

Winnipeg
1967
Mar. 30
Ottawa
Apr. 20

BETWEEN:
ADMIRAL INVESTMENTS LIMITED . . . APPELLANT;
AND
THE MINISTER OF NATIONAL REVENUE RESPONDENT.

Income tax—Company incorporated to invest—Purchase and sale of second mortgages—Subsequent purchase and sale of corporate shares—Whether trading transactions.

Appellant was incorporated in Manitoba in 1954 as an investment company, all of its share capital being held beneficially by Mrs. M whose husband guided the company's affairs. During the years 1955 to 1964 appellant purchased and sold second mortgages and agreements for sale of land and reported the income therefrom. In 1958 it also made a profit on the sale of land which it reported as income. In 1954 it purchased corporate securities and sold all but a few in 1956 and 1958. No further purchases of securities were made until 1961 and 1962. In 1956 appellant reported dividend income of \$1,600 but had little dividend income subsequently until 1962. In 1963 appellant made \$700 on the sale of shares purchased in 1956 and reported this sum as income. In 1964 it suffered a loss of \$13,304 on the sale of securities. The Minister refused to include the profit made in 1963 and disallowed the loss incurred in 1964 in computing appellant's taxable income for those years.

Held, appellant's appeal must be allowed. Its dealings in securities were part of its business. The testimony of Mrs. M's husband that his intentions (which must be attributed to appellant), viz to buy and sell securities in order to make a gain from an increase in their market price, was confirmed by appellant's course of conduct. Further, appellant's acts, though they were not those of a trader in securities, as e.g. an underwriter with a seat on the stock exchange, were the ordinary acts of a person who deals in shares. *I.R.C. v. Livingston*, 11 T.C. 538 referred to.

APPEAL from Tax Appeal Board.

Alan Sweatman, Q.C. and *T. G. Mathers* for appellant.

Bruce Verchere for respondent.

CATTANACH J.:—This is an appeal from a decision of the Tax Appeal Board¹ dated July 25, 1966, whereby appeals by the taxpayer against its assessments to income tax for its taxation years ending September 30, 1961 to 1964 inclusive were dismissed.

At the outset of the trial counsel for the appellant announced that the appeal with respect to the appellant's

¹ (1966) 41 Tax A.B.C. 409

1961 and 1962 taxation years was abandoned. In those taxation years the appellant had claimed as deductions from its income the amounts of \$8,159.57 and \$16,365 respectively, being losses sustained by it on the sales of Dominion of Canada Bonds in the years in question and which deductions were disallowed by the Minister.

Accordingly, only the assessments to income tax for the appellant's 1963 and 1964 taxation years remain in issue.

In the taxation year 1963 the appellant included in its income a profit of \$700.22 realized upon the sale of 100 shares of Dallas Transit Limited which had been purchased by it in 1956.

However, in computing its income for its 1964 taxation year the appellant claimed a loss of \$13,304.04 arising from the sale of securities. The foregoing loss was computed in the following manner:

	Date of Purchase	Date of Sale	Profit	Loss
100 shares—Bristol-Meyers Company	Sept. 28/61	Mar. 16/64	\$ 5,181.38	
300 shares—Manufacturers & Traders Trust Co. of Buffalo	Nov. 21/61	Mar. 16/64		\$ 3,102.51
208 shares—Atlas Credit Corporation	Dec. 1/61	Mar. 19/64		3,188.06
200 shares—Marrud, Inc.	Dec. 1/61	Mar. 19/64		1,783.92
300 shares—Harvest Brand, Inc.	Dec. 1/61	Mar. 19/64		3,050.25
204 shares—Monroe Auto Equipment	Dec. 6/61	Mar. 19/64		3,470.19
100 shares—Inter-State Vending Co.	Dec. 8/61	Mar. 19/64		3,963.75
100 shares—American Cyrogenics Inc.	Mar. 23/62	Mar. 19/64		475.29
4% Minneapolis—St. Paul Soo Line Railway Bonds	Apr. 10/62	Mar. 19/64	426.60	
100 shares—Celanese Corp. of America	Nov. 29/63	July 21/64	2,013.29	
2,000 shares—Forty-Four Mines Ltd.	Acquisitions July 1962	Feb. 24/64		1,606.00
2,000 shares—San Antonio Gold Mines	June 13/63	Feb. 24/64		285.34
			\$ 7,621.27	\$20,925.31
				7,621.27
				\$13,304.04

The Minister refused to include the profit of \$700.22 realized by the appellant from the sale of shares in Dallas Transit Limited in computing the appellant's income for its 1963 taxation year on the ground that the appellant was not in the business of trading in securities within the meaning of the word "business" as defined in section

1967
 ADMIRAL INVESTMENTS LTD.
 v.
 MINISTER OF NATIONAL REVENUE
 Cattanach J.

1967
 ADMIRAL INVESTMENTS
 LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE
 ———
 Cattanach J.

139(1)(e) of the *Income Tax Act* and accordingly the profit so realized was not profit from a business within the meaning of sections 3 and 4 of the Act.

The Minister also disallowed the amount of \$13,304.04 claimed by the appellant as a deduction from income for its 1964 taxation year on the ground that the losses incurred by it were capital losses within the meaning of section 12(1)(b) of the Act.

The pertinent sections of the *Income Tax Act* read as follows:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

- (a) businesses,
- (b) property, and
- (c) offices and employment.

4 Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

...

139. (1) In this Act,

...

- (e) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

...

12. (1) In computing income, no deduction shall be made in respect of

...

- (b) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part,

...

Prior to trial the Minister served notice on the appellant to admit facts as therein specified with which the appellant readily agreed subject to four minor corrections. The Statement of Facts so admitted is comprised of forty-eight paragraphs some of which are divided into sub-paragraphs. The Minister also served notice on the appellant to admit documents referred to in the Notice to Admit Facts. The appellant also agreed to this notification. The documents so admitted are the financial statements of the appellant for its 1956 to 1964 fiscal years and a schedule which accurately and completely sets forth the appellant's transactions in stocks and bonds for the period October 1, 1954 to September 30, 1965.

The relevant facts may be summarized as follows.

The appellant is a joint stock company incorporated pursuant to the laws of the Province of Manitoba by Letters Patent dated August 19, 1954 with an authorized capital stock of 900 non-cumulative redeemable preference shares of the par value of \$100 each and 100 common shares without nominal or par value for the following purposes and objects:

1967
 ADMIRAL INVESTMENTS LTD.
 v.
 MINISTER OF NATIONAL REVENUE
 Cattanach J.

- (a) To carry on the business of an investment company and to invest in shares, stocks, bonds, debentures, mortgages, agreements for sale, and other evidences of indebtedness and obligations with or without guarantee by any person, firm, corporation or public authority;
- (b) To promote, organize, manage or develop investment, enterprise or undertakings;
- (c) To purchase or otherwise acquire and hold, or otherwise deal in real and personal property and rights in particular lands, buildings, business or individual concerns and undertakings, mortgages, contracts, franchises, patents, licenses, securities, book debts and any interest in real or personal property, any claims against such property or against any personal company and any privileges and choses in action of all kinds;
- (d) To act as insurance brokers or agents.

In 1954 Mrs. Sidonia Maibach, the wife of Jack Maibach, purchased all of the authorized preference shares of the appellant. Three common shares, of which Mrs. Maibach was the beneficial owner, were issued to members of the legal firm of Sokolov and Wolinsky who became the directors and officers of the appellant. In addition to the \$90,000 paid for the preference shares, Mrs. Maibach also advanced monies to the appellant by way of loan. In 1954 the sum loaned by Mrs. Maibach to the appellant was \$6,777.75, in 1955, \$5,713.82 and in each of the years 1956 to 1964, \$6,669.33.

Mr. and Mrs. Maibach are citizens of the United States and divide their period of residence in each year between that country and Canada. Mrs. Maibach had inherited money from her father and because of the state of her husband's health (Mr. Maibach is afflicted with a heart ailment) they were both anxious that Mrs. Maibach's resources should be increased and made productive of income.

Mr. Maibach, therefore instructed the legal firm of Sokolov and Wolinsky to incorporate the appellant company. Mr. Hyman Sokolov of that firm, in addition to being

1967
 ADMIRAL IN-
 VESTMENTS
 LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE
 Cattanach J.

the Maibachs' legal adviser, was a personal friend and proffered financial advice. At the outset the appellant was primarily interested in acquiring second mortgages and agreements for sale, either at a discount or bonus, which were either sold or held to maturity. The number of mortgages and agreements for sale acquired by the appellant is tabulated in paragraph 28 of the Notice to Admit Facts as follows:

	<i>Number Owned</i>	<i>Acquired in Year</i>	<i>Matured or Sold in Year</i>
1955	7	7	0
1956	13	6	0
1957	21	11	3
1958	22	4	3
1959	22	9	9
1960	21	4	5
1961	16	2	7
1962	14	4	6
1963	12	3	5
1964	11	2	3

As satisfactory mortgages were not readily available, the appellant, in October 1954, bought Government of Canada Bonds at a premium to the face value of \$80,000 and bearing $3\frac{1}{2}\%$ interest. The bonds were left at the appellant's banks as collateral security against which the appellant could borrow at favourable rates of interest to purchase mortgages as they became available. By this method there would be no idle funds at any time. The appellant followed this course until 1961. The amounts of the appellant's bank loans were as follows:

1956 —	\$67,500.00
1957 —	\$50,000 00
1958 —	\$58,000 00
1959 —	\$59,500 00
1960 —	\$49,000 00
1961 —	\$32,500.00
1962 —	nil

On November 24, 1961 the appellant sold the Government of Canada bonds at a loss of \$16,365.00 because of the low interest yield and an anticipated further decline in their market value.

With the release of funds consequent upon the sale of the Government bonds the appellant substantially increased its purchases of stocks in late 1961 and 1962.

In paragraph 29 of the Notice to Admit Facts the allocation of the appellant's capital during its fiscal years 1955 to 1964 is tabulated as follows:

Year	<i>Mortgages Receivable</i>	<i>Cash</i>	<i>Stocks</i>	<i>Bonds</i>	<i>Total Capital</i>
1955	\$ 29,493.07	\$11,021.56	\$36,240 42	\$86,025 00	\$162,780 05
1956	47,878.10	13,248 84	29,607 93	86,025.00	176,759 87
1957	67,844.19	11,757.97	589 28	86,025.00	166,216 44
1958	103,105.99	1,730.21	589 28	86,025 00	191,450 48
1959	113,977.19	1,625.77	589 28	86,025 00	202,217 24
1960	109,743.66	1,887.28	589 28	86,025 00	198,245 22
1961	91,161 78	1,463.88	9,096 77	86,025.00	187,747 43
1962	84,447 67	5,480.21	50,117 76	2,842 15	142,887 79
1963	66,830 79	31,746 88	50,143.48	2,842 15	151,563 30
1964	58,383.97	69,643.22	15,717.44	Nil	143,744 63

1967
ADMIRAL IN-
VESTMENTS
LTD.
v.
MINISTER OF
NATIONAL
REVENUE
Cattanach J.

During its fiscal years 1955 to 1964 inclusive, the appellant received income from the following sources:

Year	<i>Mortgages:— Interest & Bonus</i>	<i>Bank Interest</i>	<i>Dividends</i>	<i>Bonds</i>
1955	\$ 2,724 38	—	\$ 127 50	\$ 812 60
1956	4,355.39	—	1,600 65	4,777 40
1957	4,808.68	—	56 30	2,795 00
1958	6,109 82	—	25 82	2,795 00
1959	9,711 23	—	29 76	2,795.00
1960	10,147.42	—	29 76	2,795 00
1961	9,784.80	—	37.17	2,795 00
1962	8,180.86	—	447.09	459 45
1963	8,796.63	—	692 41	Nil
1964	7,078.41	479.64	734 80	Nil
	<u>\$71,697.62</u>	<u>\$479 64</u>	<u>\$3,781.26</u>	<u>\$20,024.45</u>

It is common ground between the parties that Jack Maibach was the guiding force in all transactions of the appellant. It was he who gave instructions for the incorporation of the appellant and it was he who decided what mortgages would be acquired by the appellant and the decisions to purchase or sell any shares and bonds by the appellant were made by him in every instance. When Mr. Maibach made the decision to acquire a mortgage or shares Sokolov and Wolinsky as solicitors for, and officers of the appellant would implement his instructions.

A schedule of the appellant's transactions in shares and bonds from October 1, 1954 to September 30, 1965 is appended to the appellant's Notice of Appeal and to the Notice to Admit Facts.

1967
 ADMIRAL IN-
 VESTMENTS
 LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE
 Cattanach J.

In 1955 the appellant used funds borrowed from its bankers on the security of the Government of Canada bonds which had been purchased by it in 1954, to purchase shares in Canadian Breweries Ltd., Pantapac Oil Co., Ltd., United States Steel Corporation and Anglo Canadian Oils Ltd. at a total cost of approximately \$36,000 in addition to mortgages at a total cost of approximately \$29,000. Later in the same year the appellant bought shares in the Royal Bank of Canada at a cost of \$16,157.50 which were sold in 1956 at a profit.

In 1958, the appellant sold all shares acquired prior thereto except 100 shares in Dallas Transit Company, Limited acquired in 1956, the profit of \$700.22 from the sale of which in 1963 gives rise to the first issue in the present appeal.

In 1958 the appellant realized a profit in the purchase and sale of real estate which it included in its income.

The appellant did not have any transactions in securities in 1959 or 1960.

In 1961 the appellant purchased 100 shares in Bristol Myers Company at a cost of \$8,507.49.

In 1962, as previously indicated, the appellant sold its Government of Canada bonds and purchased shares in Manufacturers & Traders Trust Co. of Buffalo, Atlas Credit Corporation, Marrud, Inc., Harvest Brand, Inc., Monroe Auto Equipment, Inter-State Vending Co., American Cyrogenics, Inc. and Forty-four Mines Ltd. at an aggregate cost of \$41,020.99 as well as \$5,000 principal amount, bonds in Minneapolis St. Paul Soo Line Railway bearing interest at 4% at a cost of \$2,842.15.

In 1963 the appellant sold its shares in Dallas Transit Company Ltd. and in that year bought 2,000 shares in San Antonio Gold Mines Limited at a cost of \$615.

In 1964 the appellant sold all the stocks and bonds in its possession (except 210 shares in American Telephone and Telegraph acquired during the year at a cost of \$15,717.44) resulting in a net loss for the year of \$13,304.04 computed as previously indicated above. This loss gives rise to the second issue in the present appeal.

Further, purchases of stocks were made by the appellant in 1965.

Paragraph 48 of the Notice to Admit Facts contains a recapitulation of the dividend yield per share of twenty-one companies in which the appellant owned shares in the years 1954 to 1965. A cursory examination of the information therein contained would appear to indicate an average dividend yield between $3\frac{1}{2}$ and 4 percent.

From its inception the appellant, in making its tax returns, invariably declared in its income amounts received from bond and mortgage interest, bonuses or discounts realized on the purchase of mortgages and agreements for sale, dividends, and gains or losses on the purchase and sale of shares as well as the one real estate transaction in 1958.

In previous taxation years the Minister included any profit made on the sale of securities in the appellant's income and any losses incurred by the appellant in such transactions were allowed by the Minister as deductions from income.

All of the securities purchased and sold by the appellant are listed and traded on one or more recognized stock exchanges. The appellant purchased the shares outright and never on margin, through Winnipeg investment dealers for the most part, but on occasion from a dealer in New York who was either known to or related to Mr. Maibach. Most of the shares purchased by the appellant appear to be of the "blue chip" variety in that they were dividend producing, although in some instances Mr. Maibach testified he was willing to take a "flyer" in a stock which might be termed as "speculative".

Mr. Maibach's decisions to cause the appellant to purchase the shares it did were based on tips from persons whose information he considered reliable, such as his physician, a relative who was a dentist and a customer's man for a New York brokerage firm. He further testified that his intention in having the appellant purchase shares was that it might reap an appreciation in the market price, rather than to look for a dividend return and he conceded (as subsequent events proved that he must) that in some instances his tipsters were wrong in their recommendations.

The appellant was not assessed as a "personal Corporation" as defined in section 68(1) of the *Income*

1967
 ADMIRAL INVESTMENTS
 LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE
 Cattanach J.

1967
 ADMIRAL IN-
 VESTMENTS
 LTD.
 v
 MINISTER OF
 NATIONAL
 REVENUE
 Cattanach J.

*Tax Act*¹ from which it might be assumed that the appellant therefore carried on "an active financial, commercial or industrial business" within section 68(1)(c). However, a consideration of the facts discloses that such an assumption is not warranted. Paragraph 30 of the Notice to Admit Facts shows that in the taxation years 1963 to 1964, as well as in the years 1955 to 1964, with the exception of 1956, the appellant derived far in excess of one-quarter of its income from ownership of or trading or dealing in mortgages. It was common ground between the parties that the appellant's income from its transactions in second mortgages was income from a business and on the facts disclosed in evidence and on the basis of the authorities applicable to those facts, I have no doubt whatsoever that this is so. (See *M.N.R. v. Spencer*², *Scott v. M.N.R.*³ affirmed by the Supreme Court of Canada⁴ and *M.N.R. v. MacInnes*⁵.)

Therefore, while conceding that the appellant was engaged in a mortgage business, the Minister does not concede that the appellant's transactions in shares constituted the business of dealing therein or adventures or concerns in the nature of trade.

On the contrary, as I understood the submissions by counsel for the Minister they were that the business of the appellant was that of dealing in mortgages, rather than

¹ 68. (1) In this Act, a "personal corporation" means a corporation that, during the whole of the taxation year in respect of which the expression is being applied,

- (a) was controlled, whether through holding a majority of the shares of the corporation or in any other manner whatsoever, by an individual resident in Canada, by such an individual and one or more members of his family who were resident in Canada or by any other person on his or their behalf;
- (b) derived at least one-quarter of its income from
 - (i) ownership of or trading or dealing in bonds, shares, debentures, mortgages, hypothecs, bills, notes or other similar property or an interest therein,
 - (ii) lending money with or without securities,
 - (iii) rents, hire of chattels, charterparty fees or remunerations, annuities, royalties, interest or dividends, or
 - (iv) estates or trusts; and
- (c) did not carry on an active financial, commercial or industrial business.

² [1961] C.T.C. 109.

³ [1963] C.T.C. 176

⁴ [1963] S.C.R. 223.

⁵ [1963] S.C.R. 299.

that of trading in shares and bonds and that the purchase of shares and bonds by the appellant was from its funds surplus to or not devoted to its mortgage business as investments rather than a speculation and accordingly any resultant gains or losses would be gains or losses of capital.

1967
 ADMIRAL INVESTMENTS
 LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE
 Cattanach J.

In support of the foregoing contentions, it was submitted by counsel for the Minister that (1) the nature and quantity of the shares and bonds sold by the appellant in the two taxation years under appeal, were not such as to indicate the carrying on of a business or adventures in the nature of trade and (2) the transactions engaged in by the appellant were not of the same kind or carried on in the same manner as those characteristic of ordinary trading.

On the other hand, the appellant contends that the profit realized by it from the sale of shares in 1963 and the net loss it sustained as the result of its transactions in 1964 were not merely the realizations of the enhanced value of the shares or changes in investments, but were gains made or losses suffered in the operation of a business in carrying out a scheme of profit making, it being the appellant's intention to make profits from a rise in the market price of the shares held by it.

I do not attach any particular significance to the fact that the Minister, in the appellant's previous taxation years, included profits made on the sale of shares in the appellant's income and that he allowed losses incurred in those years as deductions from income.

It is well settled that while a decision reached by the Minister in one taxation year may be a cogent factor in the determination of a similar point in a following year, the fact that a concession may have been made to a taxpayer in one year, does not, in the absence of any statutory provisions to the contrary, preclude the Minister from taking a different view of the facts in a later year when he has more complete data on the subject matter. There is nothing inconsistent with the Minister altering his decision according to the facts as he finds them from time to time. An assessment is conclusive as between the parties only in relation to the assessment for the year in which it was made. (See *M.N.R. v. British and American Motors Toronto, Limited*¹.)

¹ [1953] Ex C.R. 153.

1967
 ADMIRAL IN-
 VESTMENTS
 LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE
 Cattanach J.

The only significance that can be attached to the appellant invariably declaring in its tax returns any gains or losses on its purchase and sale of shares is that it is illustrative of its consistent treatment of such gains or losses as gains or losses from a business.

The narrow issue for determination is whether the gains made or losses incurred by the appellant in the circumstances above outlined were made or incurred by it in the conduct of a business as is contended by the appellant or whether they were enhancements in value or losses sustained upon the realization of or changes in investments as contended by the Minister.

In *Sutton Lumber & Trading Company Limited v. M.N.R.*¹ Locke J. said at page 83:

The question to be decided is not as to what business or trade the company might have carried on under its memorandum, but rather what was in truth the business it did engage in. To determine this, it is necessary to examine the facts with care.

Mr. Maibach, whose intentions both parties acknowledge to have been the intentions of the appellant, testified that the shares were bought and sold speculatively in order to make a gain from an increase in their market price. While I am conscious of the often repeated admonition that a taxpayer's *ex post facto* declaration of his intention should be scrutinized with care, nevertheless, I have no reason to disbelieve Mr. Maibach's testimony. On the contrary, I think that his expression of his intention, which was also that of the appellant, is confirmed by the appellant's course of conduct and what it actually did.

From its inception in 1954 the appellant in its tax returns reported dividends received as income and gains or losses on the purchase and sale of shares as income or deductions from income respectively which indicates to me a consistent course of conduct and a consistent attitude by the appellant to its transactions.

Certainly Mr. Maibach was not looking to a safe and modest return by way of dividends. The Government of Canada bonds were sold because of their low interest yield and the proceeds of that sale were placed, as Mr. Maibach put it, where the "action" was. While he was not adverse

¹ [1953] 2 S.C.R. 77.

to accepting dividends when paid, it is obvious that he was looking for a much greater and quicker return based on the vagaries of the stock market. His selection of shares purchased was not based on any thorough analysis of the companies whose shares were purchased but reliance was placed on tips received from persons whom he considered knowledgeable but which subsequent events proved not to be invariably so.

1967
 ADMIRAL INVESTMENTS
 LTD.
 v.
 MINISTER OF
 NATIONAL
 REVENUE
 Cattanach J.

While shares may be the subject matter of investment, they are equally susceptible of being the subject matter of trade. Whether they fall into one category or the other, is dependant upon the particular facts of the case. The evidence above recited leads me to the conclusion that the purchase and sale of shares here involved was done in the course of business.

What must be looked at is what was done by the appellant with a view to asking the question in Lord President Clyde's words in *C.I.R. v. Livingston et al*¹:

...whether the operations involved (in the transactions of the company) are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made.

While the appellant was not a trader in securities in the sense of that term that it was an underwriter and held a seat on a stock exchange, but rather made its purchases and sales through a stock exchange in the usual manner, nevertheless, the acts of the appellant were just the ordinary transactions of a person who deals in shares.

In my opinion the transactions in question were acts done in carrying on a business from which it follows that tax is payable on the profit realized on the sale of shares in its 1963 taxation year and that the appellant is entitled to deduct the loss that it incurred in its 1964 taxation year.

The appeal is, therefore, allowed with costs.

¹ 11 T.C. 538 at p. 542.