BETWEEN:

HAROLD DIAMOND, SARAH DIAMOND, ESTELLE DIAMOND .. APPELLANTS;

AND

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

Winnipeg 1966 Oct. 4, 5

Ottawa Oct. 31

Revenue—Income—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 27(1)(e) and 139(1)(e)—Capital gain or income—Investment or speculation—Purchase and joint deals in vacant lands by members of family—Secondary intention of purchaser—Passive and silent roles of partners—Profits on properties taxable—Business loss claimed by one participant or offset—"An undertaking"—"A venture in the nature of trade"—"A business"—Appeal dismissed.

Harold Diamond and his brother-in-law Michael Shnier decided to operate a drive-in theatre on the outskirts of Winnipeg through a family corporation. During the year 1952, they purchased a five-acre strip of land near the theatre. The five-acre parcel of land was sold in five sales between 1953 and 1958.

On the 1st of July, 1953, Harold Diamond and Michael Shnier purchased a 70 acre lot near the theatre and convinced Sarah Diamond to put up the money and the property was registered under her name. It was agreed that Sarah Diamond would provide the funds for the purchase but arrangements were made that Harold Diamond and Michael Shnier were to share in any profits if the property was resold. In 1958, the land was sold and Sarah Diamond, Harold Diamond and Michael Shnier realized a substantial profit.

The three appellants were assessed by the Minister on their shares of the profits made from the two transactions.

The Tax Appeal Board dismissed their appeal. From that decision, the appellants sought to appeal before this Court.

The appellants argued that the profits from both transactions were capital gains because they acquired the two properties, having in mind several investment purposes abandoned, due to lack of financial means and also to the unprofitable operation of the drive-in theatre business. In addition to that situation, Sarah Diamond contended that she was entitled to deduct $15,000.00 for loss suffered by her in 1957.

Held, That the appeals are dismissed.

2. That owing to the profits made by the three appellants, the income received from the sale of the two properties was subject to tax;

3. That the appellants failed to discharge the onus of showing that at least one of the motivating reasons for the acquisition of these lands in 1952 and 1953 was not the hope and expectation that it could be disposed of at a profit;

4. That although Estelle Diamond in the first deal and Sarah Diamond in the second transaction had played a passive and silent role, having left matters in the hands of Harold Diamond and Michael Shnier, they should be in no different a position than Harold Diamond.

5. That in the Court's view, both transactions were a venture in the nature of trade, "a business", whereby all profits were taxable;

6. That the loss claimed by Sarah Diamond was not deductible as a business loss. It was not a business transaction on her part.

1966

HAROLD DIAMOND, SARAH DIAMOND AND ESTELLE DIAMOND v. MINISTER OF NATIONAL REVENUE

APPEAL from a decision of the Tax Appeal Board.

A. J. Irving for the appellants.

Bruce Verchere for the respondent.

NOËL J.:—This is an appeal from a decision of the Tax Appeal Board[1] dated August 16, 1965, which dismissed Harold Diamond's appeal from the assessments of income tax for the years 1957, 1958 and 1959, Sarah Diamond's appeal for the years 1958 and 1959 and Estelle Diamond's appeal for the years 1955, 1956, 1957 and 1959.

Harold Diamond's appeal, as well as the appeals of both his wife, Estelle Diamond, and his mother, Sarah Diamond, were all heard at the same time and it was agreed by counsel that the evidence herein should apply as well to the two other appellants.

There is no dispute as to the figures involved in these appeals and the main issue in all of them is whether the amounts received by the appellants from the sale of vacant land situated on the outskirts of Winnipeg are capital gains or trading receipts.

Harold Diamond's 1957 assessment, however, is based entirely on the assumption made by the respondent that his spouse earned in 1957 income in excess of one thousand ($1,000) dollars and for that reason he was not in 1959, by virtue of paragraph (*b*) of subsection (2) of section 26 of the *Income Tax Act,* entitled to a deduction of two thousand ($2,000) dollars permitted by paragraph (*a*) of subsection (1) of section 26 but was entitled to a deduction of one thousand ($1,000) dollars pursuant to paragraph (*b*) of subsection (1) of section 26 of the *Income Tax Act.* I should also add here that counsel for the appellants stated at the trial that he abandoned the contention raised in the case of Harold Diamond and his wife, Estelle Diamond, that the money invested by the appellants in common shares, preferred shares and loans of Portage Drive-In Ltd. and Prairie Drive-In Ltd. should be held to be deductible as business losses under section 27(1)(*e*) but did not abandon Sarah Diamond's alternative argument that if it is found that she has engaged in a trading transaction with respect to the McInnes property that the loss she has sustained in the Balstone Farms option of $15,000 be con-

[1] (1965) 39 Tax A.B.C. 133.

sidered as a business loss deductible in accordance with the provisions of section 27(1)(*e*) of the *Income Tax Act*.

During the year 1952, Harold Diamond and one Michael Shnier (sometimes called Max) his brother-in-law, decided to establish two corporations, Portage Drive-In Ltd. and Prairie Drive-In Ltd., to operate drive-in theatres in the Province of Manitoba. Shnier had some interests in a drive-in theatre already in operation in Winnipeg and, therefore, was experienced in that type of business. The two partners, therefore, sought out land on the outskirts of Winnipeg for the above purpose and made several attempts to purchase a portion (15 acres) of a property hereinafter referred to as the McInnes property, situated on highway No. 1, municipality of Assiniboia, some three or four miles west of Winnipeg. They were not successful in purchasing the above land and during the year 1952 they purchased another property slightly west of the McInnes property some six miles (15 to 20 minutes) from the city of Winnipeg. They established thereon a drive-in theatre known as the Circus Drive-In Theatre owned by Portage Drive-In Ltd. in which Harold Diamond and his wife, Estelle Diamond, held a one-half interest and Shnier and his wife held the other; they also, some time later, established and operated another drive-in theatre known also as the Circus Drive-In Theatre owned by Prairie Drive-In Ltd. situated at Portage La Prairie, Manitoba, in which Harold Diamond and his wife, Estelle Diamond, also held a one-half interest and Michael Shnier and his wife held the other half.

During the year 1952, Harold Diamond and Michael Shnier, having been approached by the municipality of Assiniboia, caused their respective wives to acquire, for $1,500, a strip of real property (containing five acres) for which Estelle Diamond paid $750 and Mrs. Shnier paid $750. This land, situated directly across from the Circus Drive-In Theatre of Portage Drive-In Ltd., was registered in the joint names of Estelle Diamond and Mildred Shnier.

Both of these ladies owned one share each of Portage Drive-In Ltd. and Prairie Drive-In Ltd. as well as a number of preferred shares. They did not carry out the negotiations which led to the purchase of the five acres which was carried out by their respective husbands nor did they have anything to do with a number of sales of the lots of this

1966

HAROLD DIAMOND, SARAH DIAMOND AND ESTELLE DIAMOND v. MINISTER OF NATIONAL REVENUE

Noël J.

parcel of land, Estelle Diamond admitting, however, that she did exactly what her husband told her to do with respect to the purchase as well as to the sales and relied entirely on him in this regard. The above five acre parcel was sold as follows:

(1) 1st July 1953—
Sale of lots 1-8 block 1 plan 1120 to Engelhardt Stelzer for $3,390 00
Profit . . . . . $ 3,021 40

(2) 21st October, 1954
Sale of lots: 6 block 12 plan 1120
1-5 block 12 plan 1120
7-8 block 12 plan 1120
to Henry Schultz and Lloyd Richmond for $11,400 00
Profit $10,902 87

(3) 18th August 1955
Sale of lot 22 block 1 plan 1120 to Henry Schultz for $200 00
Profit . . . . . $ 125 53

(4) 19th May 1957
Sale of lots 1-8 block 11 plan 1120 to Canadian Oil Companies Ltd. for $15,000 00
Profit $13,344 52

(5) 7th May 1958
Sale of lots 1-8 block 22 plan 1120 to Max Yale Diamond for $10,000 00
Share of Profit applicable to Estelle Diamond $ 4,655 60

One half of the profit realized from the sales of the above land only is applicable to Estelle Diamond of which $2,-706.45 was assessed in 1955, $2,582.26 in 1956, $6,672.26 in 1957 and $3,711.05 in 1959.

During the early part of the year 1953, the "McInnes property", which was until then being farmed, became vested in the executors of its recently deceased owner and the executors approached Harold Diamond and offered the whole of the McInnes property (70 acres) at a price considerably less than what they had previously offered for a portion of that property. As a matter of fact, the offer made by Harold Diamond and his partner for 15 acres of the McInnes property in 1952 went as high as $1,000 an acre but the owner then would not part with the land for less than $1,200 an acre. The executors, after his death, offered the whole of the 70 acres for approximately $12,450 and they bought it.

Harold Diamond and Michael Shnier, as well as the two corporations, were at this time without funds and in order to provide for the purchase of this property, the appellant

convinced his mother, Sarah Diamond, to put up the money, which she did. Upon completion of this purchase, the property was transferred from the McInnes estate to Michael Shnier on October 19, 1953, and then registered in the name of Sarah Diamond on November 7, 1953. On October 1, 1954, an agreement was signed between Sarah Diamond, Michael Shnier and Harold Diamond, whereby Sarah Diamond (1) undertook not to sell the McInnes lands before October 1, 1958, without the consent of both Michael Shnier and Harold Diamond; (2) agreed that if before October 1, 1958, Michael Shnier and Harold Diamond brought to her a purchaser for cash of the lands and Michael Shnier and Harold Diamond both authorized her in writing to sell the land to the purchaser she would agree to sell provided the amount of the purchase price was such that after deducting the moneys she paid for the lands together with costs incurred by her and all moneys expended by her for taxes and maintenance of said lands and interest on all moneys paid out by her at 4% from the date of respective payment, it would be sufficient to leave her with a profit of at least $5,000. It was further stipulated in this agreement that "in the event the profit, after deducting income tax that she may have to pay (sic) by reason of said sale of the lands exceeds $5,000 but does not exceed $15,000, she agrees to divide such excess in equal shares" between Michael Shnier, Harold Diamond and herself. Any excess over $15,000 was to be divided equally between the three of them; (3) she agreed that if at any time before she sold the land Michael Shnier and Harold Diamond together would tender to her in cash two-thirds of the moneys paid by her for the purchase of the said lands plus two-thirds of the costs incurred by her in obtaining title to said lands, plus two-thirds of all taxes and other moneys that she had to expend in respect to said lands, plus the interest then she shall transfer to each of Michael Shnier and Harold Diamond an undivided one-third interest in the said lands.

On May 11, 1956, Harold Diamond wrote to Michael Shnier referring to the above agreement and in paragraphs 2 and 3 of this letter stated:

> I further agree to act along with you on your decisions in order to exercise that agreement in our behalf. It is specifically understood that Harold Diamond does not have to abide by a decision of Max Shnier to sell the land unless the total sale price is a minimum of $1,250 per acre.

1966

HAROLD DIAMOND, SARAH DIAMOND AND ESTELLE DIAMOND v. MINISTER OF NATIONAL REVENUE

Noël J.

It is also understood that whatever profit or loss is made on the sale of this land, both Max Shnier and Harold Diamond will share equally.

On July 7, 1958, Michael Shnier and Harold Diamond wrote to Sarah Diamond, c/o Nitikman & Nusgart, solicitors, referring to the agreement of October 1, 1954 between her and both of them and to the clauses contained in the agreement, advising her that they believed "that Diamond Agencies Ltd. are desirous of purchasing the said land at the price of $1,250 per acre and we do hereby authorize and instruct you to execute in favor of the said Diamond Agencies Ltd., and to deliver to its solicitor, Max Yale Diamond . . . an option to purchase said lands for the price of one thousand two hundred and fifty ($1,250) dollars per acre, the option to be in such form and on such terms as you see fit . . .".

"The option which you are to grant will be from yourself and the two of us, and we will join in the execution of the said option".

On October 9, 1958, Harold Diamond, Michael Shnier and Sarah Diamond wrote to Messrs. Nitikman and Nusgart in connection with the transfer by Sarah Diamond of the McInnes land stating that these solicitors would receive cash in the sum of $29,278.25 "being the balance of the cash payment in respect of the aforesaid transfer" which they would be authorized to disburse by paying to Sarah Diamond the sum of $19,867.06, and after deducting their fees of $1,000 plus disbursements, by dividing the balance remaining into three equal parts, one part to Sarah Diamond, one to Harold Diamond and one to Michael Shnier.

On the same day, October 9, 1958, Sarah Diamond, Michael Shnier and Harold Diamond entered into another agreement whereby, after referring to the agreement of October 1, 1954, the option to Diamond Agencies Ltd. and the sale to the latter of the McInnes land, the parties therein confirm that the said sale is at and for the price and sum of $86,500 payable $30,000 in cash and the balance to be secured by a mortgage from the said Diamond Agencies Ltd. in favour of the appellant, Sarah Diamond and Michael Shnier for $56,500 and interest at 6% per annum.

The parties also agreed therein that out of the cash payment of $30,000, Sarah Diamond shall be paid firstly all monies she paid for the lands with costs incurred by her

and interest, Nitikman and Nusgart shall be paid their legal fees and disbursements and any balance remaining shall be divided equally between the three parties. It is to be noted that the amount of $5,000 to be paid to Sarah Diamond in the previous agreement has now been deleted and she now shares equally with the other two partners.

The agreement contains a further clause 3(*a*) and (*b*) which reads as follows:

> 3. The parties further agree that the monies secured by the real property mortgage shall, when realized, be disbursed and divided as follows:
>
> (*a*) There shall be paid firstly to the Party of the First Part (Sarah Diamond) all monies which the said Party of the First Part shall be required to pay and shall pay by way of income tax payable by her by reason of the sale of the said lands; (sic)
>
> (*b*) the balance of the monies shall be divided equally between the Parties of the First, Second and Third Part.

Harold Diamond's share of the profit from the sale of the McInnes property was $22,295.85 of which $7,718.91 was assessed in 1958 and $14,863.08 in 1959 and Sarah Diamond's share of the profit was $25,551.91 of which $8,-846.17 was assessed in 1958 and $17,033.66 in 1959.

It appears clearly from the above that the McInnes property was purchased on a partnership basis by Harold Diamond, Michael Shnier and Sarah Diamond, with the latter supplying the funds and all eventually dividing equally the profit realized from its sale. It is true that Sarah Diamond seems to have played a passive and silent role in this matter but as she was content to leave the handling of the jointly held property to the other two she should be in no different position than they are. If the true nature of that transaction is a business transaction, any profit derived therefrom by any of them should be held taxable (compare *M.N.R. v. C. H. Lane*[1]).

It also appears that although Estelle did not know why she was purchasing an interest in the 5-acre property, her husband Harold knew and as she relied entirely on him in purchasing the interests as well as in selling the land, the latter's intention and actions also become relevant in determining the nature of the transactions which allowed her, over a period of years, to benefit from the profitable sales of the land.

[1] [1964] C T.C. 81.

1966

HAROLD DIAMOND, SARAH DIAMOND AND ESTELLE DIAMOND v. MINISTER OF NATIONAL REVENUE

Noel J

The position taken by the appellants herein is that the profits realized from the sale of the 5-acre parcel as well as the McInnes property are all non-taxable as capital gains; that the 5-acre property acquired by the two wives was to be used to build a motel, a service station and a drive-in restaurant and that the McInnes property acquired by Sarah Diamond in partnership with Harry Diamond and Max Shnier was for the purpose of establishing thereon a pitch and putt golf course, a stock car racing track and, according to Harold Diamond, it was also a good purchase in that it prevented a competitive drive-in theatre from establishing itself on this land which was closer to Winnipeg than their Drive-In theatre. The appellant, Harold Diamond, admits that no specific arrangements had been made to finance these projects and that the two partners were hoping to be able to obtain sufficient funds from the operations of their two drive-in theatres. He stated that in no case did they attempt to sell the land outright but that they were trying to develop Assiniboia to attract people. He further stated that they had no fixed objective but were trying with a lot of ideas. The evidence discloses that the two partners had arranged no financing for the establishment of a restaurant or a motel, had no plan or drawings prepared and were merely toying with the idea that if their drive-in theatre operations were profitable, they could consider such developments. In cross-examination, he was at one stage referred to his evidence before the Tax Appeal Board, p. 109 of the transcript, and agreed that he had then stated that it was in their mind that if they could not use the property "we would have to say that we would have to sell it".

The appellant's explanation as to why they did not go ahead with all these projects but sold the land instead is that when they started their drive-in theatre business they were confident that they could, based on the happy experience of Michael Shnier in the North Main Drive-In operation in which he held an interest prior thereto, anticipate a substantial profit; their estimation was that they would earn between $65,000 to $75,000 annually which was 40% of what the North Main Theatre had been doing and this would have enabled them to realize their projects. The first year of operation, however, turned out to be disappointing in that a loss after depreciation of $488.49 was incurred in 1952 and a small profit of $471.59 was realized after de-

ing and when the partners needed funds, but here again the preciation in 1953. The business then started to deteriorate towards the end of 1953-1954 and declined drastically after 1954. It was operated at a loss until 1956 and then the land and the fixtures were sold to Western Theatres Limited for $82,000 in 1957. Harold Diamond explained this unfortunate turn of events because of the advent of television in 1954, its novelty, people preferring to stay home and watch television rather than going out to see a movie. Their operations were also hampered by the fact that they could only get last run films after every theatre in Winnipeg had shown them.

Harold Diamond and Estelle Diamond later sold their shares in Portage Drive-In Ltd. for $4,000 and in Prairie Drive-In Ltd. for $18,500. The appellant Harold Diamond then entered into a new business, the cold storage business and is still in it.

Now, although the lack of funds may have explained why some of these projects did not materialize, the evidence discloses that a sale made as early as July 1, 1953, i.e., when the two partners should have been confident that their drive-in theatre operations would be successful, could not be explained for this reason and that is the sale made to Engelhardt Stelzer for $3,390. This gentleman was in the restaurant business and approached the two partners with the idea of establishing on the property a drive-in restaurant. Now, although here Harold Diamond claimed that their intention was to set up a restaurant operation themselves, they do not appear to have resisted at all Stelzer's appeal to purchase land for this very purpose. I might also add that after buying the land he did not build a restaurant on it. The only conclusion one can arrive at in this case is that one of the motivations of the two husbands in purchasing the land was to sell it whenever feasible and, of course, this is what they did at a profit of $3,021.40. The sale of the lots to Henry Schultz on October 21, 1954, at a price of $11,400 and at a profit of $10,902.87, as well as the sale to the same purchaser of lot 22, block 1, plan 1120, for $200 at a profit of $125.53 is also significant in that the purchaser, according to his evidence, was approached on a job by Mr. Shnier who offered to sell him the property, This, of course, occurred in 1954, when business was declining and when the partners needed funds but here again the

1966

HAROLD DIAMOND, SARAH DIAMOND AND ESTELLE DIAMOND v. MINISTER OF NATIONAL REVENUE

Noël J.

conduct of Mr. Shnier is consistent with an intention of a relatively quick resale.

The conduct of the partners with regard to the sale made to Canadian Oil Companies Ltd. of lots 1-8, block 11, plan 1120, for $15,000 at a profit of $13,344.52 on May 19, 1957, although also at a time when they needed funds, does not indicate any real and serious intention to establish a filling gas station on the property. Indeed, their only attempt, according to Harold Diamond, to establish a gas station was when he discussed this possibility with Canadian Oil the year before but did nothing to establish it. They ended once again by selling the lots to Canadian Oil for the site and here again the only conclusion one can arrive at from such conduct is that if the two partners intended to build a gasoline station on this land, they surely must have also had an alternative of selling to build if they could not go ahead with their plan. The balance of the 5-acre parcel was disposed of on May 7, 1958, to Max Yale Diamond for $10,000. It therefore appears that the totality of this 5-acre parcel was disposed of from 1953 to 1958 with none of the various projects intended by the partners realized, nor from the evidence can I see that any of the purchasers of the land used it for any particular development.

In my opinion the above evidence is not sufficient to rebut the obvious inference from all the circumstances that at least one of the motivating reasons for the acquisition of the vacant 5-acre land was the hope and expectation that it would be possible to dispose of it at a profit and, of course, if that was one of the motivating reasons, profits made upon subsequent disposition of the property are taxable in accordance with *Regal Heights v. M.N.R.*[1].

I now come to the purchase and sale of the McInnes 70-acre property purchased in 1953 and sold at a profit of approximately $74,000 in 1958. It appears from the evidence that although the partners did not need this land for their business, it was too good a bargain to resist. They had failed to buy 15 acres for $15,000 in 1952 and they were offered the whole of the 70 acres for $12,500 in 1953. The appellant's plans to use this property are still more nebulous and uncertain than those for the 5-acre parcel. Harold Diamond states he wrote to a company who owned a golf course near Chicago to obtain some information but the

[1] [1960] S.C.R. 902; [1960] C.T.C. 384.

short golf course or driving range never materialized and although he claims he had some conversations with a man interested in setting up a stock car racing track, nothing ever came of that either. A portion of the land was rented one year to a man who operated a driving range who, however, failed to pay any rent. A man was found who leased the land on a share crop basis and the net revenue from this operation totalled, before municipal taxes, $932.54 for the years 1954-1956-1957.

Here again the inference is inescapable from all the circumstances that at least one of the motivating reasons for the acquisition of this land was the hope and expectation that it could be disposed of at a profit. This conclusion is further supported by the agreement between Sarah Diamond, Harold Diamond and Michael Shnier of October 1, 1954, where the intention to sell is confirmed by the measures taken therein to insure a proper distribution of profits in the event of a sale and where Mrs. Sarah Diamond's tax liability in the case of a sale of the land is even provided for.

The appellant, Harold Diamond, embarked on a number of ventures in connection with a housing development and the promotion of a gas company. He also acted for his brother, Larry Diamond, in taking a $5,000 option on the Fink property for the purpose of purchasing this 177 acre property on which his brother, a real estate broker and land developer, intended to set up a housing development for Air Force families. The development did not go through and Larry Diamond lost the $5,000 option money. Harold Diamond's expectation of profit from this venture was that he was to work in the project as a field man and would receive shares in the company to be incorporated.

In my view, neither of these ventures are particularly relevant or helpful in determining the main issue in these appeals which depends rather upon the proper analysis of the transactions which gave rise to these appeals.

They do indicate, however, the business ability and enterprise of Harold Diamond, one of the appellants, who, although confined to a wheel chair, has entered into a number of enterprises one of which, however, ended in a loss of a deposit of $15,000 advanced by his mother, Sarah Diamond, and for which she is claiming a deduction under section 27(1)(*e*) of the *Income Tax Act*. In 1956 he indeed caused a deposit to be made of $15,000 for the purchase of

1966

HAROLD DIAMOND, SARAH DIAMOND AND ESTELLE DIAMOND v. MINISTER OF NATIONAL REVENUE

Noel J.

Balstone Farms situated behind the drive-in theatre, at a time when he was acting for The Great Plains Gas Company. The land was to be used for a housing and industrial development and was expected to create a market for the company's gas. This money had been obtained from his mother, Sarah Diamond, in whose name the option was registered. She, however, stated that she had expected no profit from this deal which would go all to her son Harold and hoped only for the return of her money. The money, however, was lost when the financial company withdrew its backing and the option was dropped. Sarah Diamond now claims this $15,000 as a loss to offset the profits made in the sale of the McInnes property in the event these profits are held to be taxable. She states that "if (she) has engaged in an act of business with respect to the McInnes property, that the Balstone Farms option should be similarly construed as an act of business and the loss incurred in the sum of $15,000 is therefore a business loss for the taxation year 1957 and deductible in accordance with the provisions of section 27(1)(*e*) of the *Income Tax Act*.

I would gladly comply with her request if the above loss could be considered as a business loss. However, in view of the evidence adduced by her and confirmed by Harold Diamond, that is not possible. Indeed, it appears that the amount of $15,000 was simply turned over to Harold Diamond by Sarah Diamond upon his request as an accommodation. She loaned him this money and expects to get it back and never hoped to participate in the profits had the option been accepted and the property purchased. The sole beneficiary would have been Harold Diamond and Sarah Diamond's alternative argument must, therefore, be denied.

Having regard to the evidence adduced in this case as a whole it appears clearly to me that one of the motivating reasons which caused them to acquire these lands in 1952 and 1953 was a hope and expectation that they could resell them at a profit. In any event, I am not convinced by the evidence that the appellants have discharged the onus of showing that such was not one of their motivating reasons.

It therefore follows that the appellants' appeals fail and are dismissed with costs. The respondent, however, will be entitled to the cost of one appeal only as these appeals were heard together on the same evidence.