1962
Apr 25, 26
1963
Dec. 6

BETWEEN:

ALEXANDER BRUCE ROBERTSON ...APPELLANT;

AND

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

Revenue—Income Tax—Income Tax Act, 1948, S. of C. 1948, c. 52, s. 127(1)(e)—Income or capital gain—Profit on sale of shares.

The appellant was at all material times vice-president and general counsel of the British Columbia Electric Company Limited. During the early months of 1949, negotiations took place between the appellant, another vice-president of B C Electric, an oil and gas lands acquisition expert,

a geologist and a Victoria businessman with a view to the formation of an oil and gas company. The five men acted in the role of promoters and the company, Britalta Petroleums Ltd., was incorporated under the British Columbia *Companies Act* on April 12, 1949, the appellant being one of the subscribers to the Memorandum of Association and to the Articles of Association. The Articles of Association provided for, *inter alia*, the allotment of shares and the giving of options to subscribe for further shares to the five promoters in terms set out in an already executed agreement The appellant purchased in all about 146,000 shares of the company, 125,000 of them in 1949 at the nominal price of ½ cent per share and the remainder in 1951 at 60 cents per share. During 1951 and 1952, the appellant disposed of 100,000 shares, and ten years later he still retained 46,000 shares The gains realized by the appellant on the sale of shares were $85,389 70 in 1951 and $50,385 00 in 1952, both of which amounts were added to the appellant's taxable income previously assessed for 1951 and 1952.

The evidence established that the appellant had seldom bought stocks and that the Britalta undertaking was the first one of its kind in which he had been engaged.

Held: That the appellant took part in a collective venture in the form of a selective and compact group of men possessing qualities and knowledge which were calculated to render more likely the success of an inherently speculative venture.

2 That the purchase and sale of the shares in issue by the appellant constituted a scheme for profit making which was essentially a trading adventure and this is borne out by the facts that he, as a member of the original group, helped to develop, promote and organize the maturing and disposal of the greater portion of his shares, that he contributed his time and ability without reward other than what he could derive from the sale of his shares, and that the group, including the appellant, paid only a nominal price of ½ cent per share for the original issue of 250,000 shares and the second issue of 500,000 shares, both of which transactions were sanctioned by the directors of the company for the benefit of the promoters thereof, who were none other than themselves.

3. That the appeal is dismissed.

APPEAL under the *Income Tax Act*.

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

J. L. Farris, Q.C. and *P. W. Butler* for appellant.

W. J. Wallace and *T. E. Jackson* for respondent.

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

KEARNEY J. now (December 6, 1963) delivered the following judgment:

The issue requiring determination in the present case is whether, in the light of the particular circumstances later

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described, gains realized by the appellant from sales of shares in Britalta Petroleums Ltd. in the years 1951 and 1952 represent taxable income or capital gains.

Briefly, the facts reveal that in May 1949 the appellant together with Messrs. Cloakey, Slipper, Ker and Mainwaring as associates (hereinafter sometimes referred to as the Canadian group) subscribed, severally but in a single agreement, at a price of ½ cent per share, for common stock of Britalta Petroleums Ltd. (hereinafter sometimes called Britalta or the Company) aggregating 250,000 shares, out of which the appellant's allotment, as well as that of Messrs. Ker and Mainwaring, amounted to $\frac{1}{6}$, or 41,160 shares, and Messrs. Cloakey and Slipper were each entitled to $\frac{1}{4}$ interest and received 62,600 shares respectively.

I will omit reference, for the moment, to any further shares of the Company which the appellant's associates acquired and deal solely with the appellant's added interest therein. In consideration of the payment by the appellant of $208 for the aforesaid 41,160 shares, he became entitled, at his option, to subscribe for an additional 83,333 at the same price per share, totalling $416, which sum he duly paid in November 1949.

In March 1951, under circumstances later described, the appellant acquired an additional 20,833 shares of company stock from one Jas. C. Ralston at the price of 60¢ per share. As a result, speaking in round figures, the appellant's total holdings amounted to 145,000 shares, and during the taxation years 1951 and 1952 he disposed of 50,000 of them at the same price as he paid for them, namely, ½-cent per share, but realized the undermentioned gains claimed by the Minister on another 50,000 which he disposed of at prices ranging from $1 to $4 per share.

The appellant did not dispose of the balance of his shares, consisting of approximately 43,000 ½-cent shares and 3,000 sixty cents shares, and still retained ownership thereof at the date of trial.

As appears by the relevant documents transmitted to this Court by the Minister, pursuant to s. 100(2) of the *Income Tax Act* which was filed by the appellant as Exhibit 1, the Minister, by reason of the aforesaid gains, added $85,389.70 to the appellant's taxable income previously assessed for the year 1951, which amount represented the difference between the cost of the aforesaid shares and the amount realized by

the sale thereof, and for similar reasons a sum of $50,385 was added to the appellant's taxable income previously assessed in respect of the taxation year 1952. The Minister made the above two reassessments on the ground that the appellant together with Messrs. Cloakey, Slipper, Ker and Mainwaring, as owner or jointly as a syndicate or partnership, acquired the said shares with a view to profit by turning them to account or trading in them and that the gains in question constituted profit from a business or adventure in the nature of trade within the meaning of s. 127(1)(*e*) of the *Income Tax Act* (1948).

In due course the appellant objected to the said reassessments but the Minister confirmed them. The appellant, by notice filed on December 28, 1960, appealed from the said reassessments, and apart from denying that the amounts realized on the aforesaid sale of shares are income and affirming that they constitute capital gains, the said notice contains the following as additional reasons in support of the appeal.

The purchase of the shares by the appellant was for investment purposes only and the sale by him of some of the shares was the realization of an investment; the appellant was not in the business of trading in shares; the appellant did not undertake an adventure or concern in the nature of trade; the appellant at no time was a promoter or a speculator and his conduct was that of a prudent investor.

Apart from denying the aforesaid allegations, the respondent adopted the position that the circumstances reveal a joint venture where a group, of which the appellant was a member, conceived the idea of pooling their ability, knowledge, training and reputation to promote and develop oil or gas companies in a similar manner to those engaged in the promotional business, with a view to making a profit from the sale of shares which they had acquired at prices and in proportions which they themselves determined.

The only witness heard was the appellant. Forty-seven documentary exhibits were produced by him without objection on his examination in chief and a further sixty-five on cross-examination. Counsel for the appellant, during cross-examination, took exception to the filing of Exhibit B and it was admitted under reserve of the said objection—which I will comment upon later. Except as to the admissibility of

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the evidence above referred to, the facts in the case are not in dispute and may be conveniently divided into those leading up to the incorporation, on April 12, 1949, of Britalta Petroleums Ltd. and those which occurred in the three succeeding years. By consent, copies of the above-mentioned documentary exhibits, with the exception of the Minister's record (Ex. 1), were inserted in a folder each page of which was numbered consecutively (hereinafter referred to as the Documents) for the convenience and use of the court and counsel.

In reciting the details of the facts I propose to begin with the period prior and leading up to the incorporation of Britalta on April 12, 1949.

The appellant is by profession a barrister and solicitor and one of Her Majesty's counsel. He was admitted to the Bar of British Columbia in 1928 where he was engaged for nearly twenty years in private practice, after which he joined the head office in Vancouver of British Columbia Electric Company Limited (hereinafter called B.C. Electric), of which he became a vice-president and general counsel on a full-time basis and so remained at all material times. The said Company was interested in importing natural gas from the province of Alberta to replace its manufactured gas and, in the early days of January 1949, the appellant together with Mr. W. C. Mainwaring, who was also in the exclusive employ of B.C. Electric and was likewise one of its vice-presidents, with a view to obtaining the required natural gas, were designated to make representations before a Royal Commission which was then sitting in Calgary and conducting an inquiry concerning Alberta gas exportation. On their return journey, Mr. Mainwaring informed the appellant that he had become acquainted with a Mr. George H. Cloakey who was an oil-and-gas lands acquisition expert and a Mr. Stanley E. Slipper who was a geologist of high repute, both of Calgary—I might here add that while in Calgary the appellant also met Mr. Cloakey but only in a casual way. Mr. Mainwaring also informed the appellant that Messrs. Cloakey and Slipper had asked him to join them in forming an oil-and-gas company in which they themselves wanted to retain a substantial interest, as they were tired of working and finding profitable properties for the benefit of others. Mr. Mainwaring also stated that Messrs. Cloakey and Slipper desired his help because they

thought that he might have better access to capital than they did and that he had agreed to join them. Mr. Mainwaring then asked the appellant to likewise join the group, and he agreed to do so. Mr. Mainwaring then remarked that he intended to ask Mr. Robert H. B. Ker, whom the appellant knew and who was a well-known businessman in Victoria, to take an interest in the project. Mr. Ker (as it appears later) became the fifth member of the group of original shareholders and the first president of Britalta. Apparently, no detailed discussion as to the respective interest or responsibility of the parties had been discussed on the Calgary visit; but during the next few months Messrs. Cloakey and Slipper made several trips to Vancouver, where they met Mr. Mainwaring and the appellant.

The evidence of the appellant on cross-examination shows that, as a result of the aforesaid discussions, by April 4 he was in a position to place before the group several draft proposals of ways and means for carrying out the instant undertaking (see Ex. A dated March 29, 1949, entitled "Cloak and Dagger Ltd. Preliminary Outline"; Ex. D, "Draft Outline of Proposal" dated March 30, 1949; Ex. E dated March 31, 1949, entitled "Outline of Proposal"; Ex. F, a draft of Articles of Association dated April 4, 1949). Exhibits A, D, E and F, which were prepared by the appellant, indicate, *inter alia,* that the appellant and his four associates were acting in the role of promoters; that, at least initially, Britalta was destined to be a private company with an authorized capital of $1,000,000 no par value shares, the issued price whereof not to exceed $1 per share; that the company would be authorized by its Articles of Association to enter into an agreement with its five promoters under which they would agree to subscribe forthwith for 250,000 shares at ½-cent per share and the Company would agree that whenever it proposes to issue shares beyond the first 500,000 it would give to the promoters an option to subscribe for a corresponding number of shares at a price of ½-cent each; also that it was contemplated that the Company would acquire permits or reservations on certain oil-and-gas lands in British Columbia and in Alberta; that the fees payable thereon would be $10,000 and $26,000 respectively; that the estimated total cost for the first year, including the drilling of one well in British Columbia and another in Alberta, would be about $500,000.

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On finalization of the foregoing draft proposals, the appellant and Mr. Mainwaring became the subscribers to Memorandum of Association Exhibit 2 and to Articles of Association Exhibit 3, both dated April 12, 1949, whereby Britalta became incorporated as a private company under the provisions of *The Companies Act*, R.S.B.C., c. 68. The concluding paragraph 21, entitled "First Business", of the said Articles of Association (Documents, p. 11) reads as follows:

> 21. The Company shall forthwith enter into, adapt and give effect to an agreement already prepared and for the purpose of identification signed by W. H. Q. Cameron, a solicitor of the Supreme Court of British Columbia, expressed to be made between George H. Cloakey, Stanley E. Slipper, William C. Mainwaring, R. H. B. Ker and A. Bruce Robertson of the one part and this Company of the other part, with full power to agree from time to time to any modification of the terms thereof and either before or after the execution thereof. The basis on which the Company is established is that the Company shall allot shares and give an option to subscribe from time to time for further shares on the terms set forth in the said agreement subject to any such modification and accordingly *it shall be no objection to the said agreement that all or some of the individual parties to the said agreement are or may be promoters of the Company* or that in the circumstances the Directors of the Company do not constitute an independent Board and every member of the Company both present and future is to be deemed to join the Company on this basis. [Emphasis supplied]

Before leaving the evidence dealing with the events prior to the incorporation of Britalta, I wish to revert to the objection first raised by counsel for the appellant in respect of the filing of Exhibit B on the ground of its inadmissibility. The exhibit consisted of a photostat of a letter written by Mr. Mainwaring to Mr. Ker dated March 31, 1949 (Documents, p. 87), a copy of which had been concurrently sent to the appellant. It begins by reviewing the events that occurred during the Mainwaring-Robertson visit to Calgary in January 1949 and which could serve to attract venture capital to the group undertaking in issue; it ends by informing Mr. Ker that the writer, before approaching some of his own friends in California, wanted to give Mr. Ker the opportunity to approach some of the latter's friends in eastern Canada who might wish to provide all of the capital required and thus keep the development in question entirely Canadian.

As appears at page 136 of the transcript, the ground of objection was that writings emanating from Mr. Mainwaring cannot constitute evidence of the purpose or intent

the appellant had in mind when he agreed to join the original group and that it was, moreover, improper to put questions to the appellant, by way of cross-examination, on correspondence between two other people.

I consider, as counsel for the respondent readily agreed, that what Mr. Mainwaring wrote could not be and was not offered as evidence of the appellant's intent in embarking on the undertaking in question; but I think that it constitutes some evidence of the formation of a group and of the collective efforts and various roles played by the members of this original group, and that, since Exhibit B dealt with matters concerning which the appellant had testified on his examination in chief, it was proper subject matter on cross-examination.

Furthermore, I might add that the Court record discloses that on February 6, 1962 the appellant filed an affidavit wherein he declared, *inter alia,* that he had in his possession a large number of documents relating to the case at bar and to the production of which he had no objection, as more fully appears by Schedule A of the affidavit (see Court record) and in which Exhibit B appears as second on the list.

Since I am presently dealing with this question of admissibility of Exhibit B, which had been written prior to the incorporation of Britalta, I may as well pause in order to dispose of a general objection (Transcript p. 159) raised by counsel for the appellant in respect of all similar documents dealing with the period subsequent to the incorporation of Britalta.

I consider that counsel for the respondent was entitled to file any documents relevant to the case which the appellant admitted having in his possession and to ask the appellant for his comments thereon. In the absence of the writer being called by the respondent in rebuttal, the comments or qualifications made by the appellant in respect of any such letter should be accepted.

Without dealing individually with documents similar to Exhibit B, I find (Transcript pp. 182-183) that I allowed, subject to objection, Exhibit P to be filed, being a copy of a letter dated October 28, 1949, from Mr. Mainwaring to Mr. Cloakey. It emanated from the Mainwaring file and the appellant had never seen it prior to trial. I consequently sustain the objection which was made to it.

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In my deliberations I have only taken into account copies of so-called similar letters which are to be found in Schedule A of the appellant's affidavit. I might here add that the effort and time-saving device of concurrently sending copies to one or more of the group, when the original was addressed only to a particular member, was employed, as the evidence indicates, by the appellant himself (Exhibits I, W, X, Z-16-31-38).

Now, dealing with the period subsequent to the date of incorporation, the following is a sequence of the main events which are clearly established by the evidence and which are not contested by the parties.

Effect was given to paragraph 21 of the Articles of Association (*supra*) by an agreement dated May 5, 1949 (Ex. 4—Documents p. 13; Transcript, pp. 16-18). The five members of the group accordingly agreed to subscribe for 250,000 shares of the company stock at an allotted price of $\frac{1}{2}$-cent per share, payable forthwith in cash, and in consideration for doing so were granted the right to subscribe for 500,000 additional shares at the same price whenever the Company proposes to allot shares beyond the first 500,000 shares allotted by it.

As appears by Exhibit H dated May 12 (Documents, p. 112), by resolution of the Board of directors, Mr. Ker was appointed a director and president, Mr. Robertson a director and secretary, Mr. Mainwaring director and treasurer of the Company and Messrs. Cloakey and Slipper directors, and the 250,000 shares were allotted in the following proportions: $\frac{1}{4}$ each to Messrs. Cloakey and Slipper and $\frac{1}{6}$ to each of the other three members of the group.

The said resolution also discloses that immediately after the incorporation of the Company the subscribers to the Memorandum of Association borrowed on behalf of the Company the aggregate sum of $12,000, one quarter of which ($3,000) was loaned by Messrs. Cloakey and Slipper respectively and one sixth ($2,000) each by Messrs. Ker, Mainwaring and Robertson; that notes of the Company, payable on demand, were signed in favour of the aforesaid lenders; that the said borrowings were ratified and approved.

As appears also by Exhibit H (*supra*), the Company acquired a permit to prospect for petroleum products on the Queen Charlotte Islands and subscribers to the Memo-

randum of Association were authorized to reimburse the appellant the sum of $413.50 paid on behalf of the Company to the Registrar of Companies as incorporation fees and $10,250 to the Deputy Minister of Lands for rental and permit fees under the *Natural Gas Act* of British Columbia in respect of oil-and-gas lands on Graham Island.

During the month of July, Britalta, through a man named Newburn, negotiated a farm-out to Royalite Oil Co. Ltd. whereby it would drill a well in consideration of Britalta giving it a checkerboard half-interest in the permit and by August the agreement was signed. See Exhibit J, a letter from Cloakey to the appellant dated July 23, 1949—Documents, p. 116; also Transcript, p. 49.

The above agreement also anticipated that the money loaned by the shareholders would be repaid to them because the Company would be entitled to obtain refunds from the Provincial Government, up to the full extent of the rental and permit fee, as the work performed by Royalite progressed.

Early in September, G. H. Cloakey was in touch with Robert L. Reed, of New York, who represented American financial interests, with a view to obtaining the necessary financing to procure a permit and carry out drilling operations on the Alberta oil-and-gas properties. As appears by Exhibit 5, dated September 8, 1949 (Documents, p. 16), the appellant, at the request of Mr. Cloakey, addressed a letter to Mr. Robert L. Reed containing an up-to-date summary of the main activities of the Company since the date of its incorporation.

The Canadian group carried on negotiations with the American interests, who were represented in New York by Attorney Robert L. Reed and in British Columbia by Jas. C. Ralston, another legal counsel, which negotiations continued over a few months. In November 1949, in anticipation of an agreement being reached whereby the American group would purchase shares of the Company to an extent which would net its treasury $500,000, the Canadian group were allotted a further 500,000 shares at ½-cent per share. The negotiations between the two parties culminated in two agreements dated December 23, 1949, in both of which Jas. C. Ralston as nominee for the American group is described as the purchaser (Ex. 7, Documents p. 29; Ex. 8, Documents p. 24). The terms "American group and Jas. C.

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Ralston" are later used synonymously. Counsel for the parties have agreed that a satisfactory summary of Exhibits 7 and 8 are contained in the following letter dated December 15, 1949, signed by the appellant and addressed to R. H. B. Ker (Ex. Y, Documents p. 145), which reads as follows:

15th December, 1949

R. H. B. Ker, Esq.,
909 Government Street,
Victoria, B.C.

Dear Robbie:

Answering the first paragraph of your letter of 13th December, the following is a brief outline of the agreements in which Ralston (who is called the purchaser) is named as a party, he being the representative of Reed and associates.

There are two agreements. The first is made between Britalta, Ralston and our five selves, who are called the shareholders. By it the Company grants an option (to the purchaser) on 1,250,000 shares as follows:

250,000 shares at 20¢ per share on or before 30 days following the effective date as hereinafter defined;

All or any part of 250,000 shares at 30¢ per share on or before 4 months following the said effective date;

All or any part of 250,000 shares at 40¢ per share on or before 12 months following the said effective date;

All or any part of 250,000 shares at 50¢ per share on or before 18 months following the said effective date;

All or any part of 250,000 shares at 60¢ per share on or before 24 months following the said effective date.

The effective date is the date after the Company has increased its capital to 3,000,000 shares and on which it can deliver a permit under the Securities Act for the sale of the 1,250,000 shares.

The second agreement is between the shareholders and Ralston. Under it the shareholders grant Ralston an option to purchase 300,000 shares at ½¢ per share. The option is exercisable in four installments of 75,000 shares each, exercisable after Ralston has taken up each of the four respective blocks of shares from the Company. All of the 750,000 shares held by the shareholders are to be put in escrow with the Royal Trust Company. The shareholders' remaining 450,000 shares remain in escrow until Ralston has paid the Company $350,000, or the first agreement has terminated. Ralston grants the shareholders an option to purchase at 60¢ per share all or any part of 125,000 of the last block of shares upon which Ralston has an option from the Company.

George telephoned me last evening and said that Reed now had $90,000 in hand and was practically ready to go ahead on the first two blocks of shares at 30¢ per share, he to receive a commission of $25,000 and the Company to net $125,000.

I commented on this in my letter to George yesterday. I enclose a letter which I have written him this morning, which refers further to the matter.

I am writing in great haste.

Yours truly,
A. BRUCE ROBERTSON

Before June 1950, the drilling carried out by Royalite on the Queen Charlotte Island, under its farm-out agreement with the Company, turned out to be a dry hole. Nevertheless, as anticipated the permit fees and charges which Britalta had paid to the Government of British Columbia were rebated to the Company, which in turn paid the promissory notes it had given to the five original shareholders (See the appellant's letter to R. H. B. Ker dated September 19, 1950, Ex. 10—Documents, p. 33).

In October 1950, the Company, jointly with Deep Rock Oil Corporation, acquired a permit on oil-and-gas lands in the Many Island Lake Field in Alberta, which lands were later developed with success.

The Americans had taken up, and paid for, all of the 250,000 forty cents shares and 200,000 of the 250,000 fifty cents shares ahead of the scheduled date of January 1951. They had still to take up 50,000 of the 50¢ shares and 250,000 of the 60¢ shares.

As we have seen, when Jas. C. Ralston had paid for the 300,000 remaining shares the Canadian group were entitled to exercise their option on 125,000 out of the 250,000 sixty cents block of shares, and if they exercised their right, the Canadian group could throw them on the market.

The same thing could occur for the same reasons on the release of 450,000 ½-cent out of the 750,000 shares which the Canadian group had placed in escrow with The Royal Trust Company (Ex. 8, paragraphs 4 and 5—Documents, p. 24).

The brokerage firm of James, Copithorne & Birch Ltd. (hereinafter sometimes referred to as the brokers) mentioned in paragraph 6 of Exhibit 8, through market operations, had been providing Jas. C. Ralston with the finances necessary to acquire the 1,250,000 shares referred to in Exhibit Y (*supra*). The said brokers became concerned that the Canadian group, when free to do so, might throw a considerable number of their 575,000 shares on the market and cause it to get out of control unless something was done to prevent it.

As a result, the appellant, on January 29, 1951 (Ex. Z-53—Documents, p. 183) enclosed two undertakings, concerning the ½-cent shares and 60¢ shares respectively, addressed to the brokers, both dated January 22, 1951 (Exhibits 13 and 14—Documents, pp. 37 and 38), which had been signed by or on behalf of the Canadian group.

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As appears by Exhibit 13, the Canadian group, in consideration of the brokers continuing their financing of the Company, undertook that on release of the 450,000 half-cent shares they would not put any of them on the market, except with the brokers' approval.

Exhibit 14 makes reference to 135,000 sixty cents shares. This is explained by the fact that Jas. C. Ralston personally had obtained an option from his principal on 10,000 sixty cents shares and he joined the Canadian group in appointing the brokers as selling agents for his shares.

I will now deal with the disposition which the appellant made first of his 60¢ shares and later of his ½-cent shares.

The record thereof and the sums realized by the appellant, subject to minor adjustments, are set out in paragraph 16 of the notice of appeal. As therein indicated, in respect of the 60¢ shares, the brokers, in March 1951, sold 13,548 shares out of 20,833 held by the appellant at nearly $1 a share, which netted him $13,118.50. The amount thus realized was a little more than sufficient to pay the cost of his acquisition of the said 20,833 shares, which amounted to $12,499.80. The effect of this was to leave the appellant holding 7,235 of the said shares at no cost to him.

The appellant declared (Transcript, p. 70) that he stopped selling his 60¢ shares when he had sold enough to permit him to pay the cost thereof.

As appears by a memo of a telephone communication, dated November 7, 1950 (Documents p. 179—Ex. Z-20), which the appellant had with Messrs. Cloakey and Ker, the latter was of the opinion that the group should not sell any more of their 60¢ stock than would pay for the cost thereof, for fear of income tax.

The very next month, the appellant, who was in England at the time, received word that a natural gas well strike had been made in the Many Island Medicine Hat area which was being operated jointly by Britalta and Deep Rock Many Island Company and that, by test, it was esimated that the volume of the gas resulting from the strike would exceed 3-million cu. ft. daily (Transcript, pp. 72, 76; Exhibits 17 and Z-27—Documents, p. 187).

By the end of April the stock of the Company was selling at close to $2 a share. James, Copithorne & Birch Ltd. found themselves facing a short market position, and far from

making use of their right to prevent the appellant and other members of the Canadian group from selling their shares, they were requesting them to sell, and some of them did. The appellant was asked to sell 5,000 shares but he declined (Exhibits 19 and 20, pp. 44 and 45 of the Documents; pp. 74 and 75 of the Transcript).

The appellant returned from England in the summer of 1951 (Transcript, p. 76). On July 13 Britalta was listed on the Toronto Stock Exchange.

The evidence shows that the appellant sold 3,000 shares in July and a further 1,000 in September at approximately $4 per share, thereby realizing $4,000 more on 4,000 shares than he had received by selling 13,548 shares at $1 per share in the previous month.

In respect of the appellant's 75,000 ½-cent shares which he then had, he procured the release thereof from escrow on October 5, 1951 (Ex. Z-34—Documents, p. 199) and within ten days thereof, through Mr. R. L. Reed, he disposed of 20,000 of them by private sale at $3.50 a share, which was 10 percent below the market price (Transcript, pp. 79 and following of the Documents). Starting at p. 79, the appellant gave the following explanations concerning the above-mentioned sale:

> Well my Lord, at that time I had 79,285 shares and with a market 10%, or of which $3.50 represented 10%, those shares were worth over $300,000. That was an astronomical sum for me, I had never thought I would have that much money The shares had gone up very fast, I was afraid they might go down equally fast, and I thought the prudent thing to do was not to leave everything in one place but to realize some of it. I still however wanted to stick to my original resolve which was to have a substantial interest in the company, and I did not want to sell as many as 25,000 shares which I had the chance to sell, and so I told Mainwaring I would be prepared to sell 15,000 shares but that if, in order to satisfy whoever it was who wanted to buy the shares it was necessary for me to sell more, I would go as high as 20,000 shares, and on the 16th of September Mainwaring wired me to that effect.

The last sale with which we are concerned occurred in February 1952 when the appellant sold 12,000 shares for approximately $50,000. In reply to an inquiry about the reasons which prompted him to sell this further 12,000 at $4.10 a share, he said at p. 92:

> I still held 58,285 shares worth at the market over $200,000. And I thought it was the wise thing to do to spread my risk by diversifying and so I said I would sell 12,000 shares.

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At page 177, during cross-examination he was asked about the services rendered by him to the Company and he answered as follows:

Q. No charge was made for those services?

A. No.

Q. This effort and time you put in was to advance the interests of the company?

A. Yes.

Q And thus enhance the value of the stock you held?

A. Whenever you do something as a director for a company you hope it will enhance the value of the stock.

Q And this, of course, was in your case the only commercial return that you could get from your efforts?

A. I think that is fair. Whenever you go into a company you hope that its shares will be worth more later on than they are when you put your money in . . . .
Excuse me, getting back to the last thing you put to me, another thing that one hopes for when you invest in a company is that you will get dividends on your shares, you don't only look to the possibility of selling the shares.

Q That is true. Did you have that thought in mind at that time?

A. Yes, I went into this thing with one idea of getting an interest in a company which would give me some return.

Q Well now, let's put it clearly Mr. Robertson. Did you go into purchase these shares at half a cent with a view to getting dividends on these shares?

A. I went in with the idea that you have investing in any company, you hope that you will get dividends and you hope that you will increase your substance by appreciation in the value of the shares.

Q. You are an experienced businessman What chance did you think that this company, its ability to pay dividends on these shares?

A. That is what you . . . .

Q. When you went in, when you were putting in this investment of $200

A. I wouldn't have put in a nickle if I hadn't thought the company would ever . . if I thought the company would never be in a dividend paying basis.

Q Let's be frank. You really didn't put in a nickle, you got these shares on the hope or for the efforts that the promoters were going to make in the hope you would develop a company that was really worthwhile and enhance the value of these shares, isn't that right?

A I hoped that the company would develop into a paying proposition.

The following exchange of letters occurred between the appellant and Mr. R. L. Reed. The appellant's letter

(Ex. 36—Documents, p. 65) is dated February 18, 1952 and reads as follows:

18 February 1952

AIR MAIL

Mr. Robert L Reed
Reed, Crane & McGovern
570 Lexington Avenue
New York 22, N Y., U.S.A.

Dear Bob:

Very many thanks for your telegraph of Thursday last and your confirming letter of the same day. It was indeed very kind of you to arrange the sale of my 12,000 shares.

I feel that I did the right thing in selling, but for the sake of all of us I hope that in the result it will turn out to have been a frightful mistake!

With kind regards,

Yours sincerely,
A. BRUCE ROBERTSON

ABR/MB

The reply of Mr. Reed (Ex. Z-37—Documents, p. 207) is dated February 29, 1952 and reads as follows:

February 29, 1952

A Bruce Robertson, Esq., Q.C.,
425 Carrall Street,
Vancouver, B.C.
Canada.

Dear Bruce:

Just a line to acknowledge receipt of your letter of the 18th with respect to the sale of your stock. I am glad that I could be of assistance to you and the others, but I hope, as you say, that you made a frightful mistake in selling.

As I wrote Robbie Ker, I am hopeful that now that you three have disposed of the shares you wished to, that at least for the time being you will not sell further shares. Without laboring the point, it is rather difficult to explain to some people why your respective shareholdings become less each time a report to shareholders is put out. Considering the profits that have been made, I am sure all of you will be content to "rest on your oars" at least until the market has become a bit more stabilized. I very sincerely feel that we can build a substantial Company out of Britalta, and I look forward to the time in the not too distant future when I hope I can say "I told you so".

With all the best.

Sincerely yours,
B O B

Before proceeding to deal with the case on its merits, I should mention that the record discloses that the appellant had seldom bought stocks and the Britalta undertaking was the first one of its kind in which he had been engaged.

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At no time did the Company pay a dividend and, starting in July 1951, when Britalta stock was first traded in on the Toronto Stock Exchange, the high and low stock market quotations thereof were as follows:

1951	$ 6.30	to	$ 3 00
1952	9.85	to	4 50
1953	10.25	to	2.75
1961	3 05	to	2.00

I should also add that Mr. Reed had become the president of the Company on June 27, 1951 (Ex. Z-30—Documents, p. 190).

Considerable argument was directed to the purpose or intent which the appellant had in embarking on the Britalta venture. I use that term because its appropriateness was not questioned.

The present case is somewhat unique because, unlike in *Regal Heights v. The Minister of National Revenue*[1], I consider we are not here concerned with a case of frustration and alternative intentions. In effect it was held in the above-mentioned case that actions speak louder than words and that, unless there is evidence to support the taxpayer's *post facto* declaration of intent, such declaration has little if any probative value. As I read the appellant's evidence, although he may not have said so in so many words, his declared purpose in acquiring the shares in issue, should they increase in value, was twofold: First, to dispose of most of them to best advantage whenever, in his opinion, an opportune moment presented itself, and secondly, to retain indefinitely a substantial number of the remainder to fulfill a long-standing desire to possess a substantial interest in an oil or gas company.

The evidence clearly shows that the appellant disposed of approximately 100,000 shares in 1951 and 1952, that ten years later he still retained ownership of about 46,000 shares, and such retention, in my opinion, is not inconsistent with an original dual-declaration of intent but tends to confirm it.

We are here concerned, however, only with the appellant's first intent or objective and it becomes necessary, I think, to inquire whether in acquiring and disposing of his 100,000

[1] [1960] S.C.R. 902.

Britalta shares he did so in a manner characteristic of a capital investment or of an adventure in the nature of trade.

Although the *Income Tax Act* does not define what constitutes a capital investment or gain, in my opinion one aspect of the evidence affords a classical example of such a transaction. It occurred when the appellant, in October 1951, after realizing gains of approximately $70,000, reinvested over $50,000 of it in various high grade listed securities of well-known companies on the advice of Ames & Company. No one, I think, could gainsay but that if in due course he realized on these securities and if in doing so he made a profit or a loss it would constitute a non-taxable gain or non-deductible loss.

In respect of what constitutes a capital gain, I will here confine myself to simply observing that I think it is self-evident that the manner and means adopted by the appellant in obtaining the aforesaid high grade securities were greatly different from those employed by him in the acquisition and disposal of his Britalta shares—which made the above-mentioned $50,000 investment possible.

I pass on to the consideration of a more positive test and one concerning which our jurisprudence provides more guidance in determining whether or not a transaction constitutes an adventure in the nature of trade.

In the case of *Irrigation Industries Ltd. v. The Minister of National Revenue*[1], in which a long list of authorities was reviewed, Martland J. observed at p. 351:

> In my opinion, a person who puts money into a business enterprise by the purchase of the shares of a company on an isolated occasion, and not as a part of his regular business, cannot be said to have engaged in an adventure in the nature of trade merely because the purchase was speculative in that, at that time, he did not intend to hold the shares indefinitely, but intended, if possible, to sell them at a profit as soon as he reasonably could. I think that there must be clearer indications of "trade" than this before it can be said that there has been an adventure in the nature of trade.

In examining this aspect of the case I think it is also helpful to recall the recommendations of Rowlatt J., in a similar case, when he referred it back to the Commissioners of Taxation for reconsideration and which was cited with approval by Martland J. in the *Irrigation* case *supra* at page 356:

> . . . but I commend the Commissioners to consider what took place in the nature of organizing the speculation, maturing the property, and

[1] [1962] S.C.R. 346.

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disposing of the property, and when they have considered all that, to say whether they think it was an adventure in the nature of trade or not.

Another suggested guidepost is to ascertain whether the appellant's disposal of the shares sold can be regarded as a deal or deals or trades in shares of the Company. Cartwright J. (dissenting) in the *Irrigation* case *supra* quoted Lord Radcliffe in *Edwards v. Bairstow*[1] to the following effect (p. 361):

> Dealing is, I think, essentially a trading adventure, and the respondents' operations were nothing but a deal or deals in plant and machinery.

In my opinion, the following factors are weighty elements tending to establish that the appellant, in effecting the previously mentioned purchases and sales by a series of deals, organized a scheme for profit-making which was essentially a trading adventure.

As appears by Exhibits A, B, D, E, F and I, the appellant as a member of the original group, by devoting much effort and little money, helped to develop, promote and organize the maturing and disposal of the greater portion of his shares.

Leaving aside any evidence to which counsel for the appellant took exception, I think the proof clearly shows that, beginning in January 1949 with the meeting between Messrs. Cloakey and Mainwaring, the seed of a collective venture was planted and it grew and took shape in the form of a selective and compact group possessing qualities and knowledge which were calculated to render more likely the success of an inherently speculative venture. Whether the five members of the original group were bound to each other by a syndicate or partnership agreement which was legally enforceable, or by a verbal understanding or gentleman's agreement, is in my opinion of little importance. At all material times the appellant and those associated with him fulfilled the various functions expected of them as fully and effectively as if they had been evidenced by a signed and enforceable contract.

Among the other significant features pointing in the same direction is the nominal price of $\frac{1}{2}$-cent each which the group paid for the original issue of 250,000 shares, of which the appellant was entitled to 41,667. The same is true of the second lot of 83,333 shares acquired by the appellant

[1] [1955] 3 All E.R 48

out of 500,000 shares which were issued to the group at one half cent each. These two transactions were sanctioned by the directors of the Company for the benefit of the promoters thereof, who were none other than themselves.

It was the intention of the original group to interest outsiders in putting up the capital necessary for development of oil properties. The inconsequential amount of $1,875 realized by the Company on the two above-mentioned transactions, as well as the subsequent loan, repayable on demand, made by the sole shareholders of the Company to the Company itself, represented preliminary contributions of a promotional nature, since, as appears at page 3 of Exhibits D and E, the group estimated that the capital required during the first year of operations would amount to about $500,000.

I think the promotional and trading activities of the appellant, as a member of the Canadian group, were much the same as those practised by one who is engaged in the promotion business and they continued after the Company was incorporated, because he was personally a party to a contract (Ex. 8) wherein, *inter alia,* the appellant and his associates, called the vendors, traded or exchanged option rights with Jas C. Ralston, called the purchaser, whereby the latter acquired a conditional option in the appellant's $\frac{1}{6}$ interest (50,000 shares) in 300,000 shares out of the 750,000 owned by the Canadian group, in consideration of his granting the appellant an option to purchase a $\frac{1}{6}$ interest in 125,000 shares (20,388 shares) which the purchaser had agreed to acquire from the Company.

Counsel for the appellant submitted that the delay of $2\frac{1}{2}$ years between the date of acquisition by the appellant of his first block of 41,667 $\frac{1}{2}$-cent shares and October 1951, when he began selling them, was such as to negative the intention of making a short term realization on them, and the fact that he did not sell as many shares as he could at the first opportunity was a further indication of a capital investment. In this latter connection the evidence shows that on a few occasions the appellant declined to sell as many shares as he could and in other instances he was asked to refrain from selling. Whatever decision the appellant took was not in my opinion indicative of a capital investment transaction but the exercise of his own judgment in

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deciding whether or not the occasion was sufficiently opportune.

Insofar as the above-mentioned delay is concerned, it is to be noted that the appellant exercised his option to acquire from Jas. C. Ralston 20,833 shares at 60¢ each in March 1951 and at the first opportunity sold 13,548 of them during the same month; and following the gas discovery he disposed of an additional 4,000 between July and September 1951.

As far as the ½-cent shares are concerned, he sold 20,000 in October 1951 and 12,000 in February 1952. I do not think that the date of acquisition is important, and, as appears by the foregoing, all the sales made by the appellant were effected within less than a year from the date at which it was first possible to sell them.

Counsel for the appellant submitted that the *Irrigation* case was very much in point since it concerned an isolated purchase of shares by a taxpayer which were disposed of *in toto*.

It should be noted that in the above case the appellant, with money borrowed from the Bank for another purpose, purchased 4,000 common shares out of a public offering of 5,000 shares of treasury stock of Brunswick Mining and Smelting Corporation Limited at a price of $10 a share, thus benefiting the treasury of the said Corporation to the extent of $40,000. Shortly thereafter, the Bank having demanded repayment of the loan within 30 days, the *Irrigation* Company disposed—presumably on the public market—of the greater portion of its Brunswick shares, the value of which, in the meantime, having risen within three weeks of their acquisition. The remainder of the said shares were sold four months later at a sufficiently large profit to discharge its bank overdraft. The Brunswick transaction as between the parties concerned was an at arm's length transaction and the taxpayer in making the purchase had taken no hand in the promotion of the said company and had acted in an individual capacity unconnected with any group or association.

At the risk of redundancy, I mention the following additional facts, which I consider to be indicia of trade present in the case at bar and not to be found in the *Irrigation* case.

The appellant joined with other members of the Canadian group for the purpose of promoting the Company (Bri-

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talta), whose shares are in issue; he contributed his time and ability without reward other than what he could derive from the sale of his shares. He acquired his shares as a result of not one but three transactions; namely, the purchase in March 1949 of 41,667 shares at the nominal price of ½-cent per share; the second purchase, in November 1949, of 83,333 shares was also at ½-cent per share; the acquisition in March 1951, at 60¢ each, of the 20,833 shares which the appellant had under option from Jas. C. Ralston and in consideration of agreeing to sell 50,000 of his ½-cent shares which were under option to the said Ralston at ½-cent per share; and finally, the two undertakings whereby he and the Canadian group placed all their shares in escrow with The Royal Trust Company and, in order to control the market, undertook not to dispose of any of them except through and with the consent of James, Copithorne & Birch Ltd.

I cannot accept the submission of counsel for the appellant that, even if the sales of stock made by the appellant in March 1951 constituted an adventure in the nature of trade, the discovery of the gas well in April 1951 with its beneficial result on the value of his shares had the effect of converting their subsequent sales into the category of capital gains realized by the appellant from an investment. I am accordingly of the opinion that the Minister was justified in regarding the transactions in issue as a scheme for profit-making.

For the foregoing reasons I consider that the appeal should be dismissed, with taxable costs in favour of the respondent.

Judgment accordingly.