1958

Feb. 19, 20, 21 & 28

Apr. 18

BETWEEN:

STUYVESANT-NORTH LIMITED .....APPELLANT;

AND

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

Revenue—Income Tax—Income Tax Act S. of C. 1948, c. 52, ss. 3, 4 and 127(1)(e)—Appellant engaged in business of underwriting and trading in securities obtaining shares of mining company as consideration for advancing capital—Transaction made in ordinary course of appellant's business—Profit from sale of such shares constitutes income in hands of taxpayer—Appeal dismissed.

[1] (1854) 23 L.J. Ex. 179 at 183.

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Appellant, incorporated in 1945, engaged in the business of underwriting and trading in securities and in such business it acquired shares both by purchases in the market and under contracts with mining and oil companies seeking to obtain capital to finance their undertakings by sale of shares of their capital stock. It is not a loan company nor has it been engaged in business as a moneylender in the ordinary sense. By two agreements it loaned money to a mining company receiving from that company the right to purchase shares at a price below the market price of such shares. The money loaned was to be used by the borrower to build a mill and was to be repaid in a certain manner with interest at five per cent. Appellant purchased the shares as provided in the agreements and subsequently sold them at a profit. The Minister assessed appellant for income tax on this profit. The appeal to the Income Tax Appeal Board was disallowed and a further appeal to this Court was taken.

Held: That each of the transactions was a transaction to obtain a right to acquire shares for sale in the course of its business and as engaging in contracts giving appellant the right to acquire shares at favourable prices so that profit might be made from selling them was one of the common methods employed by appellant in carrying on its business of dealing in shares, these transactions were not mere investments dissociated from the appellant's ordinary business but were in fact operations of that business.

2. That the appellant's ordinary business included that of making profit by acquiring and marketing shares and in carrying on this business one method commonly used was to enter into contracts in which it obtained rights to acquire shares; that the transactions in question were ones by which appellant obtained rights to acquire shares and the dominant purpose of appellant in entering into each of such transactions was to obtain the right to acquire such shares for sale in the course of its business and that the transactions themselves were connected with and part of a continuous course of dealing by the appellant with the mining company for the purpose of gaining profit by acquiring and marketing its shares.

3. That the transactions were transactions of the appellant's business within the meaning of the *Income Tax Act*, ss. 3, 4 and 127(1)(*e*) and the moneys realised from the sale of the shares were income and properly assessed.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Thurlow in Ottawa.

H. H. Stikeman, Q.C., P. N. Thorsteinsson and *W. D. Goodman* for appellant.

D. W. Mundell, Q.C., and *J. D. C. Boland* for respondent.

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

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THURLOW J. now (April 18, 1958) delivered the following judgment:

This is an appeal from the judgment of the Income Tax Appeal Board[1] dismissing an appeal by the appellant from an income tax assessment for the year 1951. In making the assessment, the Minister added to the income reported by the appellant a sum realized by the appellant in 1951 on the sale of certain shares of Donalda Mines Ltd. which the appellant had acquired through two transactions in each of which the appellant loaned a sum of money to Donalda at interest and, as part of the transaction, obtained the right to purchase a certain number of shares at a price far below the current market price. The Minister treated the receipts from the sale of the shares acquired pursuant to these transactions as income arising from the appellant's business, and the issue between the parties is whether or not he was correct in so doing.

The appellant was incorporated under the *Dominion Companies Act* in 1945 and for some years prior to and at the time of the events in question was engaged in underwriting and trading in securities. In this business, shares were acquired by the appellant both by purchases in the market and under contracts with various mining and oil companies seeking to obtain capital to finance their undertakings by sale of shares in their capital stock. The contracts usually took the form of a firm agreement on the part of the appellant to purchase a certain number of shares at a stated price and one or more options giving the appellant the right to purchase additional shares within times and at prices stated in the contract. In these contracts the price of the shares which the appellant undertook to buy was below the current market price, and this afforded the appellant some opportunity to sell them at a profit. In such cases, there would be a chance to make further profit in the event of an increase in the market price of the shares, and the option or options contained in the contract afforded to the appellant the opportunity to take advantage of any sufficient advance in market price without being bound to purchase the shares included in them. On the other hand, by undertaking to purchase a definite number of shares at a firm price the appellant ran the risk of loss if the market price should fall below that price before the shares were sold.

[1] 14 Tax A.B.C. 384.

In giving such a commitment, one of the matters of importance to the appellant was the purpose for which the mining or oil company required the capital which it would obtain from the sale of its shares. The appellant was interested in the speculative chance of a rise in the market price of the shares, and that chance was to a considerable extent dependent upon the money which the appellant paid for them being used for purposes holding possibilities of a discovery that might quicken the demand for them. For this reason, purposes such as the construction of a mill for the processing of ore bodies already discovered did not offer the same attraction to the appellant as purposes related to exploration for new bodies of ore or oil. Until the events in question, the appellant had never underwritten shares or debentures or advanced money to enable a company to finance the construction of a mill.

The contracts were not all alike. Sometimes there was no firm commitment but simply an option to purchase shares granted by the company to the appellant for some other consideration. And such consideration might be an advance by the appellant of money to be repaid by the mining or oil company, with provisions in the contract for recovery of the advance from moneys payable by the appellant if the option should be exercised.

The appellant is not a loan company, nor has it been engaged in business as a moneylender in the ordinary sense. But in the course of its business the appellant from time to time had made small advances to certain mining and oil companies with which it had business dealings, and it had made substantial advances in a few cases in the expectation of obtaining repayment from the moneys to accrue to the mining or oil company under prospective underwriting contracts. No interest or bonus was received, nor was any security taken by the appellant for any of these loans, though some of them were outstanding for considerable periods.

The shares acquired by the appellant through contracts with mining or oil companies were usually marketed over a period of time, depending on market conditions, and the appellant entered into such contracts only when it regarded the time and marketing conditions as appropriate. In the course of its business, the appellant also bought shares of the same companies on the market, not merely when the

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market price was attractive but also to support the market price and thus maintain an orderly market and protect the value of its holdings.

One of the mining companies with which the appellant had entered into contracts was Donalda Mines Ltd. By the first of the appellant's contracts with this company, which was dated July 5, 1949, the appellant undertook to buy 250,000 shares at 40 cents per share and was given an option to buy a further 250,000 shares at the same price. The appellant exercised the option and purchased all of the 500,000 shares included in the contract. By another agreement dated July 12, 1949, the appellant was granted an option to buy a further 500,000 shares of Donalda at prices ranging from 55 cents to $1 per share. What consideration was given by the appellant for this option does not appear. In October, 1949, the appellant purchased 50,000 of the shares included in the option at 55 cents. By a further contract, dated November 4, 1949, the agreement of July 12, 1949 was cancelled, and the appellant gave a firm commitment to buy 150,000 shares at 50 cents and obtained options on a total of 300,000 shares at prices ranging from 55 to 75 cents. This contract contained provisions, effective so long as the options subsisted, by which Donalda agreed that, without the consent of the appellant, it would not issue, sell or grant options upon its treasury shares, or alter its capital, or issue securities or create any charge or mortgage upon its properties or assets, or purchase additional mining properties or sell any properties it then had. By further provisions, Donalda agreed to supply the appellant with monthly statements pertaining to its financial affairs and, in priority to others, with information pertaining to its exploratory operations. It also agreed to provide the appellant with information as to its list of shareholders. The appellant purchased the 150,000 shares comprised in the firm commitment at 50 cents in November and December, 1950 and 50,000 of the shares included in the options at 55 cents on April 6, 1950. In the meantime, by two agreements dated February 24, 1950 and February 28, 1950 the times for the exercise of the options had been extended so that the last of them would not expire before October 1, 1950 and would not then expire until terminated by a seven-day notice. What consideration the appellant gave

for these extensions does not appear, the documents merely stating that the extensions were made in consideration of $1 and other valuable consideration.

In April, 1950, shares of Donalda were being traded on the Toronto Stock Exchange at 60 to 65 cents a share. The appellant held options on 250,000 of Donalda's remaining treasury shares, the last of which options could not be terminated prior to October 1, 1950, and so long as such options existed Donalda could neither sell treasury shares to anyone else nor borrow money on the security of its assets for the purpose of financing its undertakings. Under the market conditions then prevailing, the appellant was not anxious to exercise its options and acquire further shares at the option prices.

It was in this situation that the first of the transactions in question occurred. This was an agreement dated April 18, 1950 by which the appellant released its options and other rights under the agreement of November 5, 1949 and agreed to lend Donalda $100,000 in five stated consecutive instalments of $20,000 each, when requested within one year. In return Donalda agreed to use the money to procure and erect a mill and put it into operation within eighteen months, to repay the loan with five per cent interest in two years from the date of each advance, and to apply 60 per cent of the mine mill gross revenue towards the repayment of the loan in less than the two-year period. As part of the transaction, Donalda also agreed to sell to the appellant 100,000 of its treasury shares at five cents per share. The contract contained provisions, effective until the mill should be built and the loan repaid, restricting the right of Donalda to deal with its treasury shares and property and to provide information, all in terms almost exactly similar to those previously mentioned as contained in the contract of November 4, 1949. In addition, the agreement of April 28, 1950 contained the following clause, the terms of which were not expressly restricted to the duration of the loan:

8. Donalda agrees that it will not sell or option to sell any of its unissued treasury shares, except on condition that it will give Stuyvesant the first opportunity of purchasing the said shares on the same terms as they are being offered for sale or option to any other purchaser and Stuyvesant shall have thirty days within which to elect whether to purchase the said shares in whole or in part.

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Though the agreement was made in April, 1950, the moneys to be advanced under it were not in fact advanced until December of that year and January and February of the following year. The 100,000 shares were issued by Donalda and received by the appellant proportionately as each advance was made, and the appellant paid the five cents per share for them. In the meantime, the appellant had arranged for a Mr. Bain to participate in the transaction to the extent of 25 per cent. Mr. Bain reimbursed the appellant to the extent of $25,000 and received 25,000 of the shares at five cents each.

Evidence as to the negotiations leading up to this transaction was given by Mr. A. G. Fisher, a chartered accountant who was the general manager of the appellant and negotiated the agreement on its behalf. He stated that he was approached by Mr. Arthur P. Earle, the president of Donalda, now deceased, who requested that the appellant lend Donalda $100,000 and that he (Fisher) was given to understand that the cost of building a mill on the Donalda property had far exceeded the estimate given by Donalda's engineers and that Donalda was short of funds and required the loan to complete the mill. This strikes me as strange in view of the fact that none of the moneys arranged for in April were advanced before the following December and even more strange in view of the fact that the minute book of Donalda, which was introduced in evidence by the appellant, indicates that the estimate for the construction and equipment of the mill was presented to a meeting of the directors of Donalda in June, 1950 and it was at that meeting that the directors authorized its mine manager to purchase equipment and erect the mill. I think Mr. Fisher is mistaken and has confused the situation obtaining at the time of the negotiation of the first loan with the circumstances in which the second loan was arranged. Mr. Fisher also stated that initially the arrangement between Donalda and the appellant was that the appellant should get the 100,000 shares as a bonus without any payment for them, but before the contract was drawn up it was discovered that Donalda was restricted by one of its by-laws from issuing shares at a discount greater than 95 per cent and the parties thereupon amended the arrangement to express this part of

it as a sale at five cents per share. In explaining this change in the arrangement, he said in the course of his examination in chief:

A. We found out that the only way this transaction could be completed, that is the loan transaction, would be to either pay the five cents per share or have Donalda go to its shareholders and have the by-law amended. By this time too much would have elapsed, and the need was fairly imminent, and we agreed to pay 5 cents per share for that stock.

Q. What need are you talking about there?

A. Donalda's financial needs.

* * *

Q. Just before the Court rose yesterday we got into an argument about market price—just to go back there for a moment, because it had a relation to something else you were telling us, namely, the reason the contracts of April, 1950 and April, 1951 provided for the purchase of shares at five cents. Would you give us those reasons again, and then we will talk about market value.

A. After Mr. Earle had approached Stuyvesant-North through me, and we had negotiated the loan and the bonus arrangement on the basis that we were to get a share of Donalda for every dollar that was loaned to the company, the matter was then turned over to lawyers for drafting an agreement. They found that there was a discount by-law that prevented Donalda from issuing shares at less than five cents per share, and we had no intention of purchasing shares. The deal was definitely a loan, but the negotiations had gone too far and too much time had elapsed; so, *rather than awaiting any change of the discount by-law, we decided that we would not quibble* about the five-cent price and we went ahead. We agreed to comply with the by-law and went ahead and made the loan on that basis.

Q. You stated you were not going to quibble about that five cents. At the time that the contract April, 1950 was entered into, do you know what price shares of Donolda were selling at on the Toronto Stock Exchange?

A. Shares were selling in the 60 to 65-cent range.

In cross-examination he said:

Q. In the result you purchased them?

A. There was a provision in the agreement that we pay Donalda five cents a share.

Q. And what it boils down to is this: You paid over a certain sum of money and you got shares; in the agreement you got the right to do that?

A. Under the loan agreement, yes.

Q. And then you did it?

A. Yes.

Q. I asked you this before, but I would like to clear it up: Why were the option agreement of November 4 and the extension agreements cancelled?

A. Because market conditions were such at the time that we did not really want to acquire additional Donalda shares.

* * *

Q. No moneys have been taken down since the preceding April, until December 18th. I understood you to say the immediate negotiation of the agreement was urgent. How do you account for that?

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A. I don't know the Donalda financial structure as such. I only knew that the costs were running away above the estimates. I don't know whether Donalda was able to keep their creditors patient in the interval or not.

Q. You had said you did not wish to wait for an amendment to the discount by-law because of the urgency of entering into the agreement. The first advance was made some seven months later.

A. I don't think I said that.

Q. I think I am quoting you accurately.

A. I don't think I said that. I think what I did say was that in order to get the shares at anything other than 5 cents *we would have had to wait* for a change in the by-law, and *we weren't going to quibble* about the five cents.

It will be observed that it was the appellant who was anxious to avoid the delay incident to a change in the by-law and that its desire to consummate the transaction without delay was such that it would not quibble about paying for the shares a sum which was the equivalent of a full year's interest on the loan. From this it seems clear that the main object of the transaction, so far as the appellant was concerned, was to obtain the shares.

On January 17, 1951 a further contract was made between the appellant and Donalda by which the appellant undertook to buy 75,000 shares at 45 cents and obtained an option to buy a further 75,000 shares at the same price. Under this contract, the appellant purchased the 75,000 shares included in the firm commitment, but it did not exercise the option.

In April, 1951, the second of the agreements in question in these proceedings was made. At that time the mill was not yet completed, and Donalda was in need of money to complete it. By this agreement the appellant undertook to lend Donalda $125,000 in two instalments, one of $50,000 on April 21, 1951 and the other of $75,000 on April 30, 1951. Donalda, on its part, agreed to use the money to complete its mill and to repay the loan with five per cent interest on April 1, 1952 and earlier than that from the first moneys received from the operation of the mill, but on a pro rata basis with the earlier loan. It also agreed to sell to the appellant 125,000 shares of its capital stock at five cents per share. At that time, shares of Donalda were being traded on the Toronto Stock Exchange at 52-53 cents. Arrangements were made for several others to participate in this loan, and the appellant itself participated in it to the extent of $50,000, which it advanced in two payments, one of $25,000 on April 5, 1951 and the other of the same

amount on April 13, 1951. Again the shares were issued by Donalda and received by the appellant proportionately as the advances were made.

In October, 1951, by another contract the appellant undertook to advance to Donalda $15,000 which Donalda agreed to use for drilling and exploration purposes on its property in locations to be approved by Donalda's engineers, but subject also to the approval of the appellant. By the terms of the contract, Donalda agreed to repay the advance on February 11, 1953 and also gave the appellant an option to buy the whole or any part of 50,000 shares at 40 cents and the right, if it exercised the option, to recover payment of the advance from the moneys payable to Donalda for the shares. The shares included in this option formed part of a purchase of 150,000 shares at 40 cents made by the appellant in January, 1952. In the meantime, between December 3 and 13, 1951, the appellant sold on the market the 125,000 shares which it had obtained through the loan transactions and thereby realized the sum in question in this appeal. The appellant continued to sell Donalda shares throughout December of 1951, and at the end of that year had sold such shares short to the extent of 45,000 shares. The loans in question were not in fact paid from the proceeds of production of the mill but were liquidated after they became due in part from the proceeds of sales of shares under subsequent contracts between Donalda and the appellant.

In support of the assessment of the receipts from the sale of the shares in question as income, the Minister relied on ss. 3, 4 and 127(1)(*e*) of *The Income Tax Act*, S. of C. 1948, c. 52. These sections are as follows:

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;

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The position taken by the Minister is that the receipts from the sale of the shares were income from the appellant's business within the meaning of these sections.

For the appellant it was submitted that the two transactions in which the appellant obtained rights to acquire the total of 125,000 shares at five cents were loan transactions beyond the scope of its ordinary business of underwriting and trading in shares, that the appellant was not in the business of moneylending, these being the only occasions on which the appellant has made commercial loans—meaning by commercial loans, loans carrying interest and a bonus and secured by promissory notes, that accordingly such transactions should be regarded as capital transactions in which the rights to acquire the shares were the appellant's compensation for incurring the capital risk involved in lending substantial sums of money without security to a company such as Donalda, that such rights were capital rights and the moneys received on sale of the shares were merely proceeds of the realization of capital assets. It was also argued that, even if the purchases of the shares pursuant to the contracts and the sales of them must be regarded as having been made in the course of the profit-making activities of the appellant, the right to acquire the shares at five cents was a capital right, and in computing the profit attributable to the purchase and sale of the shares the value of such right should be deducted from the proceeds as if such capital right had been brought into inventory by a notional transfer by the appellant of its capital to its inventory at the market value of such right. In the view I take of the case, it is unnecessary to deal with this alternative argument.

In my opinion, it is important to note that the issue to be determined does not depend on the narrow question whether or not, as between the appellant and Donalda, the right to purchase the shares was given by Donalda and received by the appellant as a premium or bonus to compensate for a capital risk, but on the broader question whether or not the receipts from the sale of the shares were receipts of the appellant's business. For, even assuming that the rights were bonuses or premiums and were given and received to compensate for the capital risks involved in making the two loans and could, on that account, be regarded as capital if the loans were mere investments, such

bonuses or premiums could not be so regarded if they were obtained in the course of the operation of the appellant's business. This distinction is clearly expressed in *Californian Copper Syndicate v. Harris*[1], where the Lord Justice Clerk said at p. 165:

> 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 . . . .
>
> 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?

In the present case, despite the fact that the transactions in question were loans for definite periods, carrying interest and involving a very material risk that the principal sums might never be repaid or recovered, and despite the fact that the appellant's business activities had not included the making of loans of that kind, the principal, if not the sole purpose of the appellant in entering into the transactions was not to earn the interest so provided for but to obtain the right to acquire shares at a favourable price and to realize the profit that could be made from their sale. In my judgment, this clearly appears from the evidence of Mr. Fisher above quoted. Moreover, when entering into the transactions, the only purpose of the appellant with respect to such shares was to sell them on the market, a purpose which it proceeded to carry out in the ordinary course of its business. From the point of view of the appellant, each of the transactions was, accordingly, a transaction to obtain a right to acquire shares for sale in the course of its business. When this fact is considered in the light of the further fact that engaging in contracts giving the appellant the right to acquire shares at favourable prices so that profit might be made from selling them was one of the common methods employed by the appellant in carrying on its business of dealing in shares, in my opinion it becomes

[1] 5 T.C. 159.

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apparent that these transactions were not mere investments dissociated from the appellant's ordinary business but, in truth, operations of that business. The fact that as loan transactions they differed from others in which the appellant obtained the right to acquire shares for its business is, no doubt, a feature to be taken into account in reaching such a conclusion, but it is well settled that that circumstance does not conclude the matter. In *Atlantic Sugar Refineries Ltd. v. Minister of National Revenue*[1] Kerwin J. (as he then was) put the matter thus at p. 707:

> The Court of Appeal in England decided in *Imperial Tobacco Co. v. Kelly*, [1943] 2 All E.R. 119, that the intention with which a transaction was entered into is a feature that should be considered under the British Income Tax Act. That is an important matter under our Act but the whole sum of the circumstances must be taken into account in determining whether a profit arose as part of the taxpayer's business. A number of cases are referred to in the reasons for judgment in the Court below and they, with others, were discussed fully in argument before us. Some are on the point whether the individual or company concerned was carrying on any business and, as has been pointed out several times, a company comes into existence for some particular purpose and, therefore, different considerations apply to it than would apply to an individual. Other decisions consider what bearing upon the issue has the circumstance that it was an isolated transaction, and it is settled that the mere fact that that was so does not dispose of the matter.

In my opinion, the loans made by the appellant cannot be regarded as mere investments unrelated to the appellant's business. Elements of an investment were, no doubt, present, but present as well in each case was the circumstance that the increment to be obtained from the loan transaction included and was mainly that of a right to shares for sale in the course of appellant's business. Investment in one sense it may have been, but it was not mere investment, for it was investment made for the purpose of an operation of the appellant's business of dealing in shares.

Moreover, the evidence, instead of showing that these transactions were separate and apart from the day-to-day transactions of the appellant's business, in my opinion, supports the contrary view. At the time of the negotiation of the first loan contract Donalda, as a result of previous dealings with the appellant in the course of the latter's business, was obligated by the options and other provisions of the contract of November 4, 1949 to deal only with the appellant, at least in so far as its endeavours to raise further

[1] [1949] S.C.R. 706.

moneys for its projects were concerned. The release of such options and provisions, constituting, as they did, rights of the appellant obtained in the course of its business, was a necessary step to enable Donalda to enter into the first of the transactions in question and formed part of the transaction itself. The first loan transaction is thus connected with the earlier underwriting transactions. Next it appears that the contract evidencing the first of the loan transactions contained agreements by Donalda in favour of the appellant similar to those contained in the earlier agreement, plus an additional clause affording the appellant a right to purchase Donalda treasury shares in priority to anyone else. It can hardly be doubted that any shares that might have been acquired under this clause would have been acquired as inventory and on trading account. And since, under the provisions of the loan contract, Donalda thereafter could not raise money to finance its undertakings by the sale of its shares or by charging or selling its property except with the appellant's consent, the circumstances suggest the inference that the subsequent underwriting contracts with the appellant and the terms included in them, such as the clause giving the appellant a voice in the location of Donalda's drilling operations, resulted to some extent from the rights obtained by the appellant under the first loan contract. In my opinion, the loan transactions in question cannot be dissociated from the other transactions between the appellant and Donalda, but on the contrary were connected with such other transactions in what was a continuous course of dealing by the appellant with Donalda for the purpose of gaining profit from the acquisition and marketing of its shares.

The situation, as I find it, is thus one in which (1) the appellant's ordinary business included that of making profit by acquiring and marketing shares, (2) one of the methods commonly used by the appellant in carrying on this business was that of entering into contracts in which, for various kinds of consideration, the appellant obtained rights to acquire shares, (3) the transactions in question were transactions by which the appellant obtained rights to acquire shares, though in a somewhat unusual way, (4) the dominant purpose of the appellant in entering into each of such transactions was to obtain the right to acquire such shares for sale in the course of its business, and (5) the trans-

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actions themselves were connected with and part of a continuous course of dealing by the appellant with Donalda for the purpose of gaining profit by acquiring and marketing its shares. Certain other indicia, such as the source of the funds advanced and the fact that the certificates for the shares were not kept physically separate from other Donalda shares belonging to the appellant, were also urged as showing the revenue nature of the transactions, but, while such facts are consistent with the Minister's contention and might in a close case be of some importance, I prefer to rest this judgment on the facts above mentioned. In my opinion, the transactions in which the appellant acquired and sold the shares were transactions of the appellant's business within the meaning of the sections of *The Income Tax Act* above referred to, and the moneys realized from the sale of the shares were, accordingly, income and were properly assessed.

Counsel for the appellant stressed the judgment of the Court of Appeal in *Lomax (H. M. Inspector of Taxes) v. Peter Dixon & Son Ltd.*[1], where certain premiums and discounts obtained by an English company from its wholly owned Finnish subsidiary company in refunding an indebtedness of the subsidiary to the parent company over a long period were held to be capital and not subject to income tax, but in my opinion that case is clearly distinguishable from the present one. The question which was there being considered by the Court of Appeal was not whether or not the discounts and premiums in question were profits of a trade but whether or not they were income chargeable to tax under Case V of Schedule D of the English statute as income from possessions out of the United Kingdom or under Case III of Schedule D as discounts, and the judgment was that they were not subject to tax under Case V or Case III. In the course of a judgment with which the other members of the Court agreed, Lord Greene M.R. discussed considerations which are relevant in determining when a premium or discount should be treated as income and when not, but I think it is clear that, in doing so, he was considering such premiums and bonuses for the most part where they arise in situations of investment not within the scope of a trade, for after citing

[1] 25 T.C. 353.

examples of cases in which the question whether or not a discount or premium was capital or income might be resolved from the contract itself pursuant to which the discount or premium was received, and of some cases in which the contract afforded no answer he said at p. 362:

> A rather different case is that of a moneylender who stipulates for payment by instalments of a sum very much larger than that which he lends. From a business point of view, the excess, one would have thought, is referable largely, if not mainly, to the capital risk. So long as the moneylender is carrying on his business this is immaterial since he will be assessed under Case I, of Schedule D. It is part of his business to take capital risks.

I regard this passage not as limiting the application of Case I of Schedule D in situations of this kind to those in which the transaction is entered into by a moneylender in the course of his business but merely as the citation of an example of a kind of case in which the discount or premium would be taxable as a profit of a trade. At p. 363 Lord Greene continued:

> I refer to these problems not for the purpose of attempting to solve them but in order to show that there can be no general rule that any sum which a lender receives over and above the amount which he lends ought to be treated as income. Each case must, in my opinion, depend on its own facts and evidence *dehors* the contract must always be admissible in order to explain what the contract itself usually disregards, namely the quality which ought to be attributed to the sum in question.

In my opinion, the considerations discussed by Lord Greene for determining when a premium or discount might be treated as income and when not, when such premiums or discounts arise in situations of investment not within the scope of a trade, and not conclusive where, as here, the question to be determined is whether or not the rights obtained as a bonus or premium were receipts of the business of the taxpayer, for while such considerations may indicate that the bonus or premium is capital rather than income when the transaction is viewed as a mere investment, the bonus or premium may, nevertheless, be income if it is a receipt from a transaction carried out *in what is truly the carrying on or carrying out of* the taxpayer's business.

The appeal, accordingly, fails and will be dismissed with costs.

Judgment accordingly.