Edmonton 1964 Mar. 23 Ottawa 1965 Sept. 10

BETWEEN:

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

G. W. GOLDEN CONSTRUCTION LIMITED ..... RESPONDENT.

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e)—No capital gain but taxable income—Purchase, exchange and sale of real estate—Series of real estate transactions—Adventure in the nature of trade—Appeal allowed.

The respondent was a contractor and builder, whose principal activity was building houses. Its normal house building operation consisted of building a house on land owned by it and then selling it. It had built apartments for at least one other company and more recently had made an unsuccessful bid to do so in another instance.

It was the receipt in 1958 of the sum of $38,000 which gave rise to the $28,384 net profit which the Minister added to the respondent's otherwise taxable income for the taxation year 1958. An appeal to the Tax Appeal Board was allowed and from that decision the Minister appealed to this Court.

Held, that the profit realized by the respondent is income and subject to tax.

2. That for its business operations the respondent required building sites and it had an account where it listed its "lands held for re-sale". It was part of a building site so selected that the respondent disposed of in the multiparty transaction, as a result of which it made the profit.

3. That the situation remains that the land conveyed to Imperial Oil was land acquired by the Company as part of the inventory of its business and was still being held as such inventory when it was disposed of at a profit.

4. That the instant land formed part of the respondent's stock-in-trade.

5. That the respondent was engaged in adventurous undertakings of a trading nature within the provisions of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act*.

6. That respondent's dealings were profit-making transactions frequently repeated, highly speculative and could not be regarded as ordinary or normal investments.

7. That the appeal is allowed with costs.

APPEAL from a decision of the Tax Appeal Board.

D. D. Duncan and *George F. Jones* for appellant.

J. M. Hope for respondent.

1965

MINISTER OF NATIONAL REVENUE v. G. W. GOLDEN CONSTRUCTION LTD.

Kearney J.

KEARNEY J.:—This is an appeal by the Minister from that part of a decision of the Tax Appeal Board dated January 9, 1963,[1] which allowed the respondent's appeal from the income tax assessment dated February 16, 1960, for the respondent's taxation year 1958, whereby tax was levied on a net gain of $28,384 which was added to the respondent's otherwise taxable income for the said taxation year.

The Board held that the aforesaid net gain of $28,384, did not constitute taxable income to the respondent but was a capital accretion. The respondent submits that the property in question, together with other property totalling about ten acres described in the pleadings as "the property", had been acquired for the specific purpose of erecting thereon apartments it intended to retain and that the gain of $28,384 was a non-taxable unsolicited fortuitous realization of an investment. I should add that the Board, in the same decision, dismissed the respondent's appeal in respect of two other items in its re-assessment made by the Minister for the said year. No cross-appeal was taken and these two items are not now in issue.

At the opening of the hearing, in order to shorten the proceedings, counsel for the parties filed a copy of a summary of certain facts and exhibits which had been agreed upon. The exhibits which were so filed consist of:

Sketch of privacy screen — Exhibit 1.

Copies of letters dated November 22, 1957, and December 22, 1957, from G. W. Golden Construction Ltd. to Loblaws — Exhibit 2.

Plot plan — Exhibit 3.

Apartment building plans — Exhibit 4.

Certified copy of Memorandum of Association of G. W. Golden Construction Ltd. — Exhibit 5.

Instrument 5318 K. S. (dated November 5, 1958, showing effect of the replot plant bearing the same number and dated August 25, 1958)— Exhibit 6.

Replot plan 4014 dated July 9, 1952, and later replot plan No. 5318 dated August 25, 1958, which the parties agreed should be filed as a single exhibit (hereinafter sometimes referred to as the earlier and the later plans) — Exhibit 7.

Counsel for the respondent, during the hearing, produced as Exhibit 8 its notice of appeal filed with the Tax Appeal Board on February 16, 1960, to which is annexed a schedule

[1] 30 Tax A.B.C. 360.

1965

MINISTER OF NATIONAL REVENUE v. G. W. GOLDEN CONSTRUCTION LTD.

Kearney J.

of the operations of G. W. Golden Construction Company from October 1, 1952, until September 30, 1958.

In cross-examination, counsel for the respondent filed as Exhibit 9 a deed of sale or transfer dated August 13, 1959, whereby the respondent Company transferred to Cemp Edmonton Shopping Plaza Ltd. the balance of "the property" for a consideration of $210,214.08.

The following facts were agreed upon:

G. W. Golden Construction Ltd incorporated April 20, 1949.
The only shareholders of the Company are George W. Golden and his wife, Eleanor M. J. Golden.

On or about the 22nd day of April, 1955, the City of Edmonton transferred to G. W. Golden Construction Lot 42, Block 14, Plan 4014 H. W. Idylwylde (Title 196-R-153).

This property amongst others was transferred to G. W. Golden Construction Ltd. by the City of Edmonton in exchange for certain lands which G. W. Golden Construction Ltd. owned in the Parkview District in West Edmonton.

By replot arranged by the City of Edmonton certain lands including Lot 42, Block 14, Plan 4014 H. W. owned by G. W. Golden Construction Ltd. and Lots 32 to 36 inclusive, Block 4, Plan 7636 A. J. owned by Imperial Oil Limited were replotted. As a result of this replot the said Lot 42 owned by G. W. Golden Construction Ltd. was re-arranged and divided into Lots 43 and 46 in Block 14, Plan 5318 K. S. and the said Lots 32 to 36 inclusive owned by Imperial Oil Limited became Lot 48, Block 14, Plan 5318 K.S. As a result of replot 5318 K S.

(i) G. W. Golden Construction Ltd. retained title to Lots 43 and 46, Block 14, Plan 5318 K S. (Title 217-Y-171).

(ii) Imperial Oil obtained Title to Lot 44, Block 14, Plan 5318 K.S. (Title 218-Y-171).

(iii) G. W. Golden Construction Ltd. obtained title to Lot 48, Block 14, Plan 5318 K S. (formerly Lots 32 to 36 in Block 4, Plan 7636 A. J. owned by Imperial Oil (Title 217-Y-171)) and transferred the same to Prince of Peace Lutheran Church.

I will have occasion later to refer to some of the other exhibits, but for convenience and in order to clarify the agreed facts and the verbal evidence, I wish to immediately make mention of Exhibit 7 which consists of two large replot plans, numbered 4914 and 5318, dated respectively July 9, 1952, and August 25, 1958, partial reproductions of which I have caused to be prepared and hereto annexed and marked as Schedule 1 and Schedule 2 respectively. The schedules indicate that what after the 1958 replot, became Lot 44 prior to the replot, formed a small part of the northwest corner of what was then known as Lot 42. The later plan also serves to indicate the re-arrangement

effected on the neighbouring lots in which the parties referred to in the evidence were respectively interested.

Further evidence consisted of the testimony of the respondent's chief witness, Mr. G. W. Golden, who was its president and general manager. In so far as they had personal knowledge thereof, his evidence was corroborated by Mr. J. N. Stephens, a designer for the Company, and by Mr. T. Hauptman, who was formerly in the employ of the Company as a project manager.

The appellant did not call any witnesses.

The pertinent provisions of the *Income Tax Act* are sections 3 and 4 and 139(1)(*e*).

The respondent, whose fiscal period ends on the 30th of September each year, has since its incorporation continuously carried on business as a general contractor originally in the Province of Alberta but more recently in British Columbia as well.

Prior to 1953 the taxpayer purchased a number of parcels of land in the west-end of Edmonton. Later they were assembled into a block which—with the approval of the City—was subsequently subdivided into what became known as the "Parkview Subdivision" where the Company erected about 300 houses which were later sold.

One of the conditions of the aforesaid approval was that the respondent was required to provide the City with the necessary land for public services including schools.

It transpired that in order to provide for a large high school the Company was obliged to transfer about 100 small lots to the City. As a result of a much earlier land development boom in Edmonton, which later collapsed, the civic authorities had re-possessed, by reason of unpaid taxes, a great many lots in various parts of the city. In lieu of purchasing the aforesaid lots the City agreed to transfer to the Company an equivalent number of its available lots which the Company might select. It is admitted that this method of trading lots as between the City and building contractors was common practice. As a result, during the month of April 1955, the City transferred in all about 12 acres to the Company, including the corner property on 86th Avenue and 83rd Street, which was then described as

1965

MINISTER OF NATIONAL REVENUE v. G. W. GOLDEN CONSTRUCTION LTD.

Kearney J.

Lot 42 (sometimes referred to as the Bonnie Doon property) and which consisted of 2.85 acres (See Schedule 1). The balance of the properties transferred, amounting to about nine acres, was located on the west side of 85th Street at points West and Northwest of Lot 42 and which, together with original lot 42 are the lands that have been referred to in the pleadings as "the property."

Included in the aforesaid balance was a parcel consisting of a little over two acres, the location of which is too far removed to be shown on the schedules but is roughly indicated on the later plan Exhibit 7 by the letter "X" marked in ink. (Hereinafter referred to as "Property X.")

In the summer of 1955 the Mormon Church of the Latter Day Saints approached the respondent for the purpose of acquiring sufficient acreage to build a church and as a result the respondent sold property "X" for $12,000.

Later the Prince of Peace Lutheran Church also desired to acquire land in order to build a new church and sometime during 1957 it had arranged for an undisclosed price to purchase from the City what was later described as lot 50. (See Schedule 2.)

The church found that the said lot was not large enough for the purpose but could be made so by the acquisition of a contiguous property (earlier known as lots 32 to 36 inclusive and later described as lot 48) which belonged to Imperial Oil Co. Ltd. As appears by the copy of the agreed facts and by the evidence of Mr. Golden, the respondent, the Lutheran Church, the City and Imperial Oil joined in the registration of a replot plan, dated August 25, 1958, (See Schedule 2) which gave effect to the following transactions:—

The respondent, while retaining lots 43 and 46, in consideration of the sum of $20,000 and the exchange of lot 48 sold lot 44, (which, with the consent of all interested parties, was re-zoned "commercial",) to Imperial Oil Co. Ltd. and immediately thereafter disposed of lot 48 to the Prince of Peace Lutheran Church for $18,000, thus receiving $38,000 in all. The Lutheran Church, at the same time, obtained for an undisclosed amount lot 50 which belonged to the City.

It was the receipt in 1958 of the aforesaid $38,000 which gave rise to the $28,384 net profit which the Minister added to the respondent's otherwise taxable income for its taxation year 1958.

Now with respect to the remainder of "the property" consisting of about nine acres, in the following year, on August 13, 1959, the respondent sold it to Cemp Edmonton Shopping Plaza for $211,605.95, as appears by Exhibit 9.

As appears by the conclusion of the Minister's notice of appeal, in adding $28,384 net profit to the respondent's otherwise taxable income for its taxation year 1959 the appellant acted upon the following assumptions:—

(*a*) that at all material times the respondent carried on the business of a general contractor;

(*b*) that the respondent acquired "the property" as part of and in the ordinary course of business as a general contractor;

(*c*) that "the property" was acquired by the respondent in exchange for lands forming part of its stock-in-trade and the property received formed part of its stock-in-trade;

(*d*) that during its 1958 taxation year the respondent sold to Imperial Oil lot 44 and lot 48 to the Prince of Peace Lutheran Church.

The respondent's defence rests on its contention that "the property", with the exception of what was earlier referred to as "Property X", was acquired for the sole purpose of erecting apartments thereon and retaining them as investments.

Before further discussing the merits of the appeal, I shall deal with a question of law concerning the admissibility of certain evidence.

As appears by paragraph 6 of the appellant's Notice of Appeal and Exhibit 9, in the Spring of 1959, the respondent sold the remainder of "the property" for over $211,000 to the Cemp Edmonton Shopping Plaza. The respondent, both in argument and in its reply, submitted that the

1965

MINISTER OF NATIONAL REVENUE v. G. W. GOLDEN CONSTRUCTION LTD.

Kearney J.

allegations and proof, concerning the said sale, ought to be struck out and disregarded by the Court, because they deal with something that transpired subsequent to 1958—being the taxation year in question.

Counsel for the respondent, in support of his submissions, referred the Court to *Martin v. Minister of National Revenue*[1] where O'Connor J. stated:

> Evidence was tendered by the respondent as to what the appellant did after 1943. Counsel for the appellant objected to this and I reserved the question. I am of the opinion that it is not admissible and I reject it.

As pointed out by counsel for the appellant, the contrary was held by Judson J. speaking for the Supreme Court of Canada in *Osler, Hammon & Nanton Limited v. Minister of National Revenue*[2] wherein the learned judge stated:

> Counsel for the Minister on this appeal argued that there was error in a ruling on evidence made at the trial. The learned trial judge, against counsel's objection, rejected a tender of evidence and cross-examination on the following matters:
>
> (*a*) the financial statements of the appellant for its 1958, 1959 and 1960 taxation years;
>
> (*b*) purchases and sales of securities recorded in the investment account in the years subsequent to the years under appeal;
>
> (*c*) purchases and sales of securities recorded in the investment account in the 1956 and 1957 taxation years in the cases where the appellant at the end of the 1957 taxation year still held some of these securities.
>
> In my opinion, there was error in the rejection of this evidence. It was relevant to show a course of conduct in trading in securities recorded in the investment account, and to show that at all times the shares of Trans-Prairie Pipelines Limited sold in 1956 were part of the appellant's stock-in-trade and that the profit from the sale of these shares arose from the business carried on by the appellant.

See also *Ben Rosenblat v. Minister of National Revenue*[3] where Ritchie J. observed:

> I entertain no doubt as to the admissibility of evidence respecting subsequent transactions in order to establish that the particular transaction under consideration marked the commencement of a series of similar transactions or of a course of conduct in the nature of a trade or business.

See also to the same effect, *Minister of National Revenue v. Pawluk*[4] and *Sterling Trust Corporation v. Minister of National Revenue*[5].

[1] [1948] Ex. C.R. 529 at 531.
[2] [1963] S.C.R. 432 at 434.
[3] [1956] Ex. C.R. 4 at 12.
[4] [1956] Ex. C.R. 119, 123.
[5] [1962] Ex. C.R. 310, 320.

For the foregoing reasons I consider that evidence of the aforesaid subsequent sale was properly admitted.

In respect of its alleged sole intention of retaining the property as an investment, while admitting the property in question was disposed of as vacant land and that the net profit realized thereon amounted to $28,384, the respondent submitted that the Company only became a party to the transaction as an accommodation to the Lutheran Church, to Imperial Oil and to the City authorities, and that taking into account the Company's background the transaction should be regarded as a non-taxable unsolicited fortuitous realization of an investment.

In support of its submission that its sole intention in exchanging its Parkview Subdivision lots for what is termed "the property", was to construct thereon apartment houses to be retained as an investment, reference was made to evidence to the effect that at the time of the aforesaid exchange the respondent was assured by the City that about 10 acres of "the property" would be zoned as three-storey apartment dwellings and that, in fact, it was so zoned in November 1956, and remained so until lot 44 was re-zoned as commercial property in August 1958.

In respect of the sale in 1955 of "Property X" to the Mormon or Latter Day Saints Church, the president of the respondent, while admitting the said sale and that the Company had paid income tax on the profit realized thereon, testified that the aforesaid lot unlike the remainder of the property was not selected particularly to build apartments on it and that it was sold shortly after it had been acquired because it was not thought having regard to its shape and to the two main roads proposed on each side of it, that it would tie in too well with "our other property."

The respondent's president testified that, while the Company's main business consisted of buying and subdividing lots on which it built houses which were later sold, it had built two apartment projects for its own account, one in Edmonton and the other in Kitimat, B.C.

The project in Edmonton consisted of 13 duplexes for aged citizens which were constructed during the Company's

1965

MINISTER OF NATIONAL REVENUE v. G. W. GOLDEN CONSTRUCTION LTD.

Kearney J.

fiscal period commencing on October 1, 1954, and ending September 30, 1958, at a cost of about $100,000. Any lessee desirous of renting one of these flats had to be an old-age pensioner and the rent only amounted to $27.50 a month. As the witness modestly stated, they were not built as an investment but as "a bit of philanthropy I guess."

The project in Kitimat consisted of 24 apartments, built during its fiscal period commencing October 1, 1955, and terminating on September 30, 1957, at a cost of about $1,000,000, which the witness considered to be "not a bad investment". The Company, at the date of trial, still remained owner of this project.

The respondent's president also stated that in 1949 he had personally constructed an apartment-house on Connors Hill, 91st St. and 95th Avenue, in Edmonton at a cost of about $225,000 and that he and his wife owned and still retained all the issued shares of Bel Air Apartments Limited which had caused to be built a large complex, between October 1, 1952, and September 30, 1955, consisting of 25 buildings containing 600 suites, which were constructed during the Company's fiscal years commencing October 1, 1952, and ending September 30, 1955. The respondent received about $515,000 in respect of the construction of the Bel Air project.

Mr. Golden also testified that at the end of 1956, or the beginning of 1957, he was contemplating building five apartments on lots 44, 43 and 46. He recalled Mr. Hauptman from Kitimat to prepare a suitable design. Both Mr. Golden and Mr. Hauptman testified that it was found that the sale of lot 44 would not adversely affect their apartment building project. Mr. Hauptman stated that he returned to Edmonton late in January 1956, and described how he made tentative inquiries concerning mortgage money and drew up plans. After being informed of the severance of the service station property, he redrew plans. By rearranging the location of the five intended apartment buildings, he still could build the same number of apartments. See Exhibit 3.

Mr. Hauptman also stated that he later prepared a complete set of plans for apartment buildings for the site.

It seems clear from his evidence, however, that the apartment house project was something less than a scheme that had been finally decided upon for immediate action. He said that Mr. Golden wanted him "to go ahead and design apartments to be built on the piece of property to keep one occupied if nothing else turned up." He also said:

Q. And as a matter of interest Mr. Hauptman, did you have any knowledge as to how this apartment project was going to be proceeded with? Was it all going to go up at once?

A. No, not at all. These apartments were being an investment for the firm Golden Construction Ltd., and I think that the main other item of this would be that we had a number of key personnel that during the wintertime when construction was very slack, to keep them on the payroll we had to have them doing something or it would cost too much money, and Mr. Golden decided on having these apartments built by our key personnel and keep them working during the winter, and also as an investment for the firm, and we were going to build one or two or three blocks, depending on the circumstances of them and the amount of other work we had each year until the apartment site was filled up.

This is confirmed by Mr. Golden's evidence as to why the respondent did not build apartments on the site.

Q. Mr. Golden, after this re-plot was completed you still had a fairly large area left in lots 43 and 46, and was there any reason why you didn't proceed with the construction of apartments on lots 43 and 46?

A. Yes. We went ahead with our plan to build there, made a plot plan, and made plans ready to build, and we subsequently got another offer to go back to Kitimat. They asked us to build some apartments there, and we submitted a bid, and they took a lower bid, and then they turned around and offered us 50 lots in Kitimat and we thought we could let the apartments go for the time being and build something that would bring in revenue in Kitimat where Alcan controlled the lots, and we were the only people in Kitimat that they gave lots to that year. So we were going to have the market to ourselves in Kitimat, and we decided—I sent the foreman that was working on the apartments, I sent him back to Kitimat so we didn't build them at that time. And then subsequently I sold this property.

Mr. Golden told how, in the Spring of 1957 or perhaps earlier, he suggested to Loblaws that in building a shopping centre across from "the property" they place a privacy-screen at the back of their property.

Q. Have you a Mr. Stephens in your office?

A. Yes. Mr. Stephens, I had him work on it too, but I had him working on the screen wall to tidy up or to overcome a situation where you

1965

MINISTER OF NATIONAL REVENUE v. G. W. GOLDEN CONSTRUCTION LTD.

Kearney J.

have a shopping centre across the road from your apartments, you have the back of the shopping centre to contend with, and I had Mr. Stephens design a screen wall. How this came about, I made a trip to Toronto to see Mr. Metcalfe of Loblaws because when I heard that they were connected with the building of the shopping centre and I told him of my plans to build apartments on the property across the street from his shopping centre, and he suggested I give him a sketch of, or a plan of what I had in mind for them to do, and I turned it over to Mr. Stephens our designer, to design a privacy screen for the back of their shopping centre.

Q. Now, do you recall approximately when Mr. Hauptman was given the instructions and when Mr. Stephens did his work?

A. Mr. Hauptman started his work in, on the apartments in the Spring of 1957.

Q. Yes.

A. Mr. Stephens, I can't recall exactly when he started to work on it. It could be before that.

Q. You are just not sure on that point?

A. That is correct. It is about the same time.

The witness also stated that the respondent paid civic taxes on "the property" for three years and never advertized any part of it for sale, did not engage any real estate agent to sell it nor do anything to improve it.

This is a case in which there is no dispute in so far as the basic facts are concerned. The issue turns on the proper inferences to be drawn from the surrounding facts and circumstances.

The respondent was a contractor and builder. Its principal activity was building houses. It also built apartments and miscellaneous other buildings. Its normal house building operation consisted in building a house on land that it owned and then selling it. It had built apartments for at least one other company and, more recently, has made an unsuccessful bid to do so in another instance. In two instances it had built apartments and kept them for rental income.

For its business operations the respondent required building sites and it had an account where it listed its "lands held for re-sale." When it had built on such land some building that it intended to retain, the land was transferred to a fixed asset account.

In 1953 the respondent acquired and assembled into one block an inventory of building sites. In 1955 it transferred some of such building sites to the City of Edmonton to be used for building a school pursuant to an understanding that the City would transfer to the respondent other lands by way of exchange. In due course, the City did transfer to the respondent other lands which the respondent had selected from building sites belonging to the City. Some of those lands were lands that the respondent had selected as being suitable sites on which to build apartment buildings. It was part of a building site so selected that the respondent disposed of in the multiparty transaction as a result of which it made the profit the taxability of which is in dispute.

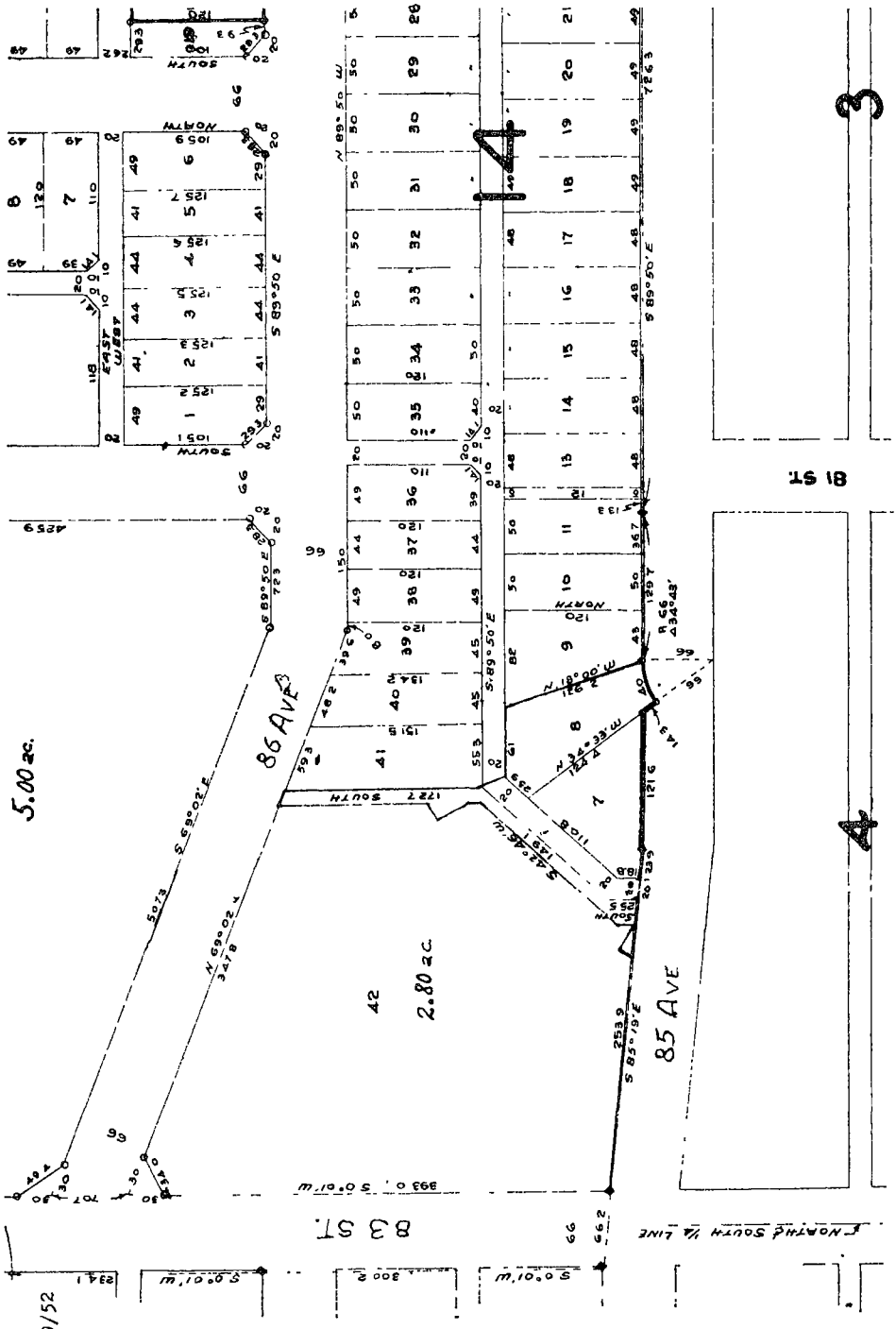
While there is no doubt on the evidence that the respondent gave serious consideration to using the building site in question for the construction of apartment houses as a rental project and embarked on preliminary preparations for such a project, the stage of actual commencement of any such project was never reached and the land in question was never dedicated to any such project to the exclusion of any other use for which the respondent might use building sites in the course of its business.[1]

The situation remains, therefore, that the land conveyed to Imperial Oil was land acquired by the Company as part of the inventory of its business, and was still being held as such inventory when it was disposed of at a profit. In my view, therefore, the profit is a profit from the respondent's business.

For the foregoing reasons, the appeal is allowed with costs.

Appeal allowed.

[1] I might say that, in addition to being satisfied upon the uncontradicted evidence that the land conveyed to Imperial Oil had never ceased to be part of the inventory of the respondent's business, I am of the view in any event that the respondent has failed to satisfy the burden of disproving the assumption of the Minister that the instant land formed part of the respondent's stock-in-trade.



SCHEDULE 1
dated July 9/52

SCHEDULE 2
dated August 25/58