BETWEEN:

HENRY WERTMAN .....APPELLANT;

AND

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

1963
Sept. 10-13
1964
Aug. 5

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 21(1) and (4) and 139(1)(e)—Transfer of property from husband to wife—Whether execution of pre-nuptial contract and marriage effects transfer within meaning of s. 21(1)—S. 21(1) applicable whether or not transferor resident in Canada at time of transfer—Income from property substituted for property transferred by taxpayer to wife—No part of money borrowed jointly by taxpayer and wife or raised on their joint credit is property transferred within s. 21(1)—Rentals for apartment building accrued to owners as owners, not as traders—Whether operation of apartment building to be regarded as mere rental of property or operation of business—Taxpayer occupied full-time in management of apartment building.

The appellant and his wife were married in Poland in 1938 where they were then domiciled, and came to Canada in 1949, settling in Vancouver, B.C. While in Poland, before the war, the appellant converted as much of his property as possible into gold or other precious metal and hid it. After the war he and his wife moved to Munich where they lived for three years before coming to Canada. He took with him to Munich his cache of coin and United States currency, which he deposited in two Swiss banks. To this he added the caches of his deceased brothers and sister which he had later removed from Poland. The appellant and his wife had executed a pre-nuptial contract which provided for a general community of all the property of both spouses whether held at the time of marriage or acquired subsequently during the marriage.

In 1949 funds in excess of $100,000 were transferred from the Swiss banks to the appellant's account in Vancouver and this money was used by the appellant to purchase a parcel of real estate in Vancouver, title to which was taken in the names of the appellant and his wife, upon which they constructed an apartment building containing forty-nine apartments. On its completion the building represented a total investment of about $415,000, of which $122,500 was brought by the appellant from Europe, $13,000 was invested by the appellant's son and the balance of about $280,000 was borrowed by the appellant and his wife, virtually all of it through two mortgages on the property. The appellant devoted his full time to the management of the apartment building.

For the year 1956 the appellant declared 45 per cent of the net income from the apartment building as his income and the respondent in re-assessing added thereto the 45 per cent thereof which the appellant had treated as income of his wife. There was no dispute as to the 10 per cent of the net income treated as income of the appellant's son.

Held: That there is nothing in the evidence of the pre-nuptial contract and of its effect under the law of Poland which would serve to dispel the *prima facie* conclusion arising from the fact of ownership of the apartment building by the appellant and his wife and the law of British

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Columbia that the income from their 90 per cent interest in the property belonged to them in equal shares, and accordingly, the whole of the income from the 90 per cent interest is not taxable as income of the appellant by reason of any right of his thereto under the pre-nuptial contract.

2. That there is no element of retroactivity involved in applying s. 21(1) of the *Income Tax Act* to transactions which occurred before the appellant and his wife came to Canada. The section applies to residents and non-residents and there is no reason why its application should be confined to situations in which the transfer was made when the transferor was resident in Canada.
3. That on the facts whatever interest the appellant's wife had in the funds in the Swiss banks must for the purposes of this case be regarded as property transferred to her by the appellant within the meaning of s. 21(1) and insofar as the income from the apartment building can be regarded as income from property substituted for those funds, her share thereof was properly included in the computation of the appellant's income pursuant to s. 21(1).
4. That no part of the money raised jointly by the appellant and his wife and used to finance construction of the apartment building can be regarded as having been property transferred by the appellant to his wife and to the extent of her share in the investment of these funds her interest in the apartment building cannot be regarded as property to which s. 21(1) applies.
5. That there is nothing in the situation which affects the rentals with a trading character as distinct from mere income receipts from property and the operation of the apartment building was not a business in which the appellant and his wife were partners within the meaning of s. 21(4) of the Act.

APPEAL from a decision of the Tax Appeal Board.

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

W. R. D. Underhill for appellant.

Alan F. Campney and *R. Tassé* for respondent.

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

THURLOW J. now (August 5, 1964) delivered the following judgment:

This is an appeal from a judgment of the Tax Appeal Board[1] which dismissed an appeal by the appellant from a re-assessment of income tax for the year 1956. The matter in issue is the liability of the appellant for income tax in respect of an amount of $4,154.18 which the Minister in making the re-assessment included in the computation of

[1] 25 Tax A.B.C. 31.

the appellant's income. Basically the appellant's case is that this amount was income of his wife, Eugenia Wertman and was not taxable as his income.

The appellant and his wife were married in 1938 in Lvov, Poland, where they were then domiciled, and after living in Munich for three years following the end of the war came to Canada early in 1949. When he came to Canada the appellant had in his own name in two Swiss banks, deposits of funds worth in excess of $100,000 Canadian dollars. In September and October 1949 funds totalling $104,041.07 were transferred from the Swiss bank accounts to an account in his name in a bank in Vancouver, and these were subsequently used to purchase early in 1950 a parcel of real estate in Vancouver for $22,500, title to which was taken in the names of the appellant and his wife, and to pay a part of the cost of constructing an apartment building thereon pursuant to a contract made in May 1950 by the appellant and his wife with a builder. In June 1950 a further amount of $6,018 was transferred from Switzerland to the appellant's bank account in Vancouver and this amount was later used for the same purpose. These funds were not however sufficient to pay the whole cost of the building and by the time the project was completed a further $210,000 borrowed by the appellant and his wife from the New York Life Insurance Company on the security of the property, $13,000 invested by the appellant's son, $11,000 representing the proceeds of the sale of a dwelling house in Vancouver which the appellant had purchased in the names of himself and his wife shortly after their arrival in Canada, and some smaller amounts borrowed from friends had gone into the construction and a further mortgage for $65,000 representing the balance due on the contract had been given to the builder. When completed some time in 1951, the property, which became known as the "Park Strand" represented a total investment of an amount in the vicinity of $415,000 of which $122,500 was admittedly brought by the appellant from Europe, $13,000 was invested by the appellant's son and the remainder totalling about $280,000 was financed by moneys borrowed by the appellant and his wife.

For the years 1952 to 1955 the appellant's income tax returns were prepared by a Mr. Hogg, an accountant in the employ of the builder and in them 90 per cent of the net income from the Park Strand was reported as income

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of the appellant, the other 10 per cent being treated as income of the appellant's son. Mr. Hogg was, however, not in a position to assist the appellant in preparing his return for 1956 and at his suggestion the appellant consulted a chartered accountant who in preparing the 1956 return treated 45 per cent of the net income of the Park Strand as income of the appellant, another 45 per cent of it as income of the appellant's wife and the remaining 10 per cent as income of the appellant's son. No question arises in these proceedings as to the 10 per cent treated as income of the appellant's son but the Minister in making the re-assessment added to the appellant's income the $4,154.18 representing the 45 per cent of the net income from the Park Strand treated as the income of his wife and it was his action in so doing which gave rise to the appellant's appeal first to the Tax Appeal Board and later to this Court.

Both in the notice of re-assessment and in the notification by the Minister under s. 58 of the *Income Tax Act*, R.S.C. 1952, c. 148, following notice of objection by the appellant it was stated that the $4,154.18 was deemed to be income of the appellant pursuant to s-s. (1) of s. 21 of the Act but in the latter document it was also stated "that in the alternative if there was a partnership between the taxpayer and his wife the taxpayer has been correctly assessed under s-s. (4) of the said s. 21." On the appeal to this Court it was also sought to support the assessment on the ground that the interest of the appellant and his wife in the Park Strand was held by them as community property under the terms of a pre-nuptial contract the effect of which was that the appellant was alone entitled to the enjoyment of the income therefrom and was therefore taxable in respect of the whole of it.

The questions to be determined are accordingly:

1. Whether the appellant was entitled to the whole 90 per cent of the income from the Park Strand under the terms of the pre-nuptial contract. If so the appellant is taxable in respect thereof and that is the end of the matter. But if not the further question arises:

2. Whether and to what extent the interest of the appellant's wife in the Park Strand is property transferred to her by the appellant or property substituted therefor so as to bring into operation the provisions of s. 21(1) of the Act. If the assessment cannot be supported in its entirety under s. 21(1) there arises the further question:

3. Whether the appellant is taxable in respect of his wife's income from the Park Strand under the provisions of s. 21(4) of the Act.

I turn now to the evidence respecting the terms and effect of the pre-nuptial contract. While the making of such a contract was admitted by the Minister in his reply to the notice of appeal no copy of it was available at the trial. The appellant explained its absence by his evidence that he had destroyed his copy in 1939 when the Russians overran the portion of Poland in which he lived and that as this part of Poland has since the war been Russian territory it was impossible under present circumstances to ascertain whether or not the notary's copy is still in existence let alone to obtain a copy of it. His wife was not called as a witness. His evidence, however, satisfies me that the contract was of a common type and provided for a general community of all the property of both spouses whether held at the time of marriage or acquired subsequently during the marriage.

Evidence of the effect of such a contract under Polish law was given by Mr. Jacob Kalisky, a notary public now residing in Vancouver who between 1925 and 1939 was a member of the Polish bar and practiced as a barrister and solicitor in Warsaw. Mr. Kalisky came to Canada in 1941 and has since then resided in Vancouver. He stated that in 1938 the law respecting family relationships in that part of Poland which prior to 1918 had been under Austrian domination and in which the City of Lvov was situated was the General Civil Code of Austria which came into effect by Imperial decree in 1811 and was later applied to that part of Poland which fell under Austrian rule following the Napoleonic wars, and that by 1938 as a result of judgments of the Supreme Court of Poland married women

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were no longer subject to any legal disabilities or incapacities in any part of Poland and could enforce their rights in the courts in their own names even against their husbands. He also stated that under the General Civil Code of Austria joint ownership of property with a right of succession to the whole of the property vested in the surviving owner was unknown, that community of property under which a man and his wife held property in equal shares in common was known but arose only by virtue of a pre-nuptial contract and that while there was complete freedom of contract as to the terms which might be inserted in them, such contracts ordinarily provided either that all property then possessed by the intended spouses together with all property that might thereafter during the marriage be acquired by either of them should be community property, this type being known as a general community, or merely that all property thereafter acquired by either spouse during the marriage should be held in community, which type was known as a special community. Whether special or general, however, the income from community property in his opinion belonged to the community, with the management of such income resting with the husband not as his own property but in his capacity as the head of the family. During the continuance of his management the husband was not obliged to render accounts but his power with respect to the disposition of community property including income belonging to the community was that of a manager under a power of attorney. He was obliged to provide proper maintenance for his wife and he had authority to make expenditures of the income of the community suitable to his status but in the administration of his function, he was bound to exercise the care of a *pater familias* with respect to both the capital and income of the community and at the termination of his management he was required to render an account and was chargeable with amounts alienated beyond his authority. In case of emergency or danger to the community property he was removeable from his position as manager even in cases where the management had been expressly given to him for all time.

In my opinion there is nothing in the evidence of the contract and of its effect under the law of Poland which

would serve to dispel the *prima facie* conclusion arising from the fact of ownership of the Park Strand by the appellant and his wife and the law of British Columbia that the income from their 90 per cent interest in the property belonged to them in equal shares. Rather the evidence to which I have referred in my opinion serves to reinforce that conclusion. The case of *Sura v. Minister of National Revenue*[1], which was relied on by counsel on behalf of the Minister in my view is clearly distinguishable on the marked differences between the rights of the husband in that case under the law of the Province of Quebec to deal with income forming part of the community property without being accountable therefor and the rights of the appellant in this case under the pre-nuptial contract and the law of Poland applicable thereto when the contract was made. In the *Sura* case Taschereau J. (as he then was) described the rights of the husband under the Quebec Law thus at p. 69:

> Le mari administre les trois masses et en perçoit les revenus qui servent à augmenter l'actif commun. Lui seul peut disposer de ces revenus, lui seul en a la jouissance sans restrictions, et rien ne peut sortir du fonds commun à moins que ce ne soit comme résultat de l'expression de sa volonté. Il reçoit pour lui, et nullement comme mandataire ou fiduciaire pour le bénéfice de son épouse. Cette dernière ne retire aucun revenu, et son bénéfice consiste dans l'augmentation des biens communs dont elle est copropriétaire et dans lesquels elle a un droit éventuel au partage futur.

That the judgment in the *Sura* case was not intended to govern the situation which might arise where property is held in community under contract either in Quebec or elsewhere is moreover made plain at p. 72 where the learned judge said:

> De plus, quand il s'agit de communauté conventionnelle, il est certain que la situation peut être différente, car les conjoints peuvent toujours par contrat, tout en stipulant la communauté qui doit déterminer le régime marital financier, faire toutes sortes d'autres conventions qui, évidemment, ne doivent pas être contraires aux bonnes mœurs ni à l'ordre public. (C.C. 1257, 1262, 1268). Pour les fins de la présente cause, il serait superflu de les discuter.

It follows from what I have said that the whole of the income of the 90 per cent interest of the appellant and his wife in the Park Strand is not taxable as income of the appellant by reason of any right of his thereto under the

[1] [1961] S.C.R. 65.

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pre-nuptial contract and that the assessment cannot be supported on that basis.

Accordingly it becomes necessary to consider the second question, that is to say, whether and to what extent the assessment can be supported under s. 21(1) of the Act. That subsection provides as follows:

> 21(1) Where a person has, on or after August 1, 1917, transferred property, either directly or indirectly, by means of a trust or by any other means whatsoever, to his spouse, or to a person who has since become his spouse, the income for a taxation year from the property or from property substituted therefor shall, during the lifetime of the transferor while he is resident in Canada and the transferee is his spouse, be deemed to be income of the transferor and not of the transferee.

The moneys which the appellant and his wife invested in the Park Strand fall into two categories, viz. (1) funds brought to Canada from Switzerland amounting to $122,500 or thereabouts and (2) borrowings made by them to complete the building totalling about $270,000. With respect to the origin of the $122,500 and the half interest of the appellant's wife therein evidence was given by the appellant that at the time of their marriage in 1938 he owned and operated a cheese factory in which he employed from 16 to 18 persons and that he was a comparatively wealthy man. His wife owned nothing prior to the marriage but as a result of the pre-nuptial contract and the marriage became entitled to a one-half interest in all his property whether held at the time of the marriage or subsequently acquired. As early as 1934 when Hitler came to power in Germany the appellant and his brothers and sister foresaw that there was trouble ahead for people of the Jewish race and each began to limit his business operations and to convert as much of his wealth as possible into gold or other precious metal and to hide this in some safe place. In his case the cache was hidden under the foundation of his house and one or more of his brothers and sister hid their caches in similar places. Each let the others know where his cache was stored and according to the appellant there was an understanding among them that the survivors or survivor, if any, of them and their spouses should be entitled to dig up and take possession of the caches if and when the opportunity to do so should arise. Shortly after the outbreak of the war Lvov was occupied by Russian forces and the appellant's factory was then confiscated. Later in 1941 the city was occupied by German forces and when this occurred the appellant

and his wife went into hiding and remained hidden until the cessation of hostilities in 1945. The eastern portion of the former Polish territory, in which Lvov was situated, then became Russian territory and the appellant and his wife took advantage of an opportunity offered to Poles living there to leave with their belongings which included their cache of coin and some United States currency. The appellant and his wife moved first to Cracow in the remaining part of Poland and later to Munich where they resided for three years while awaiting visas to come to this country and during that period the appellant made a number of trips to the former homes of his sister and brothers, none of whom were alive, and recovered their caches which he deposited along with his own in Swiss banks. This in brief outlines the appellant's account of the origin of the funds later brought to Canada from Switzerland. With respect to the alleged arrangement the appellant in cross-examination said that he considered that his children would have been entitled to his cache had he and his wife not survived but that the children of his sister and brothers were not told of the hiding places or the arrangement and had no claim on the funds either of their parents or uncles who did not survive.

This account of the origin of the funds in the Swiss banks differs markedly from that alleged in the notice of appeal to this Court as well as from the account given in the appellant's notice of objection and in his evidence before the Tax Appeal Board and it leaves me unsatisfied that either he alone or he and his wife jointly became entitled to the caches which he recovered under any arrangement operating as a contract to that effect between himself and other members of his family. Rather I am of the opinion that the appellant simply came into possession of the funds which he deposited in the Swiss banks, other than the portion thereof representing his own cache, by virtue of his knowledge of how to find them and as a result of the efforts which he put forth to recover them. It may be that a portion of them would fall to him by inheritance on the deaths of one or more of his brothers who died childless but there is no evidence of the law of inheritance in the places where the caches were hidden and it is impossible to ascertain on the evidence how much of it, if any, would fall within that category. Any that might have fallen within

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that category must accordingly be treated as in the same category as the remainder which must in any event in my view for the purposes of this appeal be regarded as funds to which he had no greater right than that which simple possession gave him.

Turning now to s. 21(1) there is not, in my opinion, any element of retroactivity involved, as contended by counsel for the appellant, in applying the words of the provision to transactions which occurred before the appellant and his wife came to Canada. The subsection to my mind is nothing more than a statutory prescription of the manner in which the income of a person is to be measured or computed for the purposes of the Act, it occurs in a group of sections applicable alike to the computation for the purposes of the Act of the income of both residents and non-residents, and I can see no valid reason why its terms, which on their face are as applicable to residents as to non-residents should be confined to situations in which the transfer was made when the transferor was resident in Canada. Accordingly, I reject the contention that the subsection does not apply to transfers made by the appellant to his wife prior to their coming to Canada and as all that is necessary to constitute a transfer within the meaning of the subsection is that the owner of property should so deal with it as to divest himself of it and vest it in his spouse, regardless of the means or route by which he accomplishes the result, *vide David Fasken Estate v. Minister of National Revenue*[1], it seems clear that insofar as the funds brought by the appellant to Canada represented property which the appellant had on hand at the time of his marriage in 1938 or property later substituted therefor, any interest which the appellant's wife had in them as a co-owner of the community property came to her by virtue of her husband having entered into the prenuptial contract and the marriage and thus transferred such interest to her. Insofar as the funds brought to Canada might conceivably have represented additions to the cache of the appellant arising from earnings between the time of the marriage and the summer of 1941 when he and his wife went into hiding it is sufficient to say that there is no evidence that anything arising from earnings during that period was added to his cache and insofar as the funds represented amounts which he himself recovered and took

[1] [1948] Ex. C.R. 580 at 592.

into his possession after the end of hostilities there is in my opinion no satisfactory evidence upon which I can reach the conclusion that the assumption of the Minister that the interest of the appellant's wife in the funds was property transferred to her by the appellant has been rebutted. In particular I am not satisfied that in recovering possession of the caches he did so as agent for his wife or that these should not be regarded as property which the appellant took into his possession and put into the community and thereby transferred an undivided one-half interest in his rights therein to his wife. In the result therefore I am of the opinion that whatever interest the appellant's wife had in the funds in the Swiss banks must for the purposes of this case be regarded as property transferred to her by the appellant within the meaning of s. 21(1) and that insofar as the income of the Park Strand can properly be regarded as income from property substituted for the funds brought to Canada from the Swiss bank deposits her share thereof was properly included in the computation of the appellant's income pursuant to s. 21(1). With respect to these funds the result is accordingly the same whether the appellant's wife is regarded as having had a half interest in them before they were brought to Canada or is regarded as having acquired her interest therein upon investment of them in the dwelling and in the Park Strand property in the joint names of the appellant and his wife.

It does not, however, follow from this that the whole of the share of the appellant's wife in the income from the Park Strand was income from property transferred to her by her husband within the meaning of s. 21(1) for the evidence indicates that the contract for the construction of the Park Strand as well as the mortgages of the property were made by the appellant and his wife and that when the Park Strand became an income producing property it represented a capital investment not alone of the money drawn from the Swiss bank accounts but of some $270,000 as well which the appellant and his wife had jointly borrowed or raised on their joint credit. No part of this money can in my opinion properly be regarded as having been property transferred by the appellant to his wife and to the extent of her share in the investment of these funds her interest in the Park Strand cannot be regarded as property to which

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s. 21(1) applies. The assessment in my opinion is accordingly supportable under s. 21(1) to the extent that the income in question was income from property substituted for money which had been on deposit in the Swiss banks but is not supportable under s. 21(1) insofar as it represents income from the remainder of the moneys invested by the appellant and his wife in the Park Strand. It follows that unless the assessment can be upheld in its entirety under s. 21(4) it will be necessary to refer it back to the Minister for reconsideration and re-assessment in accordance with the reasons and findings herein expressed.

This brings me to the issues which arise under s. 21(4). This sub-section provides as follows:

> Where a husband and wife were partners in a business, the income of one spouse from the business for a taxation year may, in the discretion of the Minister, be deemed to belong to the other spouse.

In his reply to the appellant's notice of appeal to this Court the Minister pleaded that the appellant and his wife were partners in the business of owning, managing and operating the apartment building known as the Park Strand and that determination made by him by virtue of the powers vested in him by s-s. (4) of s. 21 of the *Income Tax Act* is final and conclusive and not subject to review. He did not, however, offer any evidence of his having exercised or purported to exercise the power given to him by s. 21(4) and the only suggestion of such an exercise to be found in the evidence is in the words "in the alternative if there was a partnership between the taxpayer and his wife the taxpayer has been properly assessed under subsection (4) of the said section 21" which appeared in a copy of the notification by the Minister under s. 58 of the Act offered in evidence by counsel for the appellant.

I have some doubt that this statement establishes that the discretion of the Minister was in fact exercised, since it does not say so and does not even say that the Minister was of the opinion that a partnership existed, but in view of the conclusion which I have reached on the applicability of the subsection, it is not necessary to consider the effect of the wording so used. The subsection applies only "where a husband and wife are partners in a business", and it can be applied only to the income of one or the other of the spouses from that business. Under s. 139(1)(*e*) of the Act the word "business" includes a profession, calling, trade,

manufacture or undertaking of any kind whatsoever and includes an adventure or a concern in the nature of trade, but does not include an office or employment.

The evidence discloses that the Park Strand has 49 apartments and that the rentals for the year 1956 amounted to $55,716.50. The appellant devotes the whole of his working time to its affairs and he said that it keeps him busy from morning to night. He arranges the letting of apartments to tenants and for necessary repairs even to doing some of the painting himself and he collects the rents and pays the expenses. A janitor is employed who looks after the boiler room and the sweeping and cleaning. In the financial statement which accompanied the appellant's income tax return, the wages of the janitor as well as other outgoings including fuel and the cost of operating a car to take the appellant back and forth between his home and the Park Strand and on errands in connection with repairs, are charged against the rentals and the balance is shown as belonging to the appellant and his wife and son in the proportions of 45, 45 and 10 per cent respectively. No charge is made for the appellant's services.

The Minister's case for applying s. 21(4) is that the concepts of income from property and income from business are not mutually exclusive but blend completely and that while the rentals derived from the Park Strand can be regarded as income from property, they can and should also be regarded as income from the business of leasing apartments in the Park Strand which was a business in which the appellant and his wife were partners. The appellant on the other hand submitted that the appellant and his wife and son were simply co-owners of property, that there was no business carried on in respect of the rental of suites, that the three owners were not partners in any such business and that in any case, the source of the income was the property and not a business of letting suites.

The question of when receipts from the letting of real property may be considered to be receipts from a business as opposed to mere receipts from property has, so far as I am aware, arisen in only two cases in this country. In the earlier of these, *Martin v. Minister of National Revenue*[1], which arose under the *Excess Profits Tax Act* O'Connor J.,

[1] [1948] Ex. C.R. 529.

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after citing passages from the judgments of the Master of the Rolls, and of Brett L.J., in *Erichsen v. Last*[1], as to the meaning of trade said at p. 533:

> A landowner in dealing with his own land and granting leases thereof and so receiving rents and profits is not carrying on business. But the question here is has the appellant reached the point where land ownership has passed into commercial enterprise in land. In *The Rosyth Building & Estates Co., Ltd., v. P. Rogers* (1918-24) 8 T.C. 11 at 17, the Lord President said:
>
> > It may in the ordinary case be difficult to determine the point at which mere ownership of heritage passes into the commercial administration by an owning trader, but that is a question of fact of a kind which is not infrequently met with under the Income Tax Acts . . .

On the facts before him, from which it appears that the taxpayer in the case of at least some of her tenants provided services, heat, electric stoves, furniture and linens, in addition to the premises, O'Connor J., then held that the taxpayer was engaged in a commercial enterprise.

In the later case, *Marks v. Minister of National Revenue*[2], where several persons had joined in acquiring an apartment building, which was thereafter held by a trustee for them and managed by an agent, Mr. Boisvert in the Tax Appeal Board considered that the substance of the transaction in which the property was acquired was not one of setting up a business but one of "sheer investment" and that the owners were not engaged in a business.

In Great Britain income from real property is computed for taxation purposes on a special basis prescribed under Schedule "A" and because of this, cases in which the revenue authorities have sought to bring the rentals of real property into the computation of profits taxable under Schedule "D" as profits of a trade are not strictly parallel and thus not applicable in considering a case arising under the provisions of the Canadian statute. They do, however, offer some light on the subject of what is income from property as distinguished from income from trading and incidentally indicate that there is considerable diversity of opinion on the question whether the letting of real property can be regarded as a trade. In *Inland Revenue Commissioners v. Sangster*[3], Rowlatt J., observed at p. 597:

> On the other hand Mr. Tomlin asks, "Supposing he has land and keeps on building on it and never sells it at all but has rent from the houses that he builds, is he carrying on a business?" One cannot help feeling that the

[1] (1881) 4 T.C. 422.

[2] (1962) 30 Tax A.B.C. 155.

[3] [1920] 1 K.B. 587.

answer to that question must be "No," because he is merely investing his money in new property and keeping it; he is not dealing with it in any way.

In *Fry v. Salisbury House Estate Limited*[1] where an incorporated company owned a building containing some 800 rooms which were let to some 200 tenants as offices, singly or in suites, and the company provided a staff of porters and cleaners who performed certain services for the tenants for which additional rents and charges were paid to the company, Viscount Dunedin in the course of his speech remarked at p. 446:

that the company is carrying on a business I do not doubt. The memorandum of association shows that it is.

Lord Warrington of Clyffe, however, at p. 451 said:

There is nothing in the facts stated in the case which would properly lead to the conclusion that in dealing with the property the company is acting otherwise than an ordinary landowner would act in turning to profitable account the land of which he is the owner. It would in my opinion be impossible to hold that in such a case the landowner is carrying on a trade. Such a person would I think clearly be assessable under Schedule A only, and his taxable income would be measured by the conventional annual value and not by the amounts of the rents he actually received.

But the Crown contends that the fact that the taxpayer is a limited company may distinguish its operations from those of an individual. Assuming the memorandum of association allows it, and in this case it unquestionably does, a company is just as capable as an individual of being a landowner and as such deriving rents and profits from its land, without thereby becoming a trader, and in my opinion it is the nature of its operations, and not its own capacity, which must determine whether it is carrying on a trade or not.

Lord Atkin reached his conclusion without finding it necessary to express an opinion on this particular point saying at p. 454:

In my opinion it makes no difference that the income so derived forms part of the annual profits of a trading concern.

He also said at p. 458:

My Lords, it may well be that another mode of expressing the result I have stated is to hold that a person capable of being assessed under Schedule A cannot be said in respect of his income from land to be earning profits from "trade". This view appears to commend itself to some of your Lordships. I do not dissent from it, but I view it with some misgiving. I find it difficult to say that companies which acquire and let houses for the purposes of their trade, such as breweries in respect of their tied tenants and collieries, and other large employers of labour in respect of their employees, do not let the premises as part of their operation of trading.

[1] [1930] A.C. 432.

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Personally I prefer to say that, even if they do trade in letting houses, their income, so far as it is derived from that part of their trading, must be taxed under Schedule A and not Schedule D.

Opinions more closely connected with the particular statute under consideration were voiced by Lord Tomlin who said at p. 463:

> Further in my view the perception of rents as landowner is not an operation of trade within the meaning of the Act.

and by Lord Macmillan who said at p. 467:

> Landowning, however profitable, is not a trade within the meaning of the income tax code.

Later at p. 470 also with reference to the division required by the statute, Lord Macmillan said:

> This clearly contemplates a separation between the two characters of landowner and trader. A landowner may conduct a trade on his premises, but he cannot be represented as carrying on a trade of owning land because he makes an income by letting it. The relatively insignificant services for which the company makes charges to its tenants are not in my opinion sufficient to convert the company from a landowner into a trader, though the profits so made may quite properly be charged with tax under Schedule D. To hold otherwise would be to invert the rule that the principal follows the accessory.

See also the discussion by Lord Greene M.R., in *Croft v. Sywell Aerodrome, Limited*[1].

Under the Canadian statute what is taxed as income from a property or a business is the "profit therefrom" for a taxation year, and this poses the question "what is the profit from the property or business?" In the great majority of cases it is quite immaterial whether the profit is regarded as arising from a business or from property, but when the question does arise, it is in my opinion simply one that must be resolved on the facts of the particular case and I know of no single criterion on which it may be determined. That the rentals are primarily or entirely receipts from property may be a factor of great importance but it is not necessarily conclusive for the question in a case such as the present one is not so much what the income is derived from but whether the income can be fairly described as income from a business within the meaning of that term as used in the Act. Moreover, cases are I think

[1] [1942] 1 K.B. 317.

readily conceivable where particular income may be accurately described as income from property and just as accurately regarded as income from a business.

On the evidence in the present case the sum received as rentals from the Park Strand should I think be regarded as having accrued to the appellant and his wife and son predominantly, if not entirely, in their capacity as owners of the property rather than as traders, and I also think that the rentals should be regarded as having accrued predominantly, if not entirely, from the use by tenants of the property in the sense that they represent payments for the tenants' occupation thereof rather than payments arising from the process of letting apartments and providing certain limited services such as heat of which the tenants have the benefit. To my mind while there is a sense in which the rentals can be said to be revenues from a business of letting apartments or operating an apartment building for the purpose of securing rentals, it is a fanciful and unrealistic way of describing them for it puts the emphasis of the description of their source where it does not belong viz., on the mere *sine qua non* or conduit pipe of the letting activity rather than on the fact that they arise from the use or exercise of the owners' right of occupation of the property by tenants who pay not for the letting but for the use of the property. There may well be cases wherein the extent of various services provided by the landlord under the terms of the leasing contract is such that the rental paid by the tenant can be regarded as in a substantial measure a payment for such services as well as for the use of the property and the interrelation of the use of the premises with the use of such services may be so extensive that the whole sum paid could readily be regarded not as mere rental of property but as true receipts of a business of providing apartments and services to tenants but I do not regard this as a case of that kind. The nature of the services provided in my opinion also has a bearing on the question some, such as maid service and linen and laundry service, being more indicative of a business operation than the heating of the building which in my view is so closely concerned with the property itself as to offer no definite indication one way or the other. Nor do I think that the fact that the management of the

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property occupies the appellant's time or the fact that he uses his car to go to and from the property indicate that the operation is a business for at most these facts indicate that he renders a service to himself and to the other owners of the building which so far as charged for represents a proper outgoing against revenue for the purpose of ascertaining the net profit divisible among the owners regardless of whether the rentals are mere income from property or income from a business. If the appellant had a profit from such charges it would no doubt be taxable as his income but there is no indication that he had any profit therefrom and no such issue has been raised. Moreover while the appellant's share of the net profit of the Park Strand may to him represent both his share of the profit and in a sense the result of his efforts the share of his wife in her hands does not represent return for effort on her part but simply income from her property and it is her share alone with which the case is concerned. On the whole there appears to me to be nothing in the situation which affects the rentals with a trading character as distinct from mere income receipts from property and I am accordingly of the opinion that the profits from the Park Strand were not profits from a business and that the operation of the Park Strand was not a business in which the appellant and his wife were partners. Section 21(4) therefore cannot be invoked to support the assessment.

The appeal accordingly succeeds in part and it will be allowed with costs and the re-assessment will be referred back to the Minister for reconsideration and re-assessment in accordance with these reasons.

Judgment accordingly.