1951
Oct. 5, 6
Nov. 30

BETWEEN:

MISS N. .... APPELLANT;

AND

MINISTER OF NATIONAL REVENUE .... } RESPONDENT.

Revenue—Income—Income tax—Income War Tax Act 1927, c. 97, s. 3(1) —Excess Profits Tax Act—Carrying on a business—Dealings in real estate—Intention to buy and sell real estate to realize profits—Profits taxable—Appeal dismissed.

Held: That where transactions in real estate are carried on merely for the purpose of investment with casual profits accruing to the investor such profits are not taxable but where the intention is to buy and sell with the view of earning profits such profits are taxable as being the net profit or gain from a business.

APPEAL under the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Hyndman, Deputy Judge of the Court, at Edmonton.

Geo. H. Steer, K.C. for appellant.

H. W. Riley, K.C. and *F. J. Cross* for respondent.

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

HYNDMAN D. J. now (November 30, 1951) delivered the following judgment:

This is an appeal by the taxpayer from an assessment by the Minister of National Revenue for income and excess profits taxes for the years 1943, 1944 and 1945, in the amount of $5,832.50, $6,721.93, and $6,872.96, respectively; less amounts paid, namely, $2,530.51, $2,313.28, and $4,232.55, for the years 1943, 1944 and 1945, respectively, leaving a balance of taxes unpaid as at the 5th September, 1948, for the said years, of $4,170.74, $5,184.67, and $2,989.73.

Notice of dissatisfaction was filed with the Minister, dated 2nd September, 1949, but on the 15th December, 1949, such assessment was confirmed.

The difference between the amounts paid as above mentioned and the present assessment, are claimed by the Minister to be taxes on profits or gains made by the taxpayer, the appellant, from the purchase and sale of real

estate transactions in the City of Edmonton in each of the years 1943 to 1945, inclusive.

The appellant submits that such profits are not taxable inasmuch as they are capital profits from investments of money which she had saved over a great many years and that she was not carrying on any trade or business, within the meaning of the Income War Tax Act, so far as these transactions were concerned, but merely investing her capital saving in securities which appreciated in value in a normal manner.

The issue then is, was the appellant or was she not carrying on a trade or business with a view to profit or gain in respect of these transactions within the meaning of section 3(1) of the Income War Tax Act? Section 3(1) of the Income War Tax Act reads as follows:

"Income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business.

The facts of the case as disclosed in the record and evidence at the trial are substantially as follows: The appellant stated that as a young girl she worked in a laundry at a wage of $20 per week for three years, then for four and one-half years was in partnership with her brother in the laundry business, and when that business ceased she had $1,600 saved up. Then in 1927 she worked in the Ponoka Mental Hospital for a year and three months at $45 a month, with board and lodging. After that she worked in her father's store, first at $40 a week and later at $50 a week, until 1938 when the father transferred his meat business to her and her two brothers in equal shares, and since then to the present time she says she spends all her working days in the store from 7.30 a.m. to 6 or 7 p.m. During all her life in Edmonton she has lived at home with her father at no cost to her and saved practically all her earnings when on wages, and afterwards as a partner with her brothers.

Her first investment was in 1930—a loan of $2,000; in 1931, $1,600 on a mortgage; $500 purchase of an agreement for sale; loan of $200 to her brother. In 1933 loan to

1951
MISS N.
v.
MINISTER
OF
NATIONAL
REVENUE
Hyndman,
D.J.

brother $5,000; in 1934 agreements of sale of about $1,500; 1935 loan $860; 1936 loan $376; purchase of oil stock $500 which proved worthless; agreement of sale $307; 1937 loan $110; May 21, 1937, she purchased a house for $1,400 and in June of same year sold same for $2,200. On February 9 she purchased a house for $2,118.82 and in May 1940, sold same for $4,550. Loaned $207, bought an agreement of sale for $165.16. In May, 1938, she purchased a property for $3,200 and sold same in 1943 for $7,500; and another house for $1,772.70 and sold it in December, 1941, for $1,800. On 1st October, 1938, she purchased a house for $1,600 and on December 1, 1938, sold it for $2,088.52. In 1939 she had seven separate transactions in buying and selling houses, making substantial profits, and in intervals between purchases and sales, rented some of them. In 1940 and 1941 seven similar transactions occurred each year: in 1942 three transactions; in 1943 twenty-six; and in 1944 thirteen; in 1945 ten and in 1946 three. In only two instances were the properties sold for cash. In most cases the terms were a comparatively small down-payment and the balance in monthly instalments, some with interest and others without interest, and it would take several years to fully pay for the purchase price.

The appellant made returns as income, and paid taxes thereon, on all profits in the said meat business, and on all rents received by her for rented premises, and on all interest paid her under agreements of sale, or otherwise; but not on profits realized from the sale of the real estate purchased and sold, which she regarded as capital accretions and profits and non-taxable. I might add that at different times she bought Victory Bonds, three of them at $5,000 each, which, I think, she sold in 1943.

That she had accumulated very substantial savings over the years does not admit of doubt, and had she invested same from time to time in properties with the sole purpose of securing an income such as rents, I do not think she should be considered as a trader or in business. She had no office and did all necessary work in relation to these transactions at her home at night, after shop hours, and on Sundays. Her evidence is that on the advice of her father in the year 1938 she acquired two or three properties as investments for the rent which they rendered, as she wanted to provide independence for herself in case of

sickness or other need. Later, she purchased more and more with her former savings and the profits on the sales she had effected. Her thrift and industry cannot but excite one's admiration, and it is likely that she never regarded such profits as other than capital accretions, and not subject to income tax. But examining and considering all the facts and circumstances as a whole, I cannot escape the conclusion that in purchasing at least most of these properties, her object was to sell again and reap profits, and were not transactions with the sole view of leasing and holding as investments. I quote from her Examination for Discovery:

48. Q. Did you study the real estate market?

A. Well, I worked at it very hard; I had no experience to study it from, I couldn't study it from books—I studied it from my own practical experience.

49. Q. When you say you worked very hard, what type of work did you do in connection with this real estate affair?

A. Well, before I would buy a home I probably had to inspect thirty before I could see one that was what I thought was a fairly decent buy.

50. Q. Did you improve some of them for purposes of sale?

A. Some of them, yes.

76. Q. And that changed, you tell me, about 1940. You didn't think it was such a good idea. Now, what was your purpose in acquiring houses from then on?

A. Well, I had capital gain in view, of course.

77. Q. And capital gain is the business of making money, isn't it?

A. My idea was to make investments and get enough money together so I would have enough to live on should I fall ill.

95. Q. Yes, and you tell me that you didn't keep in mind the desirability of the house from a resale standpoint?

A. Not necessarily so. I might have changed my mind at any time and wanted to rent it for ten or fifteen years, if times had changed. The market was very unsure at that time. No one knew what it would do and I might have been forced to rent them for fifteen or twenty years. I might not have been able to sell them at all. I took a big chance there.

I think the only reasonable inference from her evidence at the trial and Examination for Discovery, is that during the years in question she followed a course or system which had in view making profit or gain from the purchases which she made. Apart from her evidence, I think the number of transactions, and the close proximity of sales to purchases, compel one to the conclusion that her idea in purchasing involved the intention of selling with the object of profit, and not for investment purposes only.

1951
Miss N.
v.
Minister
of
National
Revenue
—
Hyndman,
D.J.

The principle of law underlying cases of this nature seems to be that where the transactions are merely for the purpose of investment with casual profits, such profits are not taxable; but where the intention is to buy and sell with the view to profits, such are taxable. In *California Copper Syndicate* v. *Harris* (1), at p. 165 Lord Justice Clerk said:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But, it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realization, the gain they make is liable to be assessed for Income Tax.
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> What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

This decision was approved in the Judicial Committee by Lord Dunedin in *Commissioner of Taxes* v. *Melbourne Trust Ltd.* (2) at p. 1010, and was followed by Duff, J. in *Anderson Logging Company* v. *The King* (3).

Mr. Steer for the appellant relied largely on the decision of Locke, J. in *Argue* v. *Minister of National Revenue* (4). That was the case of an individual investing his money in mortgages, promissory notes and other securities, and selling and reinvesting. The point at issue was as to whether or not he was carrying on a business as a money lender, thus rendering himself subject to the provisions of the Excess Profits Tax Act. Locke J., as I understand it, found as a fact that he was merely investing his own money and was not buying and selling with a view to profit, and therefore was not carrying on a trade or business. He quotes the

(1) (1904) 5 T.C. 159 at p. 165.
(2) (1914) A.C. 1001.
(3) (1924) S.C.R. 45.
(4) (1948) S.C.R. 468.

remarks of Jessel, M.R., in *Smith* v. *Anderson* (1), in deciding the meaning of business, as follows:

So in the ordinary case of investments, a man who has money to invest, invests his money and he may occasionally sell the investments and buy others, but he is not carrying on a business.

Locke, J. makes it plain that questions of this nature must be decided upon the facts of the particular case under consideration. Other decisions I might mention as having a bearing on the case are *The Commissioner of Inland Revenue* v. *The Scottish Automobile and General Insurance Co. Ltd.* (2), *Pickford* v. *Quirke* (3), *Morrison* v. *Minister of National Revenue* (4).

Exception was taken in the pleadings and on the argument as to the correctness of the principle upon which such taxes were calculated and Mr. Steer relied on the decision of the President in *Trapp* v. *Minister of National Revenue* (5). However, on a close examination of that decision, I am led to the conclusion that it is applicable to the facts and circumstances of that particular case only, the point being as to whether or not the taxpayer was entitled to charge as an expense interest on a mortgage which was due in the taxation year, but not paid until the following year.

In the present instance, the situation is to my mind entirely different. On a net worth basis the cost of the securities sold by the appellant would be set off against the value of the securities received on the transactions, the difference being the profit or gain to her. I apprehend that in the assessment the present worth or value of such securities received by her would be the basis thereof. However, as no evidence was adduced to the effect that proper regard was not had to this feature of the assessment, and the responsibility is on the appellant to show error in this respect, I am compelled to find that the appeal on this aspect of the case must fail.

I therefore find that the appellant is liable for income and excess profits taxes in respect of the years 1943, 1944, and 1945 on the profits or gains from the transactions above mentioned, and the appeal must therefore be dismissed with costs.

Judgment accordingly.

(1) (1880) 15 Ch. D. 247 at 261.
(2) (1931) 16 T.C. 381.
(3) (1927) 13 T.C. 251.
(4) (1928) Ex. C.R. 75.
(5) (1946) Ex. C.R. 245.