
1964

Dec. 7, 9, 10, 11

1965

Jan. 15

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

ALDERSHOT SHOPPING PLAZA LIMITED ..... RESPONDENT.

Revenue—Income—Income tax—Land purchased for shopping centre and subsequently sold at profit—Land purchased for shopping centre to be retained and rented—Sole purpose of taxpayer when land purchased—Conditions in agreement to purchase land inconsistent with speculative intention—Short existence of taxpayer insufficient to put it into business of dealing in shopping centres—Agreement of purchase and sale a capital asset, as was the land which was the subject of the agreement—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e).

The Minister of National Revenue appeals from the decision of the Tax Appeal Board allowing the appeal of the respondent from the assessment as income of the respondent for the taxation year 1961 of the sum of $55,018 08 realized as profit on the sale of land as being income from an adventure or concern in the nature of trade.

The evidence established that one Facey, who had acquired considerable experience in the construction industry and in the development of shopping centres, became aware that Dominion Stores Limited was anxious to have a shopping centre erected on land owned by it contiguous to one of its supermarkets located in the Village of Aldershot near Hamilton, Ontario. Facey was convinced that the site was suitable for such a development and lacking sufficient capital himself, he enlisted the participation of several other individuals to help finance the project and, with them, procured the incorporation of the respondent company. On August 12, 1960 an agreement for sale was executed by Dominion Stores Limited and a trustee for the respondent company which had not yet been formed and it was a term of the agreement that should the purchaser be

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unable to obtain the necessary permits for the erection of the proposed shopping centre and the approval of the vendor of the site plan, before the closing date, it might, at its option, either complete the purchase or terminate the agreement, in which latter event it would lose its deposit of $1,000. After considerable preliminary work had been done, and expense incurred for printing and distribution of brochures, for engineers', architects', surveyors', and solicitors' fee, for office rent and for secretarial help, and some progress had been made in leasing space in the proposed shopping centre, Dominion Stores Limited informed Facey that Tower Marts of Canada Limited had decided to establish a large departmental discount store in the area and was particularly anxious to have the respondent's site. There was evidence that Tower Marts of Canada Limited was, in fact, negotiating for available property just across the highway from the respondent's site. Faced with this dilemma the respondent agreed to sell part of its site to Tower Marts of Canada Limited and in so doing realized as profit the sum of $55,018.08, which is in issue.

Held: That the respondent, when it entered into the agreement of purchase and sale with Dominion Stores Limited had for its sole purpose the erection of a shopping centre on the land to be acquired and to derive rental income therefrom.

2. That the fact that the respondent had not completed the mortgage financing and other arrangements for its shopping centre at the time it sold to Tower Marts of Canada Limited does not warrant an inference that it had, from the beginning, contemplated resale of the property, inasmuch as such sale occurred before, in the ordinary course of events, such arrangements would have been made.

3. That although the proposed first mortgage on the property was to contain a provision for partial discharge, such provision is consistent with the erection of the shopping centre in stages and allowed the respondent to dispose of such part of the land as might be unnecessary for its shopping centre. If the land was capital in the hands of the respondent then the surplus over its requirements would also be capital.

4. That the conditions imposed by the provisions in the agreement with Dominion Stores Limited were designed to ensure that a shopping centre would be built and are inconsistent with speculation in the lands for any other purpose.

5. That the short existence of the respondent was not sufficient to put it into the business of dealing in shopping centres.

6. That the provision in the agreement of purchase and sale giving the purchaser the option of completing the purchase or terminating the agreement in the event it did not obtain the necessary permits and approvals, is not a condition precedent to the respondent's obligation to buy the property.

7. That the agreement for sale between Dominion Stores Limited and the respondent constituted a capital asset rather than a revenue asset and there is no valid reason for not considering the land which was the subject of the agreement for sale to be in the same category.

8. That the appeal is dismissed.

APPEAL from a decision of the Tax Appeal Board.

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The appeal was heard by the Honourable Mr. Justice Cattanach at Toronto.

D. J. Wright and *J. E. Shéppard* for appellant.

David Vanek, Q.C. and *Irving Goodman* for respondent.

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

CATTANACH J. now (January 15, 1965) delivered the following judgment:

This is an appeal from a judgment of the Tax Appeal Board[1] dated January 31, 1964, whereby an appeal, by the respondent against its income tax assessment for its taxation year 1961 was allowed and the pertinent assessment was ordered vacated.

The respondent, in assessing the appellant for its 1961 taxation year, added to the appellant's income for that year an amount of $55,018.08 realized as profit on the sale of land as being income from an adventure or concern in the nature of trade. The respondent, on whom the onus lies, does not dispute the accuracy of the amount of profit so realized, but does contend that such gain does not constitute taxable income, but was rather a "capital gain". The respondent says that it had been incorporated for the sole purpose of erecting and carrying on the business of a shopping centre to obtain rental income therefrom; that real property was acquired for the sole purpose of securing an advantageous site for the proposed shopping centre; that definite and unequivocal steps were taken towards that end; that a well established competitor had subsequently decided to locate in the identical area and subjected the respondent to irresistible pressure to sell the site to it. Accordingly the respondent says that it was frustrated in its project of developing a shopping centre and had no alternative but to sell to its competitor and that the transaction was, therefore, not an adventure or concern in the nature of trade.

The question for determination is, therefore, whether, in the light of all the surrounding circumstances, the transaction in question is "an adventure in the nature of trade" and the profit therefrom is income from a business for the purposes of the *Income Tax Act* under ss. 3, 4 and 139(1) (*e*)

[1] 34 Tax A.B.C. 429.

thereof, or whether the sale of the real property was the realization of a capital asset and the proceeds of such realization were, therefore, capital and not income within the meaning of the *Income Tax Act*.

The prime motivation of the proposal to erect a shopping centre was Allan E. Facey who was also the principal witness for the respondent. Mr. Facey had considerable experience in the construction trade, having been 14 years with a well known construction company, his function being to estimate building costs. Latterly he spent 7 years as general manager of a company engaged in the development of properties such as office buildings and shopping centres. In the course of his employment he was responsible for the supervision of the construction of three neighbourhood shopping centres which entailed engaging architects and consulting engineers, arranging for sanitary sewers, lighting of parking lots and the like. From his association with the trade he became aware that Dominion Stores Limited, which operated a number of grocery supermarkets, (hereinafter referred to as Dominion) was particularly anxious to have a shopping centre erected contiguous to one of its existing supermarkets located in the Village of Aldershot, which was on a main highway in close proximity to the metropolitan area of Hamilton, Ontario. A brief and superficial investigation of the site convinced Mr. Facey that it offered eminently suitable prospects for the construction of a successful shopping centre. He, therefore, saw an opportunity for setting out a potentially prosperous project on his own behalf, in a field for which his experience best suited him.

While Mr. Facey had little capital of his own, which included a possible loan of about $25,000 to $30,000 from his late father's estate which he valued at $300,000, nevertheless he could not carry the project on his own. Accordingly, he enlisted the participation of James Bitove, a former schoolmate who operated a number of coffee shops, John Bitove, brother of James, Bruce Kinsella, (John Bitove and Kinsella were shareholders of a company known as Kinsella Design Associates Limited, which company was engaged in the design and manufacture of store fronts and fixtures) and David Fine a chartered accountant. Later Nicholas Bitove, the father of James and John, who was

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retired but possessed some means, was induced to join the project.

These persons were instrumental in obtaining the incorporation of the respondent company under the name of Aldershot Shopping Plaza Limited, pursuant to the laws of the Province of Ontario by letters patent dated September 28, 1960 for the following objects:

> TO purchase, lease, take in exchange or otherwise acquire lands or interests therein together with any buildings or structures that may be on the said lands or any of them and to hold, enjoy, manage, improve and assist in improving such lands and to construct, develop and operate shopping centres in all their aspects;

Prior to the incorporation of the respondent, the participants, with the exception of Nicholas Bitove who joined the project at a later time, met to consider the project in July or August of 1960. They had before them an analysis of the site, prepared for another party, and the benefit of Mr. Facey's examination of the site and his experience. They decided that the site was a promising one. It is true there was a sewer problem but it seemed capable of solution. It was estimated that the cost of the project would be $1,200,000 inclusive of the cost of the land which was $240,000. The construction of the building and other improvements would be approximately $1,000,000. The building would contain 35 stores, the rental of which would yield an estimated 15 percent return on the monies expended. It was anticipated that financing of construction would be by means of a first mortgage in the amount of $750,000. Secondary financing was also contemplated as necessary and any balance remaining, when the amount of the secondary financing available was known, would be put up proportionately by the participants. The participation in the project was to be one-sixth each by James Bitove, John Bitove, David Fine and Allan Facey and two-sixths by Bruce Kinsella. A mortgage broker was consulted who was optimistic about obtaining a first mortgage in the required amount predicated upon the successful negotiation of leases for the premises before construction began. However, no steps appear to have been taken to obtain secondary financing although several possible sources were mentioned by Mr. Facey with whom he had had previous dealings.

The preliminary financing was in the amount of $15,000. James Bitove, John Bitove, Fine and Facey each put up

$1,000 and Kinsella put up $2,000, making a total of $6,000. The remaining $9,000 was put up by Kinsella Design Associates Ltd., and was advanced as required.

An offer to purchase was submitted to Dominion, (which incidentally had been attempting to dispose of the land for between five and seven years, to someone who would build a shopping centre on it) by Kinsella Design Associates Limited which was acceptable to Dominion.

Accordingly, on August 12, 1960 Dominion entered into an agreement for sale with Kinsella Design Associates Limited as trustee for a company to be formed, being the respondent herein. This agreement provided for the sale of the land owned by Dominion contiguous to its existing supermarket building, consisting of approximately 17.96 acres, with a frontage of 1200 feet and an arterial highway, at a price of $240,000 to be paid by (1) a deposit of $1,000 on the signing of the agreement, (2) $49,000 by certified cheque on closing, the closing date being fixed in the agreement as November 1, 1960, and (3) the balance of $190,000 by giving back to the vendor a first mortgage covering the entire property to mature two years after the date of completion. The mortgage was to contain a provision whereby the mortgagor was entitled to obtain partial discharges at any time before maturity. It was also provided that if, on or before the closing date, the respondent should not have obtained (*a*) all necessary permits from governmental and administrative bodies allowing the erection and operation of a retail shopping centre (*b*) all necessary permits from the Department of Highways allowing access from the adjacent public highway, or (*c*) approval of Dominion's engineers to a site plan, then the respondent may either complete or terminate the agreement at its discretion. In the event of the agreement being terminated for any of the foregoing reasons, the deposit was to be retained by the vendor. It was further provided that should the respondent not be able to obtain permission to connect to storm sewers or water mains or should it be unable to arrange for sanitary sewer facilities to be brought to the perimeter of the property to service the shopping centre in due time for the completion thereof, the respondent at its option might also terminate the agreement. By a schedule to the agreement Dominion was granted certain easements permitting of access and

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maintenance and by a further schedule Dominion reserved the right to exercise control over the construction of all buildings within 600 feet of its existing building, the respondent undertook to maintain an access road until dedicated and accepted as a public highway and the respondent also undertook not to permit the erection of any building on the land which would be used to compete with Dominion for 30 years.

The respondent thereupon began its efforts to bring the proposed shopping centre into existence. Brochures were prepared, printed and circulated to prospective tenants at a cost of $1,227.50, engineers' fees were incurred to the extent of $1,082, architects' fees in the amount of $1,756, and survey fees amounting to $212. The respondent arranged to share office space with David Fine at a monthly rental of $175, employed secretarial assistance and undertook to pay Facey a salary. Mr. Facey was willing to accept only one-half of the agreed salary and to wait for the balance and the respondent's solicitor also agreed to defer payment of his fees until the affairs of the respondent prospered.

It was a condition precedent to obtaining a mortgage commitment that firm lease commitments be obtained from reliable tenants for the shopping centre when erected. Voluminous correspondence was therefore entered into with various prospective lessees, but only one signed lease was obtained although optimistic negotiations were being conducted with other tenants who expressed definite interest. F. W. Woolworth, a variety store, was willing to sign a lease, in a form approved by it, which contained a clause that, should Dominion sell or abandon its grocery market, then Woolworth could terminate its proposed lease. The respondent unsuccessfully tried to have this provision removed because it was informed and foresaw that the amount of first mortgage monies that could be obtained might be reduced as a consequence.

The respondent was unable to close on the agreed date and Dominion readily agreed to an extension.

In January 1961 Dominion also gave its approval to a site plan as contemplated by the agreement for sale dated August 12, 1960, but the respondent never did obtain the

permits necessary to begin construction as were also contemplated in the above agreement, nor was construction of the proposed shopping centre ever begun.

Towards the end of January 1961, Mr. Facey was informed by the property manager of Dominion that Towers Marts of Canada Limited (hereinafter called Towers) had decided to establish a large discount departmental store in this area and was particularly anxious to have the respondent's site which, because of its prior agreement with the respondent, Dominion could not sell to Towers. This was no idle threat as one, H. B. Sussman, acting as agent for Towers, was also negotiating for available property just across the highway. In addition there is no doubt that the advent of a Towers discount store in such close proximity to the respondent's site effectively destroyed the prospect of a successful shopping centre being established on the site. Towers was introducing a new form of merchandising, and had unlimited resources to do so. It had completed its first store in Metropolitan Toronto and it had enjoyed a phenomenal success and caused concern among retail merchants, particularly operators and tenants of traditional shopping centres. Further, Towers was negotiating with Dominion for the acquisition of a number of other locations adjacent to Dominion's other supermarkets.

The directors of the respondent, being the persons already mentioned, met and decided to negotiate a sale to Towers. After some negotiation, directed mainly to price, during which the realities of the situation were forcefully brought to the respondent's attention, the sale of 12½ acres was agreed upon at a price of $305,000.

Towers, having achieved its purpose in acquiring the site it wished, could afford to be magnanimous. It permitted the respondent to continue negotiations already begun with prospective tenants for which it agreed to pay a commission. Towers paid the real estate agent's commission which by custom in the area was normally paid by a vendor and Towers was also agreeable to some compensation being paid to the respondent for its efforts which was, of course, reflected in the sale price.

The respondent forthwith closed the agreement with Dominion and on the same day transferred title to Towers,

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the purchase price to Dominion being paid by the respondent from the proceeds of the sale to Towers.

Towers purchased only 12½ acres of the 17 acres which the respondent had agreed to purchase from Dominion, since these 12½ acres constituted the area which Towers desired for the erection of its discount store. The remaining acreage which did not front on the public highway but was situated in a ravine so that it was of doubtful utility, was retained by the respondent which disposed of it subsequently.

It was from the sale to Towers that the respondent realized its gain of $55,018.08 which the appellant added to its declared income for the 1961 taxation year.

On the evidence adduced, I am of the opinion that the respondent, when it entered into the agreement of purchase and sale with Dominion had for its sole purpose the erection of a shopping centre on the land to be acquired and to derive rental income therefrom. In so concluding I have not overlooked the fact that the respondent was faced with a hard and tortuous path to bring its project to completion, primarily because of the limitation of its financial resources. However there was a real possibility of all obstacles being overcome and of the objective being achieved. The fact that the respondent had not completed the mortgage financing and other arrangements for its shopping centre at the time it sold to Towers does not warrant an inference that it had, from the beginning, contemplated resale of the property, inasmuch as such sale occurred before, in the ordinary course of events, such arrangements would have been made.

The amount of the deposit, which the respondent stood to lose if it terminated the agreement for purchase was $1,000 which is negligible in relation to a project of this magnitude. However the respondent did expend approximately $5,000 for architects and engineers fees, surveys and the like, which were directed exclusively to the construction of a shopping centre on the site. Further the agreement for sale with Dominion was subject to such conditions as Dominion considered necessary to ensure the erection of a shopping centre adjacent to its supermarket in which Dominion's advantage laid most. Although the mortgage was to contain a provision for partial discharge, such provision is consistent with the erection of the shopping centre in stages and

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allowed the respondent to dispose of such part of the land as might be unnecessary for its shopping centre. If the land was capital in the hands of the respondent then the surplus over its requirements would also be capital (see *Sterling Paper Mills Inc. v. M.N.R.*)[1]

The conditions imposed by the provisions in the agreement with Dominion were designed to ensure that a shopping centre would be built and are inconsistent with speculation in the lands for any other purpose.

In addition to direct costs, as above mentioned, other obligations were incurred incidental to the completion of a shopping centre. I have in mind legal fees, the establishment of an office with secretarial assistance, although on a modest scale, and the preparation and circulation of promotional literature, all designed to secure tenants upon which the availability of first mortgage money depended and which could have no possible effect on a subsequent sale. The short existence of the respondent was not sufficient to put it into the business of dealing in shopping centres.

In my view, therefore, the agreement for sale between Dominion and the respondent constituted a capital asset rather than a revenue asset and I can see no valid reason for not considering the land which was the subject of the agreement for sale to be in the same category.

Counsel for the appellant in argument, pointed out that the respondent resold the land before it was under any obligation to buy the same because permits contemplated by the agreement for sale had not been obtained. The provision in question reads:

> It is understood and agreed that if on or before the date provided herein for completion of the sale and purchase the Purchaser shall not
>
> (*a*) have obtained all necessary permits from all governmental or administrative bodies having jurisdiction in the premises allowing the erection and operation on the lands which are the subject of this agreement of a retail shopping centre, the buildings of which shall have a minimum ground floor area of 25% of the lands covered by this agreement and a maximum height of 35 feet, and
>
> (*b*) have obtained from the Department of Highways all permits required for such a shopping centre allowing access to the same directly from the adjacent public highway,
>
> (*c*) have obtained the approval of the Grantor's engineers to a site

[1] [1960] Ex. C.R. 401.

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plan as described in Schedule "C" herein hereto annexed, which approval shall not be unreasonably withheld.

the Purchaser may either complete the purchase, in which case it shall have no claim against the Vendor for the fulfilment of the above conditions (*a*) and (*b*) and (*c*) or otherwise, or the Purchaser may by notice given on or before the said date of completion terminate this agreement...

The effect of such provision, as I see it, is to permit the purchaser to avoid the agreement if permits essential to the construction and operation of a shopping centre were not forthcoming after reasonable and conscientious efforts to obtain then, so that the purchaser's enterprise was frustrated. However, the provision leaves a discretion in the purchaser either to terminate the agreement in the eventuality contemplated or to complete the agreement. It is not, in my opinion, a condition precedent to the respondent's obligation to buy the property.

Counsel for the appellant, having assumed that there was no binding obligation between the parties, then submitted that even if the agreement between Dominion and the respondent of August 12, 1960, which he construed as analogous to an option, was entered into for capital purposes, if the subject matter of the option, or in this case the subject matter of the agreement, were sold before the exercise of the option or the completion of the agreement, then that transaction is a concern or adventure in the nature of trade. As authority for such proposition he cites the decision of Thurlow J. in *Hill-Clark-Francis Ltd. v. M.N.R.*[1]

During the course of the argument I was impressed with what appeared, superficially, to be an analogy between the facts of the present case and these under review by Mr. Justice Thurlow in the *Hill-Clark-Francis* case. However upon subsequent consideration I do not think the facts are actually analogous, nor do I believe that the decision of Mr. Justice Thurlow is authority for the submission advanced on behalf of the appellant. In the *Hill-Clark-Francis* case the appellant acquired an option to purchase shares of a company which was the source of lumber supply to make it a subsidiary company. It was found as a fact that the option had been acquired as a capital asset, but the shares represented by the option, which were bought and

[1][1961] Ex. C.R. 110.

sold, were regarded differently because in the meantime different circumstances intervened, so that the shares in question became a revenue asset. Thurlow J. had this to say:

> It should not, I think, be overlooked that what the appellant acquired for a capital purpose was not shares at all but an option for which it paid $100. Had the appellant gone on and acquired the shares with the same purpose in mind and carried out its plan to make Poitras Frères Inc. a subsidiary, the shares might well have constituted in the appellant's hands assets of a capital, as opposed to a revenue nature. What happened in fact was, however quite different, and I do not regard it as in any real or practical sense the equivalent of a mere realization of the capital asset represented by the option.

Much more than the option and its value was involved. The sale of the shares also involved the appellant giving up its right to a lumber supply.

In the present case the circumstances are not similar to those in the *Hill-Clark-Francis* case. I do not regard the sale of the lands that were the subject of the respondent's agreement with Dominion as being in any real or practical sense other than the realization of a capital asset.

The appeal is, therefore, dismissed with costs.

Judgment accordingly.