1954
Oct. 20 & 21
1955
Mar. 11

BETWEEN:

MAURICE TOUGAS ..... APPELLANT,

AND

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

Revenue—Income—Income tax—The Income Tax Act, 1948 S. of C. 1948, c. 52, as amended, ss. 3, 4, 127(1)(e)—Profit from sale of real estate by taxpayer—Whether capital gain—Whether profit from business—Question to be determined in the light of facts of each case—Burden on taxpayer to show error in taxation imposed upon him—Appeal from Income Tax Appeal Board dismissed.

Appellant was reassessed for the taxation year 1950 in respect of profits realized by him on the sale of a ten-suite apartment block which he built in May of that year and sold six months later. An appeal from the assessment to the Income Tax Appeal Board was dismissed. On an appeal from the Board's decision to this Court appellant contended that it was his intention to build the block and keep it as an investment but that he was forced to sell it in order to raise funds for the completion and expansion of another business—a children's wear retail store—which he owned.

Held: That the question whether a profit realized on the sale of real estate by an individual is a realization or change of investment or an act done in the carrying on of a business is to be determined in the light of the facts in each case. *California Copper Syndicate* v. *Harris* (1904) 5 T.C. 159 at 165 referred to.

2. That the burden is on the taxpayer to establish the existence of facts or law showing the error in relation to the taxation imposed upon him. *Johnston* v. *Minister of National Revenue* [1948] S.C.R. 486

referred to. Here the assessment is based on the fact that the profit was one which arose in the course of appellant's business and to succeed in the appeal he must show that such is not the fact.

3. That on the evidence appellant at all material times was still engaged in the business of a builder or contractor and that the profit which he received from the sale of that apartment block was a profit from that business. He has not established to the satisfaction of the Court that the block was intended to be built and kept as an investment or that the reasons he gave for the sale were the real reasons.

APPEAL from a decision of the Income Tax Appeal Board.

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

G. H. Steer, Q.C. and *J. J. D. Cregan* for appellant.

D. B. Mackenzie, Q.C. and *J. D. C. Boland* for respondent.

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

CAMERON J. now (March 11, 1955) delivered the following judgment:

In reassessing the appellant for the taxation year 1950, the respondent added to his declared income the sum of $13,630.86 as "Profit on sale of 9806-106th Street". An appeal to the Income Tax Appeal Board was dismissed on May 25, 1953, and a further appeal is now taken to this Court. The appellant asserts that the profit so realized (there is no dispute as to the amount) was a capital gain and not subject to tax. The respondent submits that it was a profit from a business—that of a builder or contractor—and therefore income subject to tax under the provisions of sections 3, 4 and 127 (1) (*e*) of the Income Tax Act, 1948, which were then 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.

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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;

The facts relating to the construction and sale of this property (which I shall refer to as the "106th Street apartments") are as follows: In 1949 the appellant decided to take advantage of the provisions of the National Housing Act under which very large loans were made to builders of apartments, and contracts of rental insurance could be provided. On May 7 he purchased the land for $6,500.00 and on July 14 secured a permit from the City of Edmonton to build a ten-suite apartment block. Through Central Housing and Mortgage Corp. a loan of $51,000.00 was secured from the Manufacturers' Life Association. Building was practically completed by May, 1950, the total cost being $62,500.00. In order to finance the balance of the cost, the appellant sold an apartment block on 107th Street. By May, 1950, the new block was tenanted and the appellant moved into one of the apartments. On November 1, 1950, it was sold for $76,500.00 to Mr. and Mrs. Kirk. In the construction of the building the appellant acted as contractor throughout, purchasing all necessary supplies and supervising the work, but relying in part on the assistance of a skilled foreman. It is the profit on this sale which is here in question.

The appellant says that it was his intention to build the block, rent it, and keep it for rental revenue as an investment and as a home for his family. He says, however, that he was forced to sell it and in the Notice of Appeal to this Court the reason assigned is stated as—"To raise funds for the completion and the expansion of the 'Jack and Jill' business and to pay for stock-in-trade." It becomes necessary, therefore, to refer in some detail to that business.

From 1938 to 1945 the appellant operated a retail tobacco store in Edmonton. In the latter year he sold that business and most of his real estate holdings in anticipation of going into business in the United States. He found conditions there unfavourable and returned to Edmonton early in 1946. His intention then was to establish a children's wear retail store; he therefore purchased a lot and erected a suit-

able building known as 10424 Jasper Avenue. Due to post-war conditions, he was unable to purchase the necessary stock and for the time being gave up his intention to open the new store; he therefore leased the premises for a long term to Lowe Brothers.

Being unable to enter the retail business, he decided to embark on that of a builder. In 1946 and 1947 he purchased some sixteen vacant lots, erected houses thereon and sold them at a profit as soon as they were constructed. In 1947 he contracted to build a store for one Evanoff at 10428 Jasper Avenue—next to his own property—and received a commission of 8 per cent. on the cost of construction. That fee, and the profits he received on the sale of the sixteen houses, were shown as taxable income in his annual returns.

Upon the completion of the Evanoff building in 1948, the appellant found that he could now enter the retail business; accordingly, he leased the property from Evanoff and with one of his brothers, opened a children's wear store known as "Jack and Jill". About June, 1950, he was asked by Lowe Brothers to accept surrender of their lease. He did so, but found he was unable to get a satisfactory tenant for the premises. Accordingly, he decided to expand the "Jack and Jill" business by opening up new departments in his own property. About August of that year he commenced the reconversion of the property. He states that he soon found that he had under-estimated the cost and that he then found it necessary to sell the "106th Street apartments" in order to provide funds to complete the conversion and purchase the necessary stock.

The basic principle to be applied in determining whether the profit realized on the sale of property is a capital gain or a gain made in an operation of business is stated in the well-known case of *California Copper Syndicate* v. *Harris* (1). There the Lord Justice-Clerk said:

> It is quite a well settled principle in dealing with questions of income tax that where the owner of an ordinary investment chooses to realize 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

(1) (1904) 5 T.C. 159 at 165.

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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 . . .

In the same case the Lord Justice-Clerk said:

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 realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

In *Campbell* v. *Minister of National Revenue* (1), Locke J., in delivering the judgment of the Court, stated that while the above decision turned upon the interpretation of Schedule D of the Income Tax Act of 1842, the passage which I have first referred to expressed the principle which is applicable in Canada.

Each case must therefore be considered according to its own facts. The burden is on the taxpayer to establish the existence of facts or law showing the error in relation to the taxation imposed upon him *Johnston* v. *Minister of National Revenue* (2). In this case the assessment is based on the fact that the profit was one which arose in the course of the appellant's business and to succeed in the appeal, the appellant must show that such is not the fact.

It becomes necessary, therefore, to examine with great care the evidence adduced on behalf of the appellant. Summarized briefly, it amounts to this.

My intention was to build and retain the block as an investment for rental purposes. My original plan was thwarted because the bank was pressing me for the repayment of my loans and I needed further money to expand the "Jack and Jill" business and therefore I sold the block for that purpose.

Now if all these allegations were proven and if there were no other evidence which had a bearing on the matter, much might be said for the appellant's contention that his profit was not income. Unfortunately for the appellant, neither of these conditions prevails.

In the first place, there is no evidence which corroborates that of the appellant on these all-important matters. If the bank was pressing for repayment of its loans or had refused to grant additional loans for the extension of the

(1) [1953] S.C.R. 3. (2) [1948] S.C.R. 486.

"Jack and Jill" store, it should have been possible to produce evidence from a bank official to that effect. If the appellant had earlier offers to purchase the block—as he alleges was the case—it should have been possible to prove that by the evidence of those offering to purchase. Nothing of this sort was done.

Then it is established beyond dispute that none of the immediate proceeds of the sale—some $19,000 to $20,000—found its way into the "Jack and Jill" business. The entire amount was paid immediately after the sale to the appellant's bank to retire his own personal obligations in full. The payment had nothing whatever to do with the "Jack and Jill" business. It is somewhat vaguely suggested that as the bank relied mainly on the appellant as security for any loans made to "Jack and Jill", the extinguishment of his own liability might have resulted in an additional line of credit to the "Jack and Jill" business. But I find no satisfactory evidence as to what the line of credit was prior to November 1, 1950, or that it was altered in any way after the appellant's own bank liability was wiped out in November. There is no satisfactory proof whatever that the sale of the "106th Street apartments" resulted in any benefit, direct or otherwise, to the "Jack and Jill" business.

Moreover, with regret, I have come to the conclusion that I cannot accept the uncorroborated evidence of the appellant as to his intention in building the block or as to the reasons which led him to sell it within six months of its completion. Certain matters were brought out in cross examination which indicated that he was very careless of the truth. In the transfer of the property to the Kirks (Exhibit G), the appellant took the usual affidavit required of a transferor in Alberta, stating the total consideration to be $66,355 when, in fact, the actual consideration (exclusive of the chattels) was $72,355. His explanation is that until the date when the sale was to be completed, he had thought the purchasers would pay all cash over and above the mortgage; that then only was he told that they wanted him to accept their undertaking to pay $6,000 of the purchase price within two years (Exhibit 7); and that he feared that if the solicitor for the mortgage company (who was also his solicitor) knew that the purchasers were not paying all his equity in cash, the sale might not be allowed to proceed.

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He therefore concealed the fact from them (as was also done in the further document Exhibit 5) and swore to a false consideration. He does not suggest that it was a mistake or that he did not understand the matter and I am satisfied that he must have known that he was swearing to an untruth. There was another instance, also, when it was shown that in a similar affidavit he had grossly exaggerated the amount of the improvements on the property sold. Of a more minor nature is the fact that in 1949 when he was applying for building permits on two properties which he now says at the time belonged to his mother and brother, he described himself as the owner. He explains that by saying that he was acting for them, that it was a matter of no importance and that he merely did it to facilitate matters. These matters—and others which I need not refer to—lead me to the conclusion that I should not accept his evidence as to his intentions where that evidence is not supported by other material evidence.

Moreover, there are other circumstances which must be taken into consideration. As I have said, the appellant was admittedly carrying on the business of building and selling properties in 1946 and 1947. At the time of the trial in 1954 and for at least a year prior thereto, he has been the president of a firm engaged in the construction of apartment houses. I think the evidence establishes also that he was engaged in a similar business in the years 1949 and 1950.

The construction of the "106th Street apartments" was but one of three blocks constructed by the appellant in 1949 and 1950, the proceeds of the sales amounting to about $225,000.00. He considered that it would be good business for both his mother and his brother Paul to invest their money in the construction of apartment blocks. On behalf of his mother he purchased a lot in her name and secured a large loan through the Central Mortgage and Housing Corporation (which he personally guaranteed unconditionally); with the aid of certain monies advanced by his mother he constructed an apartment block, securing and paying for all materials, supervising the work to the same extent as he had done in his own block, and signing all documents under a power of attorney given by her. The property was sold by

him on her behalf in February, 1952, at a considerable profit, all of which the appellant says was paid to her. He states that he received nothing for his services in connection with this matter.

The story of the appellant in connection with the other block is rather peculiar. His brother Paul—who was described as an alcoholic and as incompetent to manage his own affairs—had certain monies on hand. The appellant thought it would be wise for that money to be invested in some permanent form which would produce a steady income for Paul. He therefore decided that it should be used in the construction of an apartment block which would be financed in the same way as his own and his mother's. A lot was purchased in the appellant's name and a building permit taken out in his own name as owner and contractor. A large mortgage was secured through Central Mortgage and Housing and the building completed about April, 1950. About $10,000.00 was advanced by the brother Paul and an additional $3,000.00 or $4,000.00 by the appellant or his mother. The net rentals up to December 31, 1950, seem to have been paid to Paul. As of January 1, 1951, however, the latter ceased to have any interest in the property, the appellant stating that his brother wanted to withdraw monies for various purposes, including the purchase of a coffee shop. In all, the brother was paid his advance of $10,000.00 and a small amount of rentals. The appellant became the sole owner as of January 1, 1951, although the records show that Paul did not receive the last of his advances until six months later. No records were produced to show the real nature of the transaction between the brothers. It is significant to note, however, that the appellant said at one stage that he had given Paul his "I.O.U." for the amount of the advances, and if that were correct it would seem to suggest that the real owner throughout was the appellant and that Paul had made a loan to assist in the construction of the building. The appellant also said that at the time he settled with Paul, he received some sort of document by which the latter released all his interest in the property to him, but neither that document nor the "I.O.U." was produced. The building was erected by the

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appellant in the same way as the mother's. It was sold by him in 1953 at a substantial profit, all of which accrued to him personally.

It is of some interest, also, to note that in the transfer of the apartments to the Kirks, the appellant is described both in the document itself and in his own affidavit as a contractor. The same description is used in Exhibit 5 dated November 2, 1950 (by which he assigned to the Kirks his interest in the rental insurance contract on the block), and also in Exhibit K dated February 26, 1952—the transfer by him on behalf of his mother of the block owned by her.

From these facts I can reach no other conclusion than that the appellant at all material times was still engaged in the business of a builder or contractor and that the profit which he received from the sale of the "106th Street apartments" was a profit from that business. The appellant has not established to my satisfaction that the block was intended to be built and kept as an investment or that the reasons he gave for the sale were the real reasons.

In his very able argument, Mr. Steer counsel for the apellant, drew my attention to the fact that between 1932 and 1935 the apellant had purchased three small houses which he had rented for a number of years until they were sold at a profit about 1944 and the proceeds invested in an apartment block which was also rented for a number of years. He suggests that this indicates an intention on the part of the appellant to invest his savings in something which would give him a continuing revenue. That may well have been the case at the time, but these events occurred long before the appellant actually became a contractor and builder. There may be cases in which the law would recognize a division of income in the case of a taxpayer who holds out of his inventory some portion of it as a long-term investment while trading in the balance, but I am quite unable to find that this is such a case. The difficulties encountered in attempting to establish a case of that sort are shown in *Gairdner Securities Ltd.* v. *Minister of National Revenue* (1)—a decision which was affirmed in the Supreme Court of Canada by a judgment not yet reported.

(1) [1952] Ex. C.R. 448.

For these reasons the appeal will be dismissed and the reassessment made upon the appellant will be affirmed. The respondent is entitled to his costs after taxation.

Judgment accordingly.