
1965

Apr. 5, 7

Apr. 9

BETWEEN:

BEN ARTHUR SHUCKETT ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Revenue—Income—Income tax—Acquisition and resale of real property—Real property acquired in discharge of debt—Taxability of profit from sale of real property—Burden of proof—Motivating reason for acquisition of real property—Venture in the nature of trade—Income Tax Act, R.S.C. 1952, c. 148.

This is an appeal from the decision of the Tax Appeal Board dismissing the taxpayer's appeals from his assessment for the taxation years 1953 to 1957 inclusive, whereby profits made by him on the sale of certain building lots in the City of Winnipeg were included in computing his income for those years.

The evidence established that the appellant, a practicing solicitor, a substantial part of whose business consisted in acting for builders, assisted many of his builder-clients during the period from 1946 to 1950 in their acquisition of vacant land from the City of Winnipeg, not only by acting as their solicitor but also, on occasion, by advancing on their behalf a part at least of the funds required to be paid by them under the option agreements negotiated with the City of Winnipeg.

In 1951 the appellant made bargains with some of his builder-clients who were in financial difficulty whereby he released them from liability to repay to him the money he had advanced on their behalf under the option agreements in return for a transfer to him of their interest in the properties. He subsequently acquired full legal title to the lots by paying the balance of the money called for under the agreements with the City of Winnipeg. The appellant sold these lots during the years 1953 to 1957 and realized total profits of about $35,000.

Held: That if a person who has lent money to a borrower who is unable to raise the money to repay it, accepts from the borrower some asset that cannot readily be turned into money at the moment in settlement of the obligation to repay the loan, the acquisition of such asset does not in itself constitute the launching of a venture in the nature of trade.

2. That if one of the motivating reasons for the acquisition by the appellant of the lots in question was his expectation and hope that he would be able to resell them at a profit, even if there was another motivating reason consisting of the appellant's desire to collect loans from borrowers who were in financial trouble, the acquisition was the inception of a venture in the nature of trade.

3. That the appellant has failed to discharge the burden resting on him of establishing that he did not acquire the lots in question with a view to profit by turning them to account or trading in them and that the bargains with his builder-clients for their rights were only the first stage of a scheme involving the venturing of an additional substantial amount of money in respect of a large number of parcels of land.

4. That the appeal is dismissed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Jackett, President of the Court, at Winnipeg.

C. V. McArthur, Q.C. and *R. B. McArthur* for appellant.

G. R. Hunter, Q.C. for respondent.

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

JACKETT P. at the conclusion of the argument (April 9, 1965) delivered the following judgment, orally:

This is an appeal from a decision of the Tax Appeal Board dismissing appeals from the appellant's assessments under Part I of the *Income Tax Act* for the taxation years 1953 to 1957, inclusive. While another issue is raised by the Notice of Appeal to this Court, the only portion of the appeal that was proceeded with by the appellant at this hearing is the appeal against the assessments in respect of

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profits made in those years on the sale of certain building lots in the City of Winnipeg.

It is common ground that the appellant did make the profits in question in the years in question by selling certain building lots previously acquired by him. The only question is whether such profits were properly included in computing his incomes for those years under Part I of the *Income Tax Act*.

By paragraph 8 of the respondent's reply to the Notice of Appeal filed in this Court pursuant to section 99 of the *Income Tax Act*, the respondent alleges

> 8 . . . that in re-assessing the Appellant for the 1953, 1954, 1955, 1956 and 1957 taxation years, Notices of which were each posted on the 9th day of March, A.D. 1959, the Respondent included in the Appellant's income for the 1953, 1954, 1955, 1956 and 1957 taxation years the sums of $17,766 91, $9,633.87, $4,677.12, $163 84 and $2,787 89, respectively, which sums represented the net profit received by the Appellant in each of the above taxation years from the acquisition of certain lots of vacant real property and their subsequent re-sale, and that in re-assessing the appellant he acted on the assumption that the Appellant acquired the said lots of vacant real property with a view to profit by turning same to account or trading in them and that all profit arising from the purchase and subsequent re-sale of the said vacant lots constituted part of the Appellant's income since it was a profit from a business or an adventure in the nature of a trade.

In the circumstances of this case, the onus was on the appellant to establish that he did not acquire the lots in question with a view to profit by turning them to account or trading in them. To determine whether he has discharged the onus it is necessary to examine the events leading to the appellant's acquisition of the lots. Those events took place during a period commencing in 1946 and ending in 1950 or early 1951.

During that time, the appellant was a practicing solicitor, a substantial part of whose business consisted in acting for builders—that is, persons who acquired appropriate vacant lots, built houses on them and resold the lots with the houses on them.

Among the services rendered by the appellant to such clients was that of assisting them in the acquisition of appropriate vacant land, which, during the period in question, could be acquired from the City of Winnipeg. The practice followed by the City was to grant an option for the desired property upon a payment of 5 per cent of the option price, on terms that a further more substantial payment would be made before the expiration of the option period and that the balance would be paid on or before a stipulated date. The appellant not only played some part, on occasion, in assisting his builder-clients to ascertain the availability of appropriate land, and in the negotiation of the option-agreements on behalf of his builder-clients, but he did, on many occasions, advance to such clients the 5 per cent payments as well as some of the other payments that had to be made by the builder-clients under the agreements. Monies so advanced by the appellant to his clients were paid by him on their behalf to the City.

An appreciation of the character of these transactions requires that I make reference to the fact that the appellant cannot now recall that he had any arrangement with his builder-clients to charge interest on the very substantial sums of money that he had out on loans of this kind during the period in question. The reason would appear to be that making these loans was part of a scheme whereby the appellant made very substantial profits in other ways. On the one hand, he received commissions from the City of Winnipeg in respect of each transaction in which he acted as agent for a builder-client in the acquisition of a lot from the City and, on the other hand, he used the transactions as a means of securing remunerative legal work.

As long as the affairs of the builder-clients prospered, the appellant was in due course re-paid the monies so advanced. At some point in the period 1950-1951, however, the appellant found that some of the clients in question were in financial trouble. Some were even on the verge of bankruptcy. As a consequence, in 1951 the appellant made bargains with certain of the builder-clients. As a result of the bargains, in the case of each of the lots referred to in paragraph 8 of the reply to the Notice of Appeal, the builder-client who had an option or agreement to purchase it transferred to a nominee on the appellant's behalf all of his interest in the option or agreement in consideration of the appellant releasing him from his liability to repay the amounts that the appellant had advanced to him to pay on account of the agreement. In other words, in 1951 the appellant, who until that time had had absolutely no interest in the properties in question, either by way of charge or otherwise, acquired the rights of his builder-client in each such property in consideration of a discharge of a debt owing to him by the builder-client.

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To summarize the transactions briefly, the appellant acquired the rights of his builder-clients in the lots in question by releasing them from liabilities to repay loans totalling approximately $11,000. After acquiring the rights of his builder-clients under the agreements, he acquired legal title to the lots by making further payments under the agreements to the City of Winnipeg, totalling approximately $33,000. In addition, he paid some $3,000 in respect of taxes and interest. The total cost of the lots to the appellant in 1951 was therefore between $45,000 and $50,000. He sold these lots during the years 1953 to 1957, inclusive, for amounts totalling over $80,000, yielding profits totalling about $35,000.

There is, in my mind, no doubt that, if a person who has loaned money to a borrower who is unable to raise the money to repay it, accepts from the borrower some asset that cannot readily be turned into money at the moment in settlement of the obligation to repay the loan, the acquisition of such asset does not in itself constitute the launching of a venture in the nature of trade. Normally, in any such case, at the time of the settlement transaction, the lender does not know whether he will ultimately be able to obtain, upon disposition of the asset accepted in lieu of cash, an amount equal to the amount of the loan, an amount less than the amount of the loan or an amount greater than the amount of the loan. Nevertheless, if the sole motivating reason for the transaction as far as the lender is concerned is the lender's desire to obtain repayment of the loan, the acquisition of the asset is, as far as the lender is concerned, merely receipt in kind of repayment of the loan.

On the other hand, the fact that the property acquired was paid for by discharge of a debt owing to the vendor by the purchaser is not incompatible with the acquisition being the inception of a venture in the nature of trade. Neither is the fact that the vendor of the property is unable to pay money owed by him to the purchaser of the property incompatible with acquisition being the inception of a venture in the nature of trade.

If, here, one of the motivating reasons for the acquisition by the appellant of the lots in question in 1951 was his expectation and hope that he would be able to resell them at a profit, even if there was another motivating reason consisting of the appellant's desire to collect loans from borrowers who were in financial trouble, the acquisition was the inception of a venture in the nature of trade.

As indicated earlier the onus in this case was on the appellant to show that he did not acquire the lots in question with a view to profit by turning them to account or trading in them. I have come to the conclusion that the appellant has failed to discharge that burden. There is no evidence to show that the expectation or hope that he could sell them at a profit was not one of the motivating reasons for the appellant's acquisition of the lots.

The appellant says that he became concerned about the money owed to him by the builder-clients and that he had to decide whether to sue them or to take the properties over and realize whatever he could. Assuming the correctness of this statement, I am of opinion that it does not tell the whole story.

The appellant has had a long and varied experience in real estate in the City of Winnipeg. He owns a great deal of real property. He has bought and sold real property. He manages, and has substantial interests in, companies that own real property and that buy and sell real property. In addition the acquisition of these lots was not a simple case of taking payment in kind so as to realize what he could from the assets so acquired. The bargains with his builder-clients for their rights were only the first stage of a scheme involving the venturing of an additional substantial amount of money in respect of a large number of parcels of land.

Having regard to his background in real estate transactions and to his vague and evasive way of answering many of the questions put to him on cross-examination, as well as my conviction, having regard to the evidence as a whole, that the appellant recognized in the situation that faced his builder-clients a very favourable opportunity to acquire properties that, having regard to his experience, he must have known would almost certainly become more valuable with the passage of time, I am of opinion that one of the reasons that moved the appellant to acquire these lots in 1951 was a hope and expectation that he could resell them at a profit. In any event, I am not persuaded by the evidence that the appellant has discharged the onus of showing that such was not one of such reasons.

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I desire to add that the difference between the facts as found by the Tax Appeal Board and the facts as found in this Court is probably entirely attributable, as the appellant admitted under questioning by the Court when giving evidence in this Court, to the unfortunate and misleading language used by him in giving his evidence before the Tax Appeal Board.

The appeal is dismissed with costs.