

BETWEEN:

WOLF VON RICHTHOFEN ..... APPELLANT;

Toronto  
1968  
Nov. 12-13

AND

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

*Income tax—Taxpayer carrying on farming and real estate business—  
Purchase of farm for use in farming business—Sale at profit—Whether  
capital gain.*

Appellant operated a farm and also carried on a real estate business in farm properties. In 1960 he bought a 100-acre parcel of land near his farm and farmed it for two seasons before selling it at a substantial profit.

*Held*, allowing his appeal from an assessment to income tax on such profit, on the evidence appellant's sole purpose in acquiring the property was to incorporate it in his farm business.

INCOME TAX APPEAL.

*J. E. Sheppard* for appellant.

*J. M. Halley* for respondent.

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JACKETT P. (*orally*):—This is an appeal from a decision of the Tax Appeal Board dismissing the appellant's appeal from a re-assessment of the appellant's liability for income tax under Part I of the *Income Tax Act* for the 1962 taxation year.

The sole question in issue is whether a profit made by the appellant in 1962 from the sale of a parcel of land was a profit from a transaction entered into in the course of the current operations of a business, in which event the respondent properly included that profit in the computation of the appellant's income for the year, or was a profit from the sale of a capital asset of a business, in which event the profit should not have been included in computing the appellant's income.

The appellant, who lives near Campbellville, Ontario, was born in Germany, where he became a well-known owner and trainer of standard bred horses before he came to Canada with his family in 1951. When he came to Canada in 1951, the appellant purchased a farm near Campbellville and began a cattle-raising and dairy farm business which he continued to carry on until 1956 when he converted that business to a business of training horses. In order to establish himself as a trainer in Canada, the appellant purchased some inexpensive thoroughbred horses, trained them, and began to race them with such success that other owners began to hire the appellant to train their horses. By 1960, the appellant had some twenty horses under his care and supervision. The extent of this business may be appreciated by noting two sets of figures. During the years 1957 to 1962, the appellant had a revenue each year from winning purses by racing his own horses as follows:

1957 — \$ 2,470 00	3 to 4 horses
1958 — \$ 5,645 00	4 to 5 horses
1959 — \$ 8,565 00	4 to 5 horses
1960 — \$28,562.14	20 horses
1961 — \$20,340 60	8 to 10 horses
1962 — \$21,660.00	3 to 4 horses

During the same period, his revenues from boarding and training horses belonging to others were as follows:

1957 — nil	
1958 — \$ 1,600.00 (estimated)	2 horses
1959 — \$ 1,635.00	3 to 4 horses
1960 — \$ 1,638.00	3 to 4 horses
1961 — \$16,547 03	20 horses
1962 — \$26,598.60	20 to 25 horses

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Quite apart from these activities, which I will refer to as the appellant's farming business, the appellant had a substantial source of income during the years 1959 to 1962 from activities which I will refer to as his real estate activities.

The appellant knew many wealthy persons who lived in Germany and as a result of the political situation that existed there in the late 1950's, many of these persons were anxious to invest money abroad. The appellant assisted such persons to find land that they bought in the area near his farm at Campbellville.

In some cases, the appellant merely assisted his German acquaintances to find and choose land that they decided to buy, in which cases they made payments to him, which are referred to in the evidence as commissions. In other cases, he first acquired some interest in the land, either in partnership with real estate brokers or dealers, or alone, and then benefitted on the re-sale to the German purchasers by participating in the resulting profits. The extent of the appellant's revenue from his real estate activities appears from the following figures:

1959 — Commissions	\$36,436.28
Profits	nil
1960 — Commissions	\$ 9,000.00
Profits	\$80,647.98
1961 — Commissions	\$32,722.08
Profits	\$30,500.00
1962 — Commissions	\$37,349.32
Profits	nil

No problem has arisen in connection with the appellant's revenues from his real estate activities. He has made returns of these commissions and profits as income and paid income tax accordingly.

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The problem that has arisen arises with reference to a one-hundred acre parcel of land that the appellant himself purchased outright on August 18, 1960, for \$10,000. This parcel is one and one-half to two miles from his farm and he says that he acquired it because he had an immediate need for it for the production of hay for use in his farming business and because he had the idea that ultimately he would use it for a horse breeding operation when he became too old to continue his boarding and training operations. In fact, he did take two crops of hay off the land in question for use in his farming business, but, by the latter part of 1961, he received an offer of over \$30,000 for it, which he accepted and thus made the sale in 1962 that gave rise to the profit of \$22,887.56 that is in issue in this appeal.

The Tax Appeal Board appears to have concluded that, as the appellant was in a business of trading in farm properties and as the profit in issue was the result of "turning to account of real estate acquired", it followed that the profit was a profit from that business.

The problem involved does not appear to me to be that simple. Certainly, if the property in question was acquired by the appellant with a view to re-sale at a profit, or if it was acquired with a view to using it in the farming business or re-sale at a profit as circumstances might make most expedient, then, in my view, when it was re-sold a little over a year after it was acquired, the sale must be regarded as having taken place in the course of the appellant's real estate activities and the resultant profit must be regarded as a profit from a business. If, on the other hand, at the time when the appellant acquired the property, the only purpose he had in mind for it was to incorporate it in his farming business, and if he did make it a part of the property on which he carried on his farming business, its subsequent sale would be a sale of a capital asset of that business even though it occurred within a very short time after acquisition.

Putting the matter another way, where a person carries on business as a trader in real estate and some other business at the same time, if he buys a parcel of land for re-sale at a profit and does so re-sell it, the resulting profit is a

profit from his trading business even though he found a use for the land in his other business during the period that he owned it; but, on the other hand, a profit that he makes upon the sale of land acquired for the sole purpose of being used, and that has in fact been used, as part of the capital assets of the other business is not, as such, a profit from his business as a trader in real estate, and the length of the period between purchase and sale of a parcel of land by such a person is not relevant except in so far as it is some indication as to whether the land was inventory of the trading business or a capital asset of the other business.

I must, therefore, decide whether the balance of probability on the evidence in this case is that the only purpose that motivated the appellant to acquire the property in question was to incorporate it in his farming business and that he did in fact make it a part of the property on which he carried on his farming business before he sold it.

In effect, the appellant's testimony in this Court, as I understood it, was as follows: One Robinson approached the appellant, knowing that he had something to do with arranging sales of farm properties in the area to wealthy Germans, to see whether the appellant could produce a purchaser for Robinson's 200 acre farm. Robinson's farm consisted of a 100 acre parcel without buildings (being the property in question) and a 100 acre parcel with farm buildings. The appellant recognized the 100 acre parcel without buildings as one that would fit into the needs of his own farming business and asked Robinson if he would sell the two parcels separately, but Robinson indicated that he wanted to sell both parcels at the same time although he did not insist on a single purchaser. The appellant arranged a sale to one of his German acquaintances of the parcel with the buildings and, by reason of his relations with these gentlemen, felt bound to make the other 100 acre parcel available to another, but, when it was declined by the latter gentleman, he bought it for himself. Subsequently, a little over a year later, the gentleman who declined it originally decided that he wanted it (apparently to round out his surrounding holdings) sufficiently

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to cause him to offer over \$30,000 for it. At that price, the appellant came to the conclusion that the land was not worth as much to him for his farming business as the money that he was being offered for it, and he sold it.

The appellant was thoroughly tested on cross-examination. It was, for example, suggested to him that what he had in mind from the time he first acquired the land was its re-sale to the gentleman who subsequently bought it from him. The credibility of his story was challenged, for example, by an attempt to show that the reasons he gave for wanting the land for his farming operations were not sound. No effort was spared in putting the appellant to the defence of his story. At the end of the day, in my view, after observing the manner in which the appellant gave evidence as carefully as I could, I was of opinion that the appellant's story in its main outlines was not shaken. As I appreciate the matter, I do not have to decide whether the appellant's judgment in deciding to acquire the land for his farming business was sound. The question is whether he did, in fact, decide that it would make a good addition to his farming business at a price of \$10,000 and did, in fact, acquire it for that purpose. I am satisfied, from his evidence, that that is the sole purpose that motivated him to acquire the land and that, for over a year, it was a part of the lands that he used in his farming business. I am also satisfied that the very high price that he was ultimately offered for it convinced him that it was wise to dispose of it and carry on his farming business without it.

For the above reasons, the appeal will be allowed with costs and the assessment will be referred back to the respondent to re-assess on the basis that the profit referred to in paragraph 15 of the Notice of Appeal is not part of the appellant's income for the 1962 taxation year.