



1958

BETWEEN :

Mar. 21

THE MINISTER OF NATIONAL  
REVENUE .....

} APPELLANT;

1959

Jan. 20

AND

GEORGE LINDSAY BOWER .....RESPONDENT.

*Revenue—Income—Income tax—Income Tax Act R. S. C. 1952, c. 148,  
ss. 3 and 4 and 127(1)(e)—“Business”—Profits from houses built  
speculatively and sold at a profit are income in seller’s hands—  
Appeal from decision of Income Tax Appeal Board allowed.*

Respondent has for many years been engaged in a large way and on his own account in business as an excavating contractor and in heavy hauling. He purchased houses and also lots on which he said that houses were erected for the purpose of providing housing accommodation for his employees by way of renting to them and that at the time of acquisition of the lots he had no intention of selling any of them. He entered into an arrangement with one Jameson, a builder, for the construction of houses on the lots and any profit from the sale of which was divided between them. None of the houses sold were either rented or sold to any employee of respondent and in assessing respondent's income tax the Minister added the profits realised by him on these sales to his declared income for the years 1952 and 1953. An appeal from such assessment to the Income Tax Appeal Board was allowed and from that decision the Minister now appeals to this Court.

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The Court found that even if respondent intended doing something to secure residences for his employees at the time he bought the lots in question he had completely abandoned that intention at the time he decided to build the houses on them.

*Held:* That when the respondent entered into the building arrangement with Jameson they joined forces in a business scheme to construct and sell houses at a profit and with no real intention of retaining them as an investment.

2. That respondent in doing what he did was engaged in the business of constructing and selling houses in the same manner as a speculative building contractor would do and was therefore in business at least to the extent defined as "business" in s. 127(1)(e) of the *Income Tax Act*.
3. That the profits from the sale of the houses are taxable income in respondent's hands.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Cameron at Regina.

*M. A. MacPherson, Q.C.* and *Allan Irving* for appellant.

*E. W. Gerrand, Q.C.* for respondent.

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

CAMERON J. now (January 20, 1959) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated September 14, 1956<sup>1</sup> allowing the respondent's appeal from assessments made upon him for the years 1952 and 1953. In each of these years the respondent sold certain houses at a profit, and being of the

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opinion that such profits were not of an income nature, omitted them from his taxable income. In re-assessing the appellant on March 7, 1955 the Minister added to his declared income the sums of \$2,757.10 and \$1,759.33 respectively for the years 1952 and 1953. There is no dispute as to the amounts involved, the sole question being whether, in the circumstances, such profits form part of the respondent's taxable income.

In the main, the facts are not in dispute. The respondent, who resides in Regina, has for many years been engaged in a large way on his own account in business as an excavating contractor and in heavy hauling. At the end of the Second World War his business expanded rapidly due to the increased demand for housing. He invested heavily in new machinery and added to the number of his employees who, in the years in question, numbered from ten to twenty. He found some difficulty in retaining his skilled employees who were unable to secure or retain suitable residences and accordingly he says he decided to do something to remedy that situation. He had in mind the purchase of lots on which he would erect houses of a suitable type and then rent them to his employees. It may be noted here, so as to avoid repetition later on, that the respondent stated that the properties which he acquired from 1946 to the end of 1951 and whether they were houses, or lots on which he later built houses, were all acquired with the intention of renting them to his employees. At the time of acquisition he says he had no intention of selling any of them.

Now it is a fact that to some extent that purpose was carried out. In 1951, for \$1,000 he purchased a small residence at 195 Athol Street and rented it to an employee who is still his tenant. In the same year, he purchased another lot at 1901 Garnet Street and, after moving a residence thereon, rented it to another employee; its total cost was about \$6,000. Again, in 1951 he bought another home at 1911 Montague Street for about \$6,000 and rented it to an employee Bloos, who is still his tenant. It will be noted particularly that none of the residences which were rented to his employees were constructed by the respondent. They are still his property and have no direct bearing on the question now before me. I have referred to them because

of the respondent's contention that they assist in establishing his intention in regard to the houses which he constructed and sold.

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I turn now to the evidence regarding the three houses which were sold at a profit in 1952 and 1953, namely, 3425 McCallum Avenue, 4424 Dewdney Avenue, and 4420 Dewdney Avenue. In 1949 or 1950, the respondent purchased two lots on McCallum Avenue and in 1951 two lots on Dewdney Avenue. He was not himself a builder and therefore entered into an arrangement with a friend, Mr. A. P. Jameson—a very experienced building contractor—by which they would jointly construct houses thereon, the profits to be divided between them in a manner which I need not explore. This arrangement with Jameson was carried out in all four houses to which I will refer.

On one of the lots on McCallum Avenue there existed a foundation for a house at the time of acquisition. In 1951 the respondent arranged to have a residence constructed thereon by Jameson. In the same year it was sold, upon completion, to one Schmidt, a friend of the respondent and a relative of Jameson. The respondent made a profit thereon but in his 1951 income tax return reported it as a "capital gain". That return is not before me but I record the transaction as I shall have to refer to it later in connection with the sale of 4420 Dewdney Avenue.

Prior to the construction of the houses at 3425 McCallum Avenue and 4424 Dewdney Avenue in 1952, the respondent was well aware that they would not be suitable to rent to his employees. The area seems to have improved considerably and the probable cost of construction and the extra taxes due to street paving and the like would result in a rental beyond the ability of his employees to pay. Nevertheless, he proceeded with the construction of the houses. In reference to 3425 McCallum Avenue, he stated:

Well, I still have this lot over on McCallum Avenue which has now become a liability. I knew it was of no value to build for employees at that particular time, so I told Mr. Jameson, I said: "You better go ahead and build a house over there". So Mr. Jameson went ahead and built a house. He sold it to a Dr. Good at a profit to me of \$1,100.90.

The respondent admits that that statement was applicable also to 4424 Dewdney Avenue.

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3425 McCallum Avenue, constructed at a cost of over \$11,000, was sold immediately upon completion in 1952, both Jameson and the respondent realizing a profit of \$1,100.90. No effort was made to rent it to an employee or to anyone else and quite obviously it was built speculatively with the intention of selling it if possible at a profit.

The same conclusion must be reached in regard to the house built at 4424 Dewdney in 1952 and sold in the same year. It was never rented to an employee or anyone else and was sold for \$13,000 within one month of its completion, the respondent realizing a total agreed profit on the operation of \$1,656.20 after allotting a portion of the profit to Jameson.

It is the sum of these profits, totalling \$2,757.10, made upon the sale of 3425 McCallum Avenue and 4424 Dewdney Avenue that the Minister, in assessing the respondent for 1952, added to his declared income.

In 1953, under similar arrangements with Jameson, another residence, 4420 Dewdney Avenue, was constructed at a cost of \$12,481.34. On the settlement with Jameson, it is agreed that the respondent realized a profit of \$759.33. No effort was made to rent the property and after two or three months it was sold, the respondent realizing a further profit of \$1,000—a total of \$1,759.33.

The following sections of *The Income Tax Act* were applicable to each of the years 1952 and 1953.

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;

Although the Minister is the appellant in this case, the onus of proving the assessment to be erroneous is on the respondent (*Minister of National Revenue v. Simpsons Ltd.*<sup>1</sup>).

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Counsel for the respondent submits that on the evidence it should be found that the latter never had the intention to construct houses for sale; that his sole purpose was to invest his money in houses which he would construct and which he would then rent to his employees; that that purpose was frustrated by the increased building costs and taxes which rendered such houses unsuitable for his employees, and that in building the houses and later selling them, he was merely endeavouring to salvage his investment in the lots, and complying with an agreement with the city of Regina made at the time of the purchase of the lots that he would construct houses thereon.

Now the evidence as to the respondent's original intention is very sketchy and uncertain. Apart from his own statement, I find no substantial evidence to support it. If he ever intended to rent to his employees the houses which he constructed, he did not communicate that fact to them. Both Bloos and Kerr were called as witnesses on his behalf and each denied that the respondent had ever discussed with them the possibility of renting any of the houses which were sold. Kerr stated that his only conversation was in reference to 1911 Montague Street, that he was not interested in any way and that no mention was made of renting or buying it. Bloos stated that his only discussion was in regard to that property which he rented and still occupies.

There is good reason, also, to doubt the respondent's evidence in regard to the construction of 4420 Dewdney Avenue. His evidence is that he built it in 1953 for one of his key employees Sogz, and that he was the only employee who could afford to pay the rent for a house of that type. He states that Sogz became ill in September 1953 about the time the house was completed, and left his employ. Consequently, he held the property only a few months and then sold it. Sogz was not a witness at the trial and therefore there is little evidence to support the

<sup>1</sup>[1953] Ex. C.R. 93.

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statement of the respondent. It is informative, however, to examine the respondent's statement as to why he built this house for Sogz. He says that in 1951 when he built the first house on McCallum Avenue, he intended it for Sogz, that *after it was completed* he decided to sell it to Schmidt and for that purpose secured Sogz' consent and then agreed to build another house for him later. In 1953, therefore, he says he planned to rent 4420 Dewdney to Sogz. Grave doubt is thrown on this evidence of the respondent by that of the witness Jameson. He states that the property sold to Schmidt in 1951 was built by him *for Schmidt* and not for Sogz. He was in an excellent position to know the facts as he was the builder and related by marriage to Schmidt. The respondent himself admitted that there was no definite arrangement with Sogz in regard to that house. He said:

We had discussed it but we had never finalized anything because we were too busy to go into details. I did not know what the cost would be.

In the light of all the circumstances, I have reached the conclusion that even if the respondent had a vague intention of doing something to secure residences for his employees at the time he purchased the lots at McCallum Avenue and Dewdney Avenue, he had completely abandoned that intention at the time he decided to build the houses thereon. There was then a great demand for houses in Regina and the evidence clearly establishes that a ready profit could be realized on the construction and sale of houses. I am satisfied that when the respondent entered into the building arrangements with Jameson, they joined forces in a business scheme to construct and sell houses at a profit and with no real intention of retaining them as an investment. In fact, none were rented and each was sold within a very short time after construction.

In my opinion, therefore, the respondent, in doing what he did, was engaged in the business of constructing and selling houses in the same manner as a speculative building contractor would do. He was therefore in business at least to the extent mentioned in the definition of "business" as found in s. 127(1)(e) cited above. The profits therefrom are therefore taxable income in his hands.

For these reasons, the appeal of the Minister will be allowed, the decision of the Income Tax Appeal Board set aside, and the re-assessments made upon the respondent for the years 1952 and 1953 affirmed. The Minister is also entitled to his costs after taxation.

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*Judgment accordingly.*