

1956
Mar. 28
& 29
Mar. 29

BETWEEN:

JOHN LLOYD McGUIRE APPELLANT,

AND

THE MINISTER OF NATIONAL }
REVENUE } RESPONDENT.

*Revenue—Income—Income tax—Income Tax Act, R.S.C. 1952, c. 148—
Income or capital gain—Real estate bought for farm sold as town lots
—Owner not carrying on business—No liability for tax.*

Appellant in 1940 purchased a farm for a home intending to live on it and at time of hearing of the appeal herein was living on it. In 1949 he subdivided part of it into 52 lots of which 20 lots were sold in the years 1949, 1950, 1951 and 1952. Appellant was assessed for income tax on the profits from the sale of these lots which assessment was affirmed by the Income Tax Appeal Board from whose ruling appellant now appeals to this Court.

Held: That the decision of the Income Tax Appeal Board must be reversed as appellant did not purchase the land as a venture or for speculation and there is no distinction between selling the land as a whole or in parts.

- 2. That defendant was not carrying on a business, but was selling his own property in a way that was not speculative.
- 3. That the money received from the sale of the lots was not income but a capital gain and not subject to income tax.

APPEAL from the Income Tax Appeal Board.

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

Carl H. Morawetz for the appellant.

E. D. Hickey and *T. Z. Boles* for the respondent.

HYNDMAN, D.J., orally, now (March 29, 1956) delivered the following judgment:

I could write a long judgment in this case but I don't think it necessary to do so.

Now, nobody has greater respect for my friend Mr. Fisher than I have. I have known him a long time and his ability. He is a very able lawyer and I usually agree with him in most of his decisions. But in this case I am afraid I cannot. Shortly, the facts are these: Mr. McGuire honestly and sincerely purchased this piece of land with the object of living on it. I believe him when he says that having been

born on a farm and having lived on a farm for part of his life he always had a hankering to get back to the land. I think that was what was in his mind and I am satisfied to accept his statement to that effect. After looking around at various farms he came across this particular land and decided he would like to buy it and did buy it for \$5,000 and eventually paid for it in full, \$5,000.

1956
McGUIRE
v.
MINISTER OF
NATIONAL
REVENUE
Hyndman,
D.J.

That, according to the evidence of the real estate man here seemed to be a reasonable deal, that is, the land was worth \$5,000 or \$6,000 although it was a run down farm and he was surprised that McGuire had bought it. However, he did buy it and I think he was sincere when he testified he thought he could establish himself and stay put there. He did operate the farm to the best of his ability and the best of his financial circumstances. He was more or less up against it financially but he did do some farming there and although he lost money he kept on purchasing more machinery. His wife and family lived with him on the farm and his wife did some work too, and it would seem to any person that he intended to make that his home and with no thought of speculation, or selling it at a profit, at that time and anyway I would think that under the circumstances being six or seven miles from the centre of Hamilton, surrounded by nothing but farms, that it would be mighty poor speculation if he intended to sell it in lots and I don't think any sensible man would have that in his mind, buying a farm out there at that time. Things have very much changed since and some people want to live out in the country.

Now I am coming to the point that is vital in this case. He owned that land but he found that it couldn't pay as a farm, but he still did not want to leave it. He had an offer from somebody to purchase a lot on the upper part of the farm but he found that he was unable to give title because of the Planning Act. The Planning Act requires that a plan of subdivision must be filed with and approved by the Board before he could register the plan and therefore sell the land. So I think he was quite sincere when he said it was due to this advice he got from the municipal people that he went ahead and put on a plan of subdivision—52 lots, I think.

1956
 McGUIRE
 v.
 MINISTER OF
 NATIONAL
 REVENUE
 Hyndman,
 D.J.

Now he did sell this lot, the first purchaser was anxious to buy, and later on sold a few more—eight in 1949, two in 1950, seven in 1951 and three in 1952 according to the evidence. There were sold 20 lots out of the 52 in four years.

Now there cannot be, I think, any question about the right of a man to sell his own property if he wants to. It may make quite a difference as far as income tax is concerned as to whether or not when he purchased his land he intended to sell it as soon as he could and make a profit. In all those cases I think the law is pretty clear that any profits made must be regarded as taxable but in this case I am satisfied that there was no such intention in McGuire's mind when he purchased the property. He just bought it for a home and held it from 1940 until he put on this subdivision which was nine years later. He still lives there.

Now, as I said before, there is no question but that a man has the right to sell his property and if it was not purchased as a venture or for speculation I don't think he is liable for income tax on any profit he might make. So that as far as I am concerned I don't see any distinction between selling the land as a whole or selling half of it or selling a quarter of it or selling 50 parts of it. It was his land to sell and he felt that was the best way to dispose of some of it and that is what he did.

I have not seen any case such as I was expecting to have cited to me similar to this which would have a bearing on the incident of selling a whole property or parts of a property where selling part of it like this, a subdivision, would make any difference unless it was a business in the regular business sense.

As far as I can see in this case if he was carrying on a business it was mighty poor business if he could sell only that many lots in four years and I don't think it could properly be looked upon as a business. I think it was merely a case of a man having this property and willing to sell part of it, the fact of putting up these signs advertising lots for sale I don't think having any bearing on the question of the law in the matter.

Surely the fact that a man wants to sell his own property does not constitute a business. I can't see that. If he went around the country trying to find customers and made a regular business of it that in the ordinary sense of the word

there might be a question then, or if he was selling other people's property as well as his own that might have a bearing on the case but as far as the evidence is concerned he was selling his own property and nothing more, which I think he had a perfect right to do.

1956
 McGUIRE
 v.
 MINISTER OF
 NATIONAL
 REVENUE
 ———
 Hyndman,
 D.J.
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I hesitate to differ with Mr. Fisher who is an authority on these matters but in this case I cannot agree with him. In the end if there is any appeal it may be evident he was right and I am wrong but as I see it now I am of the opinion that this is a pure case of a man selling his own property which he had acquired in a way which was not speculative and there can be no objection in law to selling it and I don't think it makes any difference whether he sold the whole property as a whole or as a half or in 50 pieces.

I am of the opinion that this appeal should be allowed and the assessment set aside and that this was not taxable property but purely a capital gain and not subject to taxation. That is my present feeling and I do not see any sense of prolonging the matter.

I would allow the appeal, set aside the judgment of the Income Tax Appeal Board, and find that the appellant is not subject to tax in connection with the disposal of this land—and costs to be taxed.

Judgment accordingly.