BETWEEN:

ANNA HINCHEY MARTIN.....APPELLANT;

1948

Jan. 22, 23
July 30

AND

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

Revenue—Income—Excess profits—Excess Profits Tax Act 1940, c. 32, s. 2 (1) (g)—"Carrying on business"—Landowner renting own properties and providing various services therewith is engaged in a commercial enterprise—Appeal dismissed.

Appellant inherited a number of houses and apartment buildings and also furniture and fixtures. She rented the houses and apartments to tenants, except for a room in one of the apartments which she retained for her own use. Appellant acquired new houses and apartments as her own property and these she also rented to tenants. Some of these houses and apartments she rented furnished and in some instances supplied heat, refrigeration and electric stoves, linen and furniture. She employed janitors and office assistants. At no time did she manage or let property belonging to any one other than herself. Appellant was assessed for excess profits tax and from such assessment she appealed.

Held: That the appellant carried on business within the meaning of s. 2(1) (*g*) of the Excess Profits Tax Act as the services supplied were not something separate and apart from the letting of the apartments, that is, the land owning; that what was let paid for and used were the apartments plus the services as constituting one composite whole, and appellant was not a mere owner leasing her own property but was engaged in a commercial enterprise.

APPEAL under the Excess Profits Tax Act.

The appeal was heard before the Honourable Mr. Justice O'Connor at Ottawa.

Rutledge C. Greig for appellant.

J. J. McKenna and *Miss Helen Currie* for respondent.

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

O'CONNOR J. now (July 30, 1948) delivered the following judgment:

These are appeals from assessments made under the Excess Profits Tax Act, Statutes of Canada, 1940, chap. 32, for the years 1940, 1941, 1942 and 1943.

1948

MARTIN v. MINISTER OF NATIONAL REVENUE

O'Connor J.

The appellant filed returns for the years 1940 and 1941 under the Excess Profits Tax Act, 1940, and the Minister of National Revenue sent a Notice of Assessment to the appellant pursuant to Section 54 of the Income War Tax Act, R.S.C., 1927, chap. 97, altering the amount of the tax as estimated by her in her return.

The appellant did not file returns for the years 1942 and 1943, and the Minister determined the amount of the tax to be paid by the appellant pursuant to the provisions of Section 47 of the Income War Tax Act. Under section 14 of the Excess Profits Tax Act, 1940, Sections 40 to 87, both inclusive, of the Income War Tax Act apply to matters arising under the provisions of the Excess Profits Tax Act.

The appellant served Notices of Appeal from the assessments upon the Minister, and the Minister affirmed the assessment. The appellant filed Notices of Dissatisfaction and the Minister confirmed the assessments.

The sole issue disclosed by the pleadings is whether or not the appellant carried on business in respect of real estate within the meaning of paragraph (*g*) of Section 2 of the Excess Profits Tax Act, 1940.

Under Section 2(1) (*g*) of the Excess Profits Tax Act, 1940, profits in the case of a taxpayer other than a corporation means the income of the taxpayer derived from carrying on one or more businesses, as defined by Section 3 of the Income War Tax Act. If the appellant carries on business within the meaning of Section 2(1) (*g*), then the provisions of the Excess Profits Tax Act, 1940, apply.

The relevant section of the Excess Profits Tax Act, 1940, is as follows:

> 2. (1) In this Act and in any regulations made under this Act, unless the context otherwise requires, the expression:—
>
> (*g*) "Profits" in the case of a taxpayer other than a corporation or joint stock company, for any taxation period, means the income of the said taxpayer derived from carrying on one or more businesses, as defined by section three of the Income War Tax Act, and before any deductions are made therefrom under any other provisions of the said Income War Tax Act.

The appellant in her evidence said that she had inherited a small duplex on the death of her mother in 1933 and that on her father's death in 1936, she inherited a number of houses and apartment buildings valued at $161,000 and furniture and fixtures valued at $5,000. She used the

front room in an apartment which she retained for herself as a combination living room and office. She let the houses and apartments and collected the rents. If a tenant wanted a furnished apartment, and if she had furniture available, she would furnish an apartment. If all the furniture was in use she would let the apartment unfurnished and advise the tenant to rent furniture from furniture stores which carried on that type of business. When her furniture was not being let it was stored. Out of the rentals from the houses and apartments she purchased additional houses and apartments and she converted single houses into duplexes and apartments and in some cases she let houses as shared accommodation. She did not sell any of the properties at any time. From 1936 to 1943 she handled only her own property and during that time she did not manage or let property belonging to anyone else.

In 1939 she filed a declaration in the partnership register in the Registry Office for the Registry Division in which she certified; (*a*) That I intend to carry on the business of a rental agency for real estate at premises known for municipal reasons as 269 Slater Street, in the City of Ottawa, under the firm name and style of the Sun Realty Company; (*b*) That the said business shall be deemed to have commenced on the first October, 1939; (*c*) That I am the only person associated in the said business.

She stated that she did this because she was tired of people calling on her and she used the name "Sun Realty Company" to hide from the tenants. Her telephone listing was changed to "Sun Realty Company". She had printed and used letterheads headed the "Sun Realty Company" with the address and telephone number, and her letter to the Department is on this letterhead. She had erected a Neon sign to advertise that there were apartments and houses to let. In 1940 she had over 150 tenants in the various apartments and houses, and she added to her holdings during the period in question 1940-1943.

Evidence was tendered by the respondent as to what the appellant did after 1943. Counsel for the appellant objected to this and I reserved the question. I am of the opinion that it is not admissible and I reject it.

During 1940-1943 the appellant let the apartments and houses in a number of ways. In the case of a duplex she, in some cases, supplied coal and the tenants or one of them

1948

MARTIN v. MINISTER OF NATIONAL REVENUE

O'Connor J.

did the firing. In all other cases the appellant supplied heat for the apartments. She also supplied refrigeration for many of the apartments. She supplied electric stoves and furniture to the extent that she had furniture available. And in some cases she supplied linen. She employed janitors for the various apartments and had office assistants on a part time basis.

The statement of revenue and expenditures attached to the 1941 return shows the following items:

Fuel	$6,151.91
Advertising	137.65
Telephone	140.23
Office and apartment cleaning	128.69
Automobile expenses for the business	800.00
Office supplies, stationery and postage	43.28

In 1943 the fuel charged was $8,969.49. The total revenue in 1940 was $49,380.57; in 1941 $59,231.89; in 1942 $68,-131.46 and in 1943 $74,149.14. The increase came, in part, from the additional properties acquired during the period but, chiefly, from increased occupancy and to a small extent from higher rentals.

The furniture was repaired and replaced from time to time. In the 1942 statement an item was charged for this of $1,404.30 and in 1943, $3,443.20.

No evidence was given as to the terms of the various lettings. I assume this was because the orders of the Wartime Prices and Trade Board had the effect of permitting the tenants to remain in possession without regard to the term of the original lease. And that this was so during the whole of the period in question.

No evidence was given as to the rents charged. I assume that following the usual practice the amounts charged would, in the majority of the letting other than single houses, include heat, refrigeration and electric stoves, but that if furniture and linen were supplied these amounts would be increased.

Neither the word "business" nor the expression "carrying on business" are defined in the Excess Profits Tax Act. There is no principle of law which lays down what carrying on business is. Neither the English nor the Canadian decisions lay down any principle or definition or legal test to be applied. All questions of this nature must of necessity

be decided upon the facts of the particular case under consideration; per Locke J., in *Argue* v. *Minister of National Revenue* (not yet reported).

In *Erichsen* v. *Last* (1), the Master of the Rolls said:

I do not think there is any principle of law which lays down what carrying on of trade is. There are a multitude of incidents which together make the carrying on a trade, but I know of no one distinguishing incident which makes a practice a carrying on of trade, and another practice not a carrying on of trade. If I may use the expression, it is a compound fact made up of a variety of incidents.

And Brett, L.J., said at page 425:

Now, I think it would be first of all nearly impossible and secondly wholly unwise to attempt to give an exhaustive definition of when a trade can be said to be exercised in this country. The only thing that we have to decide is whether upon the facts of this case it can be said that this Company is carrying on a profit earning trade in this country.

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* (2), 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 . . .

The cumulative effect of the facts already set out lead me to the conclusion that the appellant carried on business within the meaning of Section 2(1) (*g*) of the Act.

The services, heat, refrigeration, electric stoves, furniture and linen were not something separate and apart from the letting of the apartments, i.e., the land owning. What was let, paid for and used were the apartments plus the services, as constituting one composite whole.

On the facts here, in my opinion, the appellant was not a mere owner leasing her own property but was engaged in commercial enterprise. The accommodation of the property was used as the subject matter of the business.

For these reasons the appeals will be dismissed with costs.

Judgment accordingly.

(1) (1881) 4 T.C. 422 at 423.

(2) (1918-24) 8 T.C. 11 at 17.