1955
Sept. 26
Dec. 8

BETWEEN:

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

AND

JOHN PAWLUK (SR.) ..... RESPONDENT.

*Revenue—Income tax—The Income Tax Act, S. of C. 1948, c. 52, s. 3, 4, 127(1)(e)—Taxpayer carrying on a business—Admissibility of evidence of matters arising after taxation year—Appeal from Income Tax Appeal Board allowed.*

Respondent sold black loam from his farm at a profit and was assessed for income tax for the year 1951 on the money received as being income from a business. Respondent contends that because of nearby industrial development his farm was rendered unsuitable for use as a farm and that he had taken the only course open to him for disposing of it.

*Held:* That the sale of the loam from the farm load by load and day by day in 1951 establishes a course of conduct which is conclusive that while respondent acquired the land with the intention of working it for farming purposes or market gardening he in 1951 abandoned his original intention and in that year and since has been engaged in the business of selling black loam.

2. That on income tax appeals evidence may be received in respect to any matters that have occurred up to the time of the actual hearing of the appeal, provided such matters have relevancy to the taxation year to which the assessment or reassessment under appeal applies.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Ritchie at Edmonton.

*D. B. MacKenzie, Q.C.* and *F. J. Cross* for appellant.

*A. W. Miller, Q.C.* for respondent.

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

RITCHIE J. now (December 8, 1955) delivered the following judgment:

This is an appeal by the Minister of National Revenue from the decision of the Income Tax Appeal Board dated August 19, 1954 (1), which allowed an appeal from a

(1) (1954) 11 Tax A.B.C. 184.

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reassessment of income tax made by the Minister on November 4, 1953 in respect to the 1951 taxation year income of John Pawluk of Clover Bar in the province of Alberta.

The respondent, who prior to coming to Canada was a farmer in Poland, has been resident in this country since 1930, at first working as a labourer and as a miner. In 1944 the savings of the respondent were sufficient to enable him to purchase an eighty-eight acre farm at Clover Bar on the outskirts of Edmonton, an area in which there now is considerable industrial development. Later the respondent purchased another farm of one hundred and sixty-one acres situate not far from the eighty-eight acre farm. The respondent carried on farming and market gardening on the two farms and sold his products in Edmonton.

In 1951 the municipality, for the purpose of building a new road, acquired about five acres at one corner of the respondent's eighty-eight acre farm. When the road-making machinery commenced to work on what had been the respondent's land, he obtained permission to use for his own purposes the top soil being removed for the purpose of road construction. The respondent found the demand for top soil for use in Edmonton gardens so good that, after disposing of all the top soil obtained from the road site, he continued and still is continuing to market top soil obtained from other parts of the eighty-eight acre farm. In 1951 sales of top soil, or black earth, grossed $12,743.98. The top soil was sold at $10 per load if delivered in Edmonton or at $5 per load if delivery was taken at the Pawluk farm.

The respondent, in partnership with his wife, Mary Pawluk, and his son, John Pawluk, Jr., under the style Pawluk Enterprises, is doing some market gardening on both farms, is renting apartments to tenants and is disposing of the top soil on the eighty-eight acre farm. The Minister does not recognize Mrs. Pawluk as a partner in Pawluk Enterprises.

The income tax return of the respondent for the 1951 taxation year, filed on June 2, 1952 and certified by him as correct under date of May 20, 1952, included a profit and loss statement of Pawluk Enterprises reading as follows:

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*REVENUE*

| | | |
|---|---|---|
| Sales of Black Earth | | 12,743.98 |
| Sales of Potatoes | | 928.00 |
| Sale of Oats | | 78.00 |
| Rental Revenue | | 4,333.00 |
| | | 18,082.98 |

*EXPENSES*

| | | | |
|---|---|---|---|
| Salaries and Wages | | 1,052.46 | |
| Fuel, Oil and Grease | | 872.90 | |
| Equipment Repairs | | 514.03 | |
| Apartment Repairs | | 631.90 | |
| Light, Heat and Power | | 784.36 | |
| Taxes | | 1,649.26 | |
| Potato Harvest | | 545.33 | |
| Seed Grain | | 260.00 | |
| Hauling | | 184.50 | |
| Stripping | | 144.00 | |
| Advertising | | 120.44 | |
| Accounting | | 39.53 | |
| Bank Charges and Interest | | 88.71 | |
| Sundry Apartment Supplies | | 102.75 | |
| Depletion Allowance on Earth Sold | | 540.97 | |
| Depreciation | | | |
| —Trucks | 1,132.50 | | |
| —Motor and Moveable Equipment | 930.00 | | |
| —Buildings | 240.68 | | |
| —Houses | 76.50 | | |
| —Apartment | 895.38 | | |
| —Farm Home | 24.38 | | |
| —Car | 825.00 | 4,124.44 | 11,655.58 |
| Net Profit for Year Ended December 31, 1951 | | | 6,427.40 |
| Apportioned,— | | | |
| John Pawluk Sr. | | 2,142.47 | |
| Mary Pawluk | | 2,142.47 | |
| John Pawluk Jr. | | 2,142.46 | 6,427.40 |

Deducting the personal exemption of $1,000 left taxable income of $1,142.47 declared by the respondent.

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The record contains no original assessment of respondent for the 1951 taxation year but does contain a "reassessment" made by the Minister on February 2, 1953 and adding to the declared taxable income of ..... 1,142.47
the respondent's one-third share of $540.97 claimed as depletion allowance on land ..... 180.32

and

the respondent's one-third share of one-fourth the $825 claimed for depreciation of car ..... 68.75

giving

a revised taxable income of .....$1,391.54
on which tax was levied.

On February 12, 1953, following the reassessment, the respondent filed an amended income tax return for the 1951 taxation year. The amended return was certified by the respondent under date of January 26, 1953, a date prior to the reassessment. The profit and loss statement of Pawluk Enterprises included in the amended return does not contain the $12,743.98 revenue from sales of black earth nor the expense items pertaining to such sales as shown on the original return. Included in the amended return, however, there is a schedule reading:

| *Realized on Earth Sales* | *Year Ended December 31, 1951* | |
|---|---|---|
| | *REVENUE* | |
| Sales of Black Earth ..... | | 12,743.98 |
| | *EXPENSES* | |
| Salaries and Wages ..... | 1,052.46 | |
| Fuel, Oil and Grease ..... | 872.90 | |
| Equipment Repairs ..... | 514.03 | |
| Stripping ..... | 144.00 | |
| Advertising ..... | 120.44 | 2,703.83 |
| Net Income for Year Ended December 31, 1951 ..... | | 10,040.15 |
| Apportioned: | | |
| John Pawluk, Sr. ..... | 3,346.71 | |
| Mary Pawluk ..... | 3,346.72 | |
| John Pawluk, Jr. ..... | 3,346.72 | 10,040.15 |

On November 4, 1953 the Minister issued a second reassessment in respect to the respondent's 1951 taxation year. Under the November 4, 1953 reassessment participation of the respondent's wife as a partner in Pawluk Enterprises was disallowed and a capital cost allowance was allowed to the respondent but disallowed to his son.

Counsel for the respondent contended that no consideration should be given to any matters which have arisen since the 1951 taxation year.

The president of this Court in *Nicholson Limited v. The Minister of National Revenue* (1) said at page 201:

> The extent of the Court's jurisdiction under section 66 of the Act is very wide. Subject to the provisions of the Act it has exclusive jurisdiction to hear and determine all questions that may arise in connection with the assessment. It may, therefore, deal with issues of fact as well as questions of law. Nor is its jurisdiction restricted to questions arising subsequent to the assessment; it may deal with all questions, whether they arise before or after the assessment, provided they are connected with it.

In *Lincolnshire Sugar Co. Ltd. v. Smart* (2) Lord Macmillan said at page 419:

> It may be a question whether it is legitimate to have regard to the fact that it is now known that the payments are irrevocable and that the contingency of repayment can now never arise. The question might have had to be decided before this was known. There are observations by noble and learned Lords in *Bwllfa & Merthyr Dare Steam Collieries* (1891) *Ltd.* v. *Montypridd Waterworks Co.* [1903] A.C. 426; 11 Digest 129, *186,* to the effect that a court ought not to shut its eyes to the true facts if it subsequently knows them, although these facts could not have been known when the question originally arose, and ought not to resort to guessing when certainty is available. I have sympathy with this view, and with what LORD WRIGHT and GREENE, L.J., have to say on the point.

It is my view that on income tax appeals evidence may be received in respect to any matters that have occurred up to the time of the actual hearing of the appeal, provided such matters have relevancy to the taxation year to which the assessment, or reassessment, under appeal applies.

(1) [1945] Ex. C.R. 191

(2) [1937] 1 All E.R. (H. of L.) 413.

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That the sales of top soil have been carried into 1955 is evidenced by Exhibit 5, two advertisements carried in the April 22, 1955 issue of the *Edmonton Journal* and reading:

*Black Loam*

From Clover Bar, superior, clean, rich, black loam. Prompt delivery at $10 per 6 yd. load. Guaranteed free of quack grass. 5 years of service to satisfied customers and Edmonton's major landscapers. Only continuous year round service.

John Pawluk
Ph. 65216

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*Attention Truckers*
Loading black loam from 7 a.m. till dark.
John Pawluk
Ph. 65216

The reference to the five years of service to satisfied customers and Edmonton's major landscapers indicates that the respondent during the 1951 taxation year was engaged in the sale of black loam. The advertisement indicates the course of conduct of the respondent in the 1951 taxation year.

The respondent contends that by reason of odours and air pollution from the surrounding industrial development the eighty-eight acre farm is no longer suitable for farming, that by reason of being undermined by old mining operations the eighty-eight acre farm is not suitable for use as an industrial site and that by selling the top soil, load by load and day by day, he is taking the only course open to him for disposing of his farm—a capital asset acquired for use as a farm but rendered unsuitable for that use by reason of the industrial development.

The Minister, on the other hand, mantains the respondent is engaged in the business of marketing black loam and that the sale of each load of earth constitutes revenue from that business.

Sections 3, 4 and 127 (1) (*e*) of the Income Tax Act, as applicable to the 1951 taxation year, read:

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 employments.

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.

127. (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;

Counsel for both appellant and respondent cited *Californian Copper Syndicate* v. *Harris* (1), a case that I regard as specially applicable to the circumstances with which the Minister was confronted when considering the reassessment made on November 4, 1953. At page 165 the Lord Justice Clerk (Macdonald) 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 realise 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 realisation or conversion of securities may be so assessable, where what is done is not merely a realisation 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 realisation, the gain they make is liable to be assessed for Income Tax.

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 realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

A recent House of Lords decision that has some application to the instant case is that in *Edwards (Inspector of Taxes) v. Bairstow and Another* (2), where Lord Radcliffe said at page 58:

If I apply what I regard as the accepted test to the facts found in the present case, I am bound to say, with all respect to the judgments under appeal, that I can see only one true and reasonable conclusion. The profit from the set of operations that comprised the purchase and sales of the spinning plant was the profit of an adventure in the nature of trade. What other word is apt to describe the operations? Here are two gentlemen who put their money, or the money of one of them, into buying a lot of machinery. They have no intention of using it as machinery, so they do not buy it to hold as an income-producing asset. They do not buy it to consume or for the pleasure of enjoyment. On the contrary,

(1) (1904) 5 T.C. 159. (2) [1955] 3 All E.R. 48.

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they have no intention of holding their purchase at all. They are planning to sell the machinery even before they have bought. And, in due course, they do sell it, in five separate lots, as events turned out. And, as they hoped and expected, they make a net profit on the deal, after charging all expenses such as repairs and replacements, commissions, wages, travelling and entertainment and incidentals, which do, in fact, represent the cost of organising the venture and carrying it through.

It is not difficult to conclude that the difference between the gross revenue obtained from the sale of black loam and expense of removing and marketing the loam represents a profit from an adventure in the nature of trade. The respondent has little, if any, intention of retaining any of the top soil on the eighty-eight acre farm for the purpose of market gardening. The respondent's marketing of the loam is, and was in 1951, well organized, advertising is used to attract customers, the soil is cleaned, mechanical loaders load the trucks which deliver the soil or to which the soil is delivered, a chartered accountant supervises preparation of the income tax returns.

The only test I consider necessary to apply to the respondent's method of selling the top soil of the eighty-eight acre farm load by load and day by day in 1951 is that of course of conduct. Application of the course of conduct test leads me to the conclusion that while the respondent acquired the eighty-eight acres with the intention of working them for the purposes of farming or market gardening he, in 1951, abandoned his original intention and in that year and since that year has been engaged in the business of selling black loam.

Quite apart from the evidence in respect to sales subsequent to 1951 I have reached the firm conclusion that the respondent in that year was conducting and engaged in the business of selling top soil. The fact that the respondent was selling an asset which each sale brought nearer to exhaustion does not mean the mode of sale did not constitute a business.

The appeal will be allowed with costs, to be taxed, and the reassessment by the Minister restored.

*Judgment accordingly.*