960 (to June 12) ..	3,836.80	13,384 94	7,895 59
Totals	$ 32,094.95	$161,007 24	$ 89,364.51
Average 8½ years	$ 3 775.87	$ 18,942.03	$ 10,513.47

Mrs. Lloyd tried to explain her husband's professional income being low during the years 1953 to 1960 by saying that when he moved from his former location to a new one, in 1948, he had to start all over again and very few patients

from his old location came to see him, although this would seem to be somewhat contradicted by Ex. A which indicates that his professional income for 1952, after the date he moved, was nearly double what he earned for the years 1953, 1954, 1955, 1956, 1957 and 1958.

Mrs. Lloyd could not say how it became known that her husband was in the market to purchase such mortgages. To her knowledge, her husband never called up real estate men to request mortgages. All she could say is that real estate men and lawyers would go to him when they had mortgages to dispose of.

She admitted that as mortgages were paid off and the bonuses realized, the proceeds were reinvested in the same type of securities and that it was a gradually building up process.

Counsel for the appellant argues that although there is a regularity about these bonuses coming in, that may make them look like income, they are not so, and that, furthermore, this is not the approach to income established by the courts. That in a case such as here where there is a capital loss through non-payment or inflation which are non deductible items in computing income, these mortgage discounts should be accepted as capital gains. I think I can dispose of this statement by merely saying that as far as inflation is concerned, the appellant is in no different position than any other taxpayer and that the losses in the event the discount mortgage transactions are taken to be the conducting of a business or an adventure or several adventures in the nature of trade, should be dealt with as allowable expenses as governed by the relevant sections of the Act.

With regard to respondent's contention that appellant's bonuses or discounts here should be regarded as interest and taxable therefore under s. 6(*b*) of the Act, I cannot agree. Indeed, it is now settled (cf. *Lomax v. Peter Dickson Co. Ltd.*)[1] that where a loan is made at or above a reasonable commercial rate of interest as is applicable to a reasonable sound security, there is no presumption that a "discount" at which the loan is made or a premium at which it is payable is in the nature of interest.

Now the interest rate in the present instance, as we have seen in most of the mortgage discounts of the appellant is far above the conventional rate to a point where one can

[1] [1943] 2 All E.R. 255 at 262.

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say in determining the true nature of these discounts by looking at all the relevant circumstances such as the term of the loan, the rate of interest, the nature of the capital risk, the extent to which, if at all, the parties expressly took, or may reasonably be supposed to have taken the capital risk into account in fixing the terms of the mortgage, that such discounts are not in the nature of interest and therefore not taxable under the above section.

The only matter now remaining to be dealt with is whether appellant's discount mortgage operations or transactions during the period under review were mere enhancements of value in the realization of securities or as contended by the respondent, gains made in an operation of business in carrying out a scheme for profit making, including the definition of "business" in s. 139(1)(*e*) as including "an adventure or concern in the nature of trade" within the well known statement of Lord Justice Clerk in *Californian Copper Syndicate Limited v. Harris*[1]:

> It is quite a well settled principle in dealing with questions of assessment of income tax that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of schedule D of the *Income Tax Act* of 1842 assessable to income tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for income tax.

And then the Lord Justice Clerk laid down the test to be applied as follows:

> What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit making?

The determination of the present issue depends also on its facts and surrounding circumstances for as put by Thorson P. in *Minister of National Revenue v. Spencer*[2]:

> . . . it is not possible to lay down any single criterion for deciding whether a particular transaction was an adventure in the nature of trade

[1] (1904) 5 T.C. 159 at 165. [2] [1961] C.T.C. 109 at 121.

for the answer in each case must depend on the facts and surrounding circumstances. In every case the true nature of the transaction must be determined.

The appellant submits there was no evidence of a scheme or pattern nor that the taxpayer's intention was to use discounts for the making of money, and that here he had merely miscalculated the loss.

Now, the appellant had the burden of establishing this as set down in *Anderson Logging Company v. The King*[1] by Duff J.:

> He must shew that the impeached assessment is an assessment which ought not to have been made.

I must say that he has failed in this regard. It would indeed appear to me, and this is something I must infer from the large number of transactions, the taxpayer's experience in mortgages as well as real estate transactions and the tremendous success of his dealings, that we do have here on the part of Dr. Lloyd in purchasing the mortgages and in some cases their renewals, the application of skill, a selection by him involving a correct appraisal of the discounts and of the market and finally the use of all that towards making a gain and this on the large scale we have seen. Indeed, he surely must have done something more than merely receive a phone call and then visit a property as Mrs. Lloyd would wish us to believe. This would, in the absence of proof to the contrary, in my opinion, be an indication that these were business transactions and that the taxpayer who well knew what he was doing intended to obtain the discount profits he so successfully earned.

There have been of late many decisions on this matter of mortgage discounts such as in the *Cohen v. Minister of National Revenue*[2], *Minister of National Revenue v. Beatrice Minden*[3], *Scott v. Minister of National Revenue*[4], *Minister of National Revenue v. Mandelbaum*[5], *Minister of National Revenue v. Rosenberg*[6], *Minister of National Revenue v. Associated Investors of Canada Ltd.*[7] cases.

The facts in all of these cases are somewhat dissimilar but from a consideration of all of them, a number of factors

[1] [1925] S.C.R. 45 at 50.
[2] [1957] Ex. C.R. 236.
[3] [1962] C.T.C. 79.
[4] [1963] C.T.C. 176.
[5] [1962] C.T.C. 165.
[6] [1962] C.T.C. 372.
[7] [1963] Ex. C.R. 6; [1962] C.T.C. 510.

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can be taken, no one of which will establish the carrying on of a business, perhaps even no two of which will but when taken with other factors, create a strong almost irresistible inference that we have in essence a business operation.

First of all, as in the *Spencer* case, we have here a long and consistent history of mortgage discount transactions involving a considerable degree of risk as some were foreclosed; they were also risky because the face value of the mortgages was too high with reference to the true value of the property and in some cases they were not in a very attractive district and/or in a good state of repair and finally in a number of cases they were substandard or second mortgages and Thorson P. in the *Spencer* case stated that this is more indicative of a speculation scheme for profits than a policy of investment to secure a fair return on the monies invested.

Mrs. Lloyd has supplied information relative to these mortgage discounts from 1950 to 1960 which discloses that there were 145 transactions during that period and stated that her husband was interested in similar transactions long before the above period. He was also interested and proficient in the allied field of real estate, dealing in houses as well as in land, and from this and his successful dealings this Court must infer that Dr. Lloyd was an extremely astute and consistent business man who carried on a systematic course of conduct in his mortgage dealings.

The multiplicity of the transactions, although this alone would not indicate that we are faced here with the conduct of a business or several adventures in the nature of trade, together with the other relevant circumstances would also, however, be a significant fact.

The number of transactions was so considered by Kerwin J., as he then was, in the *Noak v. Minister of National Revenue*[1] case.

In all of the above cases, as well as in the present one, it was emphasized on behalf of the taxpayer that the mortgages were held to maturity. This, in itself, as pointed out in a number of decisions of this Court and the Supreme Court of Canada, is not sufficient to enable one to determine that these mortgage discounts are investments because the very essence of making a profit on these discounts involves the holding of the mortgages to maturity.

[1] [1953] 2 S.C.R. 136.

Judson J. in the *Scott v. Minister of National Revenue*[1] case at p. 180 confirmed this when he said:

> . . . that these facts establish that the appellant was in the highly speculative business of purchasing these obligations at a discount and holding them to maturity in order to realize the maximum amount of profit out of the transactions, and that the profits are taxable income and not a capital gain.

Indeed, if one is going to dispose of the mortgages as soon after he buys them, he will lose most if not all of the very advantages of the discount so that the holding to maturity would not be of much assistance in determining whether we are faced here with an investment or not.

However, the main argument raised by counsel for the appellant was that the acquisition of these bonus or discount mortgages had been a mere incident in an overall investment programme, that he had invested in stocks, houses, bonds and finally in mortgage discounts. In the *Cohen* case (*supra*), Cameron J. decided in favour of the taxpayer when the latter had devoted a substantial amount to mortgage discounts although it was not the greater part of his assets. In the *Rosenberg* case (*supra*) the taxpayer stated he had set aside 25 per cent of his available capital for this type of risky investments and Thorson P. stated that that was one of the factors which favoured the taxpayer although on the whole he found against him.

There is, however, nothing of that nature here. Indeed, Dr. Lloyd upon his death in 1960 left an estate of approximately $460,831.95 which was nearly all invested in these bonus or discount mortgages. His stock holdings amounted to $41,165.77, he held $4,116 in Government of Canada bonds, his cash on hand in the bank was $1,829.66 and his timber properties were valued at $44,550.

His mortgage holdings were therefore not a mere incident in his investment programme, they comprised nearly the totality of his estate.

Under these circumstances, the inference seems to become more and more inescapable that this was not a mere investing to get a good return on the part of the taxpayer but rather indicates that he was interested in the speculative aspect of profit making. And, of course, the reinvesting of the funds he had borrowed from the bank into other discount mortgages in my opinion confirms this.

[1] [1963] C.T.C. 176.

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This very borrowing from the bank, as disclosed by the evidence, and the use of such funds for the purchase of mortgage discounts by the taxpayer, although a small part of it may have been used by the taxpayer for other items becomes also, in my estimation, a factor and tends to indicate that we have here a veritable business, as I had occasion to point out in *Minister of National Revenue v. Associated Investors of Canada Ltd.* (*supra*).

Counsel for the appellant submitted that appellant's main occupation was the practice of dentistry which kept him busy up until his death. I am afraid, however, that the evidence, and particularly the figures of his net professional earnings compared with his net mortgage interest and profits on these bonuses or discounts (as evidenced by Ex. A) conclusively show that his real occupation or activities were his dealings in these discounts or bonuses.

Indeed, merely as an example of this, in the year 1957, and this can be taken as fairly indicative of the years 1952 to 1960, Dr. Lloyd earned $3,390.55 in professional fees, which of course is way below the average earnings of a dentist, $21,517.88 in mortgage interest and $13,680.30 in bonuses or discounts. For the year 1958, he earned $2,500.62 in professional fees, $20,496.28 in mortgage interest and $25,309.94 in bonuses or discounts. Although there are some variations for the other years between 1952 and 1960, the total amount for this period of professional fees, mortgage interest and bonuses realized, respectively reads as follows: $32,094.95; $161,007.24 and $89,364.51. His average professional earnings for these eight and a half years is $3,775.87 as compared to $18,942.03 for his average mortgage interest earnings and $10,513.47 for his bonus earnings.

There therefore can be no question that his main activities as reflected by his income were in these mortgage discount ventures in which he was so successful.

Now the fact that a majority of these mortgages were first mortgages would not, in my opinion, under the present circumstances, indicate that they were as far as this taxpayer is concerned, investments. Indeed, in the *MacInnes*[1] or *Scott*[2] cases they were all first mortgages but the discounts or bonuses thereon were still held to be taxable profits. The main question in examining the nature of mortgages such as we have here is not whether they are first or second

[1] [1963] C.T.C. 311. [2] [1963] C.T.C. 176.

mortgages, but whether they were good mortgages that could readily be disposed of at their face value. In the present instance there were discounts and bonuses because these mortgages were second class securities, i.e., there was some defect in them that had to be compensated by the discounts or bonuses. This is confirmed by Mrs. Lloyd herself who, in her evidence, admitted that they were all of a risky nature and, of course, the few second mortgages held by Mr. Lloyd were clearly inferior securities.

I might add that on the facts as reviewed, I cannot distinguish this case from the *Minister of National Revenue v. MacInnes*[1] case in which the Supreme Court of Canada in a unanimous decision found that the taxpayer in his mortgage discount transactions had engaged in the highly speculative business of purchasing mortgages at a discount and holding them to maturity in order to realize the maximum amount of profit out of his transactions and that the discounts realized were taxable income since they were profits or gains from a trade or business within the meaning of ss. 3 and 4 of the *Income Tax Act*, R.S.C. 1952, c. 148.

The cumulative effect of the foregoing, together with the whole course of conduct of the taxpayer, in my opinion, rejects what might under other circumstances be considered as investments and irresistibly drives me to the conclusion that the appellant's profits from his mortgage discounts or bonuses constitute a gain made in the operation of a business in the carrying out of a scheme for profit making.

It therefore follows that on the facts and circumstances of this case, I must and do find that the discounts or bonuses realized on the mortgages held by the appellant in the years 1958, 1959 and 1960 were not enhancements of the value of investments made by him. The true nature of these transactions was not investments. These profits were made by the appellant in the operation of a speculative business scheme for profit making within the meaning of the expression used in the *Californian Copper Syndicate* case (*supra*). They resulted from speculative transactions that were adventures in the nature of trade. They are, therefore, because of the definition of "business" in s. 139(1)(*e*) income from a business within the meaning of ss. 3 and 4.

Before concluding, however, I must deal with Ex. 10 filed by Mrs. Lloyd and purporting to be a number of amounts

[1] [1963] S.C.R. 299

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which she claimed had been improperly included for the 1958, 1959 and 1960 taxation years under review here.

At the hearing, counsel for the Minister and the appellant agreed that the 1958 assessment was satisfactory subject to the reduction of the profit on the sale of the 127 Cameron Avenue property from $917.40 down to $461.10; as for the 1959 assessment, an amount of $36.82 for taxes paid was accepted as an expense by counsel for the Minister.

The Minister included in the same year a mortgage discount of $1,103.30 on the basis that the sale of the 184 Lambton property took place on January 22, 1959. The appellant contends, however, that this amount should not be included in the year 1959, as a large part of the purchase price was again secured by mortgage which has not yet been paid. This was the case of a mortgagor who had got into arrears and the mortgage had to be foreclosed. The property was then sold but not entirely for cash and a substantial part of the purchase price was secured by a mortgage in favour of Dr. Lloyd. The appellant maintains that the taking of a mortgage by him from the purchaser was not the receipt of income by him at the time that the mortgage was signed and delivered by the purchaser.

The respondent on the other hand maintains that the profit in this case was made when the property was sold and the fact that the purchase price was not paid in cash at the time of the sale does not prevent the profit being taken into account in the year of the sale.

Such indeed was the position taken by Cameron J. in *Ken Steeves Sales Limited v. Minister of National Revenue*[1] which dealt with the sales of hearing aids on credit when he said "that when trading stocks are sold and delivered the full price should be brought into account in the year in which the delivery is made irrespective of the time of payment."

The House of Lords also decided along the same lines in the case of *Absalom v. Talbot*[2] which dealt with a builder selling houses:

> . . . When a trader in the course of his trade makes a sale to a purchaser, whether the subject-matter of the sale be a house or any other asset in which he deals, his accounts for the year in which the transaction takes place should, for Income Tax purposes, normally include on the one side the cost of providing the asset with which he has parted to the pur-

[1] [1955] Ex. C.R. 108.

[2] (1944) 26 T.C. 188.

chaser and, on the other side, the price for the asset which the purchaser has paid or bound himself to pay.

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Although the above two cases can be distinguished from the present one in that the stock in trade is not the same and that in this case we are dealing with mortgage discounts which are secured claims and not moveables or immoveables as in the above two cases, it would seem from the evidence before me that upon the foreclosure proceedings the appellant became the owner of the property and therefore at that point he no longer held a claim against the property. Indeed, at that stage he had realized his security which might have been or might not have been sufficient to cover both his claim for the amount he had loaned the first mortgagor as well as for the mortgage discount of $1,103.30.

It might have been possible to establish that the real value of the security recovered did not cover all of the amount of the discount and with proper evidence this might have been done. However, the evidence before me does not enable me to establish whether such is the case or not and the fact that the appellant agreed to accept a new mortgage from the purchaser for apparently the amount outstanding, presumably comprising the full amount of the discount, (although even this is not clear as the evidence discloses that some cash was received by the appellant upon the sale of the property) would indicate, I believe, that the value of the security recovered was sufficient to cover the full amount of the discount and that, therefore, he had received the income of $1,103.30 at this point.

It therefore appears to me that the amount of $1,103.30 was properly included by the Minister in the taxpayer's 1959 assessment.

I am also inclined to hold this true on the basis of s. 24(1) of the *Income Tax Act*, R.S.C. 1952, c. 148, which although it was not referred to by the parties appears to apply to the present case. This section reads as follows:

24(1) Where a person has received a security or other right or a certificate of indebtedness or other evidence of indebtedness wholly or partially as or in lieu of payment of or in satisfaction of an interest, dividend or other debt that was then payable and the amount of which would be included in computing his income if it had been paid, the value of the security, right or indebtedness or the applicable portion thereof shall, notwithstanding the form or legal effect of the transaction, be included in computing his income for the taxation year in which it was received; and a payment in redemption of the security, satisfaction of the right or discharge

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of the indebtedness shall not be included in computing the recipient's income.

The security (the mortgage including the discount assumed by the purchaser) was given here in lieu of the payment which the taxpayer was entitled to upon the foreclosure proceedings, which payment he voluntarily consented to postpone by the acceptance of a new mortgage.

With respect to the 1960 taxation year, counsel for the respondent agreed that $197.61 should be deducted on the 21 Sackville Street property as interest. He also agreed that the price paid for the mortgage was $5,450 instead of $4,519.59 thus making a difference of $930.59 and finally he admitted a deduction of $1,100 on the 269 Greenwood Avenue property as this was not paid off up to Dr. Lloyd's death.

Subject to the above minor deductions, it therefore follows that the Minister was right in assessing the appellant as he did for the taxation years 1958 to 1960 inclusive with the result that the appeal herein for these years is dismissed.

The Minister is also entitled to costs to be taxed in the usual way.

Judgment accordingly.