

BETWEEN :

Toronto  
1967  
June 15-16,  
19-20  
Ottawa  
July 31

GORDON S. SHIPP, HAROLD }  
SHIPP, BESSIE L. SHIPP, }  
JUNE C. SHIPP ..... }

APPELLANTS;

AND

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

RESPONDENT.

*Capital gain or income—Income Tax Act, R.S.C. 1962, ss. 3, 4 and 139(1) (e)—Transfers of shares to wives—Builders of shopping centre erected by private company—Profit on sale of shares—No intention to offer shares for sale or attempting to find a purchaser—Appeals upheld.*

In these cases, the four appellants were husbands and wives who controlled, as shareholders, four companies carrying on business of real estate development and builders of homes generally.

A new company was incorporated in the year 1955 in which the four appellants held all the shares. This company, in the same year, erected a large shopping centre on land acquired from one of the other companies controlled by the appellants.

In 1959, an offer to purchase the shopping centre property was accepted by the appellants and completed by which the appellants sold their shares in the shopping centre company instead of that company selling its assets.

The profits on the sale of the shares were taxed by the Minister as income. The appellants alleged that the profits were a non-taxable capital gain

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*Held*, allowing these appeals,

1. that the profits in the transaction were on capital account;
- 2 that the shopping centre company was not incorporated as an alternative method of executing a real estate transaction; and that the appellants did not incorporate the company as a shield attempting to get a profit on capital account which would otherwise be income;
3. that the shares were acquired by the appellants as investments and the sale of such shares was the realization of such investment.

APPEAL from a decision of the Income Tax Appeal Board.

*Stuart D. Thom, Q.C.* and *John M. Fuke* for appellants.

*N. A. Chalmers* and *L. G. Budd* for respondent.

GIBSON J.:—These four appeals were tried at the same time on the same evidence pursuant to an Order made at the commencement of this hearing on consent of the parties.

The subject matter is the profit on the sale in 1959 by the appellants of their respective common shares of a company known as Applewood Village Shopping Centre Limited.

This Company was incorporated in 1953 as a private corporation under the *Ontario Corporations Act*. On incorporation, one common share was issued to each of the appellants. On organization, an additional 1,000 shares were issued to each of the appellants Harold G. Shipp and Gordon S. Shipp (who are respectively son and father). In 1957 each of the latter transferred 490 of their said shares to their respective wives namely, the appellant June C. Shipp and the appellant Bessie L. Shipp.

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This was accomplished by each giving to their respective wives monies by way of gift with which they purchased these shares. Gift tax was paid at the time of these transfers. The value of such shares declared at that time was book value, but this was not accepted by the Department of National Revenue and subsequently after negotiation and settlement additional gift tax was paid based on a substantially higher value. These gifts were made in implementation of estate planning advice given to the appellant husbands by persons in the insurance business. Substantial insurance policies were also taken out by the husbands on their lives in conjunction therewith. The financial result of the death of each or both of the husbands was the motivation for implementing the estate planning advice given.

In 1959 all the shares of Applewood Village Shopping Centre Limited, owned by the appellants, were sold to N.C. Properties Limited, an Ontario corporation, the beneficial shareholders of which resided in Europe. For these shares the sum of \$611,500.59 less a commission of some \$40,000 was paid to the appellants in proportion to their respective share interest.

Each of the appellants' tax returns for the year 1959 were re-assessed categorizing the sums received by each on the sale of such shares as income, but there was allowed certain reserves pursuant to section 85B of the *Income Tax Act* because the whole of the said purchase sum was not paid to the appellants at one time but over the years 1959 to 1962.

The issue for decision on this trial is whether or not the payments received in the years 1959, 1960, 1961 and 1962, by the appellants (arising from the sale of these shares in 1959) constituted income for tax purposes under the *Income Tax Act*.

The husbands in their Notices of Appeal put these reasons why the assessments against them should be vacated in this way:

(They were) at no time engaged in the business of buying and selling shares of companies nor (were they) as individual(s) engaged in the business of buying and selling land or properties. The business activities of the Appellant(s) consisted entirely of managing the operations of (their various companies).

(Applewood Village Shopping Centre Limited) was not incorporated to provide a means for the disposal of land, but to acquire a site for a shopping centre and to construct and operate a shopping centre thereon. (Applewood Shopping Centre Limited) did, in fact, acquire land and construct a shopping centre thereon and operated such shopping centre for upwards of four years before the Appellant(s) sold (their) shares of the Company as aforesaid.

The Appellant(s) at no time offered (their) said shares for sale or attempted to find a purchaser therefor. The sale thereof was not a consequence of any business or trading activity on the part of the Appellant(s) and the gain realized on such sale did not constitute taxable income.

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The wives' reasons why their assessments should be vacated, set forth in their respective Notices of Appeal, are different in one substantial respect, which reads as follows, namely:

The shares of the Company were acquired by the Appellant(s) and by way of gift and were held by (them) as an investment.

The assumptions of the Minister upon which the re-assessments of the tax returns of the appellant husbands were made are contained in each of the Minister's Reply to Notice of Appeal at paragraphs 9(a) to (e) which read as follows:

9. In assessing the Appellant(s) for (their) 1959, 1960, 1961 and 1962 taxation years he assumed, inter alia:

- (a) that subsequent to its incorporation on July 27, 1953, Applewood Village Shopping Centre Limited acquired a parcel of real estate from an associated company, Applewood Dixie Limited.
- (b) that on or about March 5, 1959 all the shareholders of Applewood Village Shopping Centre Limited agreed to sell their shares in that company to N.C. Properties Limited for the sum of \$611,500.59.
- (c) that Applewood Village Shopping Centre Limited acquired the above parcel of real estate from its associated company with a view to trading, dealing in, or otherwise turning the land to account.
- (d) that the Appellant(s) acquired (their) shares in Applewood Village Shopping Centre Limited with a view to trading in, dealing in, or otherwise turning the shares to account.
- (e) that the profit from the sale of the shares of Applewood Village Shopping Centre Limited was income from a business within the meaning of Sections 3, 4, and 139(1)(e) of the *Income Tax Act*.

The assumptions of the Minister upon which the re-assessments of the tax returns of the appellant wives were

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made are contained in each of the Minister's Reply to Notice of Appeal at paragraphs 7(a) to (e) which read as follows:

7. In assessing the Appellant(s) for (their) 1959, 1960, 1961 and 1962 taxation years he assumed, inter alia:

- (a) that subsequent to its incorporation on July 27, 1953, Applewood Village Shopping Centre Limited acquired a parcel of real estate from an associated company, Applewood Dixie Limited.
- (b) that on or about March 5, 1959 all the shareholders of Applewood Village Shopping Centre Limited agreed to sell their shares in that company to N.C. Properties Limited for the sum of \$611,500.59.
- (c) that Applewood Village Shopping Centre Limited acquired the above parcel of real estate from its associated company with a view to trading, dealing in, or otherwise turning the land to account.
- (d) that the Appellant(s) acquired (their) shares in Applewood Village Shopping Centre Limited with a view to trading in, dealing in, or otherwise turning the shares to account.
- (e) that the profit from the sale of the shares in Applewood Village Shopping Centre Limited was income from a business within the meaning of Sections 3, 4, and 139(1)(e) of the *Income Tax Act*.

The appellant Gordon S. Shipp at all material times since 1923 was a house builder and real estate developer. In 1946, he was joined by his son Harold G. Shipp in such business, first in a partnership and later both were shareholders and officers in a company known as G. S. Shipp and Son Limited.

Subsequent to 1948, the appellants caused four other companies to be incorporated. A brief statement of their respective businesses is as follows:

#### APPLEWOOD DEVELOPMENT LIMITED

A company incorporated by Ontario Letters Patent dated September 12, 1951, for the purpose of rendering engineering assistance and servicing land held by the three following companies.

#### APPLEWOOD DIXIE LIMITED

A company incorporated by Ontario Letters Patent dated February 19, 1953 for the purpose of assembling land for future development and subdivision.

## APPLEWOOD DUNDAS LIMITED

A company incorporated by Ontario Letters Patent dated September 27, 1955, for the purpose of objects and activities similar to those of Applewood Dixie Limited.

and

## APPLEWOOD VILLAGE SHOPPING CENTRE LIMITED.

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Most of the business activity of these companies was conducted in the Township of Toronto but some was carried on in the Township of Etobicoke, both of which are in the County of York, and are part of Metropolitan Toronto.

The husband appellants had no business activities or interests other than as directors, officers and shareholders of the above mentioned companies except in the case of the appellant Harold G. Shipp who in 1959 acquired an interest in a General Motors of Canada Limited car agency by the name of Applewood Motors Limited.

These companies, other than Applewood Village Shopping Centre Limited developed and sold a most substantial number of lots and houses in the said Townships of Etobicoke and Toronto and in doing so, they created a market for a shopping centre. In the promotional literature of G. S. Shipp and Son Limited, it was represented to purchasers and prospective purchasers of homes that a shopping centre would be provided for their convenience.

Then as stated in July 1953, Applewood Village Shopping Centre Limited was incorporated and lands at Dixie Road and Queen Elizabeth Highway were acquired for this purpose (see Ex. 1). This shopping centre was carefully planned and advice on how to establish it was obtained over a period of years from an international organization whose objects and purposes are to aid persons developing land in the various ways (see Ex. 3). The size of the shopping centre finally decided upon sometime in 1955, was constructed substantially in that year and fully completed in the year 1956.

In 1954, Principal Investments Limited, a company with extensive experience in the development of shopping centres, acquired land for a shopping centre immediately

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opposite the site acquired by Applewood Village Shopping Centre Limited for its shopping centre. The former was a much larger site. Principal Investments Limited made representations to the appellants to buy out Applewood Village Shopping Centre Limited before construction of its shopping centre was begun; and although a contract was entered into with Principal Investments Limited, the latter did not complete it but instead withdrew from the contract as it was entitled to do.

The shopping centre of Applewood Village Shopping Centre Limited after construction was immediately and at all material times most successful, and of high quality. It provided a good financial return on investment to the appellants (see Ex. E).

Applewood Village Shopping Centre Limited invested a little over one million dollars in its shopping centre.

In 1959, one Kalmar unsolicited offered to buy the assets of Applewood Shopping Centre Limited for \$1,350,000. This offer was made verbally in March, 1959 when the appellants Harold G. and June C. Shipp were leaving for a vacation in San Juan, Puerto Rico. Mr. Harold G. Shipp told Kalmar that he was not anxious to sell and would only consider a sale if the proposed purchaser purchased the shares and paid the equivalent of \$1,575,000, which sum at the time he considered would be uneconomical and unacceptable to the proposed purchaser.

On March 2, 1959, Kalmar returned and informed that his principals (who were European and who operated an Ontario company known as N.C. Properties Limited) were prepared to buy on the basis offered.

From the data on Ex. E, it is clear that this proposed purchase was most advantageous to the vendors. It was half a million over book value, \$275,000 over the offer made originally and would net them monies which would take years to earn in operating the shopping centre all things being equal. A formal offer was engrossed and signed by the proposed purchasers. Before this was done, the appellant Harold G. Shipp and his wife had gone to San Juan. On March 4, 1959, Gordon S. Shipp, the father, called Harold G. Shipp on the telephone at San Juan and informed him that he and Bessie L. Shipp, his wife and mother of Harold G. Shipp, had signed the offer, but that

it was not a deal until Harold G. Shipp and June C. Shipp signed. The latter returned on March 25, 1959 and finally signed the offer on April 3, 1959 (see Ex. 16). The sale was closed June 30, 1959. The method of payment was complicated and extended over a period of years as is indicated in the contract. \$40,000 commission was paid by the appellants to Kalmar on an instalment basis.

So much for the facts.

The appellants allege and submit that the shopping centre company was incorporated for sound business reasons some of which were: to protect the name of "Applewood"; to put the risk, which was substantial, in one company and not prejudice financially their other companies; to facilitate the management of the shopping centre in the matter of leases and other contracts; and for other reasons. The appellants further submit that there was no event after incorporation in 1953 which caused this profit from the sale of the shares to be taxable.

On the pleadings it is not alleged by the respondent that the incorporation of Applewood Village Shopping Centre Limited was a scheme or contrivance to avoid tax.

The assumption of the Minister as stated is that the profit from the sale of the shares in Applewood Village Shopping Centre Limited was income from a business within the meaning of sections 3, 4 and 139(1)(e) of the *Income Tax Act*. The Minister does not say what the business was.

From the evidence it is clear that the appellants were not in the business of trading in shares.

To be taxable, therefore, the profit from the sale of these shares must be categorized as income as a result of trading in the "business" of real estate carried on by the appellants.

In my view, on the evidence, *inter alia*, the appellants established that this shopping centre was built in response to a demand which was created by the other companies above referred to owned by the appellants; that this shopping centre company and its activities were an exception to the usual activities carried on by the other companies controlled and owned by the appellants; that this shopping centre company was not incorporated as an alternative method of the appellants to put through a real estate

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transaction; and that they did not incorporate the company as a shield for the purpose of attempting to get a profit on capital account.

In my view, on the facts of this case, it is not correct to assume for the purpose of the *Income Tax Act* that the corporation of Applewood Shopping Centre Limited does not exist as a separate legal person distinct from the appellants.

The principles of *Royal K. Fraser v. The Minister of National Revenue*<sup>1</sup> have no application here. Such principles apply when at the time of incorporation persons (1) have acquired real estate with the thought that it be sold as well as for income and (2) have caused a company to be incorporated for the express purpose of attempting to get profit on capital account which otherwise would be income.

The husband appellants in this case, in my view, acquired the shares in Applewood Village Shopping Centre Limited as an investment; and the appellant wives by the gift transactions above referred to acquired them also as an investment; and the sale of such shares in 1959 was the realization of such investments.

The appellants have satisfied the onus required in these appeals. The letters and other documents filed at trial by the respondent purporting to be some evidence, *inter alia*, of attempts by third parties to buy the shares of Applewood Village Shopping Centre Limited, and what was done by it and the appellants or some of them, about the same, I find specifically are inconclusive and I make no inferences therefrom.

In the result on the evidence, the appellants have rebutted the Minister's assumptions as follows:

- (i) that the Appellant(s) acquired (their) shares in Applewood Village Shopping Centre Limited with a view to trading in, dealing in, or otherwise turning the shares to account.
- (ii) that the profit from the sale of the shares in Applewood Village Shopping Centre Limited was income from a business within the meaning of Sections 3, 4, and 139(1)(e) of the *Income Tax Act*.

The appeal, therefore, is allowed with costs.

<sup>1</sup> [1964] S.C.R. 657.