

Windsor  
1965  
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Sept. 3, 4  
}
   
Ottawa  
Dec. 9  
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BETWEEN :

GRAND MARAIS DEVELOP-  
MENT COMPANY LIMITED ..... APPELLANT;

AND

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

*Income tax—Company formed to acquire and develop building lots—  
Receipt of rental revenue—Whether company's sole purpose to receive  
rentals—Sale of properties—Whether profit income.*

Appellant company was incorporated in November 1953 to acquire certain lots in a suburb of Windsor, Ontario, owned by a house building company, but the lands were not in fact transferred to appellant until September 1, 1955, the price being approximately \$97,000. The controlling shareholder of appellant was also controlling shareholder of the vendor. The vendor had built a number of houses in the area and three buildings on the property transferred to appellant. These buildings were leased to commercial tenants and appellant derived \$14,612 rent therefrom between September 1, 1955 and July 11, 1956. On that date it sold one of the buildings at a profit of \$44,882. On December 31, 1956 it sold the second building at a profit of some \$30,000 and on December 10, 1957 the third at a profit of \$46,300. Appellant was assessed to income tax on these profits and appealed, contending that the properties had been purchased for the purpose of deriving rents therefrom and that it had been forced to sell because of financial pressure on appellant's controlling shareholder (who was involved in many business ventures) consequent on the institution of a tight money policy in the third quarter of 1955 which resulted in a serious restriction of credit.

*Held*, the appeal must be dismissed.

The inference to be drawn from all the evidence was that appellant's sole intention at the time it acquired the property was not necessarily to retain the property for the purpose of producing rental income but that it had in mind from the outset the possibility of the sale of the property in view of the likelihood of a retrenchment of its controlling shareholder's business enterprises. *Anderson Logging Company v. The King* [1925] S.C.R. 45; *Sutton Lumber and Trading Co., Ltd. v. M.N.R.* [1953] 2 S.C.R. 77, referred to.

APPEAL from a decision of the Tax Appeal Board.

*P. N. Thorsteinsson* for appellant.

*F. J. Dubrule* and *T. G. Zuber* for respondent.

CATTANACH J.:—This is an appeal from a decision of the Tax Appeal Board<sup>1</sup> dated September 13, 1963 which dismissed appeals taken by the appellant herein against

income tax assessments levied upon it for its 1956, 1957 and 1958 taxation years.

The Minister in assessing the appellant for its three taxation years in question added to the appellant's declared income in the respective years amounts of \$44,881.80, \$30,070.22 and \$46,300 realized on three sales of land on July 11, 1956, December 31, 1956 and December 10, 1957 comprising part of property bought by it on September 1, 1955 as being profit from a business within the meaning of sections 3 and 4 of the *Income Tax Act* and the extended meaning of "business" as defined by section 139(1)(e) to include an adventure or concern in the nature of trade.

As against this, the appellant contends that its intention in purchasing the property was to retain and hold the same and to further develop it, as a long-term investment for the purpose of receiving rental income therefrom and that, accordingly, the gain realized by the appellant from the sale of the major portion of the property in three transactions was merely the realization of a capital asset.

The narrow issue is, therefore, whether the appellant when it purchased the property on September 1, 1955, had as its exclusive purpose the retention thereof as a source of rental income or whether that was not its exclusive purpose at the time of purchase of the property but that the appellant also entertained as one of its possible purposes the sale of the property.

If the first alternative were the case, then the profit from the sales would not be taxable, but if the second alternative were the case, then the resultant profit is clearly taxable.

The onus of disproving the Minister's assumption that the latter was the case in assessing the appellant as he did, falls on the appellant. To determine whether the appellant has discharged that onus, it is necessary to examine all the circumstances leading to the appellant's purchase of the property and those surrounding the appellant's disposition of the major portion thereof. The question of fact as to what the purpose of the appellant was in acquiring this property is one that must be decided after considering all the evidence.

1965  
 GRAND  
 MARAIS  
 DEVELOP-  
 MENT  
 Co. LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE  
 ———  
 Cattanach J.  
 ———

1965

GRAND  
MARAIS  
DEVELOP-  
MENT  
Co. LTD.

v.

MINISTER OF  
NATIONAL  
REVENUE

Cattanach J.

The appellant is a joint stock company incorporated as a private company, pursuant to the laws of the Province of Ontario by Letters Patent dated November 30, 1953 for the following purposes and objects:

To acquire, by purchase, lease, exchange, concession or otherwise, and to own, operate, maintain, rent, lease, mortgage or otherwise charge or encumber lands and premises situate in the Township of Sandwich West, in the said County of Essex, and being composed of lots 700 to 716 inclusive according to Registered Plan 1343 and lots 307 to 309 inclusive according to Registered Plan 1056 in the said Township of Sandwich West and such rights-of-way and easements as may be appurtenant thereto or enjoyed therewith and such other lands and premises as may be contiguous or adjacent thereto or in the vicinity thereof or wherever situate which may be used in conjunction therewith, and to build upon, develop and improve the said lands and premises or any part or parts thereof;

The authorized capital of the appellant consisted of 900 non-cumulative redeemable preference shares of the par value of \$100 each and 10,000 common shares without nominal or par value which common shares might be issued for a consideration not to exceed, in the aggregate, an amount or value in the sum of \$10,000.

It would appear that at no time pertinent to the present appeal, had any of the preference shares been issued. Prior to the relevant times, all of the 1000 common shares were issued for a consideration of \$1,000 and they remained issued and outstanding during all relevant times. Of the common shares, 85 per cent or 850 were issued to Mr. Robert Slutzky and the remaining 15 per cent or 150 common shares were issued to David Richardson, now deceased, who had acted as the solicitor and secretary of the appellant, and Alec T. Kashkawal. Whether Mr. Slutzky's shares were issued as fully paid and what amount or value he paid thereon is conjectural but such circumstances are not material to a consideration of this appeal.

Mr. Slutzky was the president of the appellant company at all relevant times.

Mr. Slutzky was also the president and the majority shareholder of Economy Home Builders of Windsor Limited (hereinafter referred to as "Economy Windsor") and Economy Home Builders of London Limited (subsequently referred to as "Economy London"). As is apparent from the corporate names, these two companies were engaged in the business of purchasing real estate, subdividing the real

property so purchased into building lots, erecting houses thereon and selling the same, in the cities of Windsor and London and their immediate environs.

It was Mr. Slutzky's invariable practice, upon the advice of his solicitor and accountant, when a parcel of real estate was purchased, to incorporate a company and vest the property acquired in the company so incorporated to be held for and ultimately used by the companies engaged in actual building.

Mr. Slutzky, though resident in Detroit, Michigan, conducted his business enterprises in the Windsor area. He began his business career at a tender age by working with his father in a linen supply business. On his father's death he continued the conduct of that business. Prior to 1944 the linen was laundered by a local laundry. In 1940 Mr. Slutzky bought the laundry. In the ensuing years he acquired several other laundries and cleaning plants in the City of Windsor.

In 1949 he embarked upon a residential home building business at which time Economy Windsor was incorporated to conduct that business and in 1953 Economy London was incorporated to conduct a similar business in the London area.

The lands which give rise to the subject appeal were acquired pursuant to agreements entered into by Economy Windsor in 1951 and were situated on Grand Marais Road, a concession road, in the Township of Sandwich West, a suburb of Windsor. In 1950 Economy Windsor built and sold a number of houses on land in this immediate area which had been, prior thereto, devoted to exclusively agricultural uses. Because of the residential development of the area Mr. Slutzky foresaw the possibility of commercial development on Grand Marais Road to supply services to residents which he foresaw as a likely main traffic artery.

Titles to the lands in question were vested in Economy Windsor by four different deeds as follows:

- In 1951, Canada Trust and Deslippe to Economy Windsor lots, 704, 716 and 730.
- In 1953, Canada Trust to Economy Windsor lots, 705 to 711 and 725 to 729.
- In 1953 Yasbeck to Economy Windsor lots, 307 to 309.
- In 1955, Canada Trust to Economy Windsor lots, 701 to 703, 712 to 715, 721 to 724 and 731, 732 and part of 733.

1965  
 GRAND  
 MARAIS  
 DEVELOP-  
 MENT  
 Co. LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE  
 Cattanach J.

1965

GRAND  
MARAIS  
DEVELOP-  
MENT  
Co. LTD.

v.

MINISTER OF  
NATIONAL  
REVENUE

Cattanach J.

Lots 701 to 716 were facing Grand Marais Road on the South side and lots 721 to 733 were to the rear of the lots facing on the street. Lots 307 to 309 were on the North side of the street and face thereon.

While the actual transfers were not effected to Economy Windsor until the years indicated, nevertheless, Mr. Slutzky testified that there was a firm commitment with the vendors who were agreeable to the lots being picked up whenever Economy Windsor required them.

Economy Windsor built three buildings on the property. The first was built in 1952 and portions of it were leased to a confectionery, a barber shop and a bank, respectively. In 1955 a second building was built. A part of it was used as the office of Economy Windsor (that part produced no rental return). Other parts were leased as a hardware store and a cabinet shop, respectively. There were three residential apartments on the second storey. In 1953, a third building was erected by Economy Windsor. It was leased to a supermarket. In 1955 the supermarket was enlarged and an alteration was made to the premises occupied by the hardware store.

The leases for the premises were negotiated by and entered into by Economy Windsor for fixed terms, usually between five and ten years, with provisions for increased rentals at specified intervals during the term of the lease or for negotiations for increased rentals.

While the appellant was incorporated for the objects and purposes above indicated on November 30, 1953, the lands described in the said purposes and objects were not transferred to the appellant until September 1, 1955. On that date the appellant purchased from Economy Windsor the lands described in its objects, with minor variations, together with buildings erected thereon by Economy Windsor at a total price of \$97,282.95, being the cost of the land and buildings, less depreciation of the buildings, as carried on the books of Economy Windsor. Payment was effected by the appellant to Economy Windsor by a cheque for \$1,000, the assumption of a first mortgage of \$20,000 bearing interest at 5½ per cent and by giving back a mortgage to Economy Windsor with semi-annual payments of

\$1,250 for the first five years and \$2,500 in the succeeding years with interest at 2 per cent. The amount of the mortgage so given back was \$76,797.54 after adjustments.

The leases were assigned by Economy Windsor to the appellant which collected the rentals from the tenants from September 1, 1955 forward. The rental income received by the appellant for the period between September 1, 1955 (when the property was acquired by it) and July 11, 1956 (when the supermarket was sold) was \$14,612.10 which would be more than sufficient to meet the commitment on the two outstanding mortgages which I compute to be roughly \$3650 leaving a net income of approximately \$11,000 less the usual maintenance and like expenses.

In his testimony, Mr. Slutzky explained that the reason the lands acquired by Economy Windsor were not transferred to the appellant immediately upon its incorporation in November 1953, despite his instructions to that effect, was either oversight or neglect on the part of his solicitor, the late Mr. Richardson, who was also the secretary and a shareholder of Economy Windsor. I cannot subscribe to such explanation. It is evident that Economy Windsor did not acquire title to certain of the lots which were to be transferred to the appellant until 1955 and accordingly no such imputations can be justifiably attributed to Mr. Richardson.

The appellant, upon its incorporation, performed corporate acts but did not embark upon the objects for which it had been incorporated until September 1, 1955. In the interval it lay in a state of suspended animation.

In 1955 Mr. Slutzky and an associated shareholder in Economy London agreed to rearrange their holdings of shares in Economy Windsor and Economy London so the latter became a shareholder in Economy Windsor to the extent of 20% and Mr. Slutzky's shareholding in Economy London was increased proportionately. Since such shareholder was not to participate in the property on Grand Marais Road, this circumstance precipitated the transfer of that land to the appellant on September 1, 1955.

Mr. Slutzky further testified that there was a two-fold purpose to be accomplished in transferring the commercial property in question to a corporate entity created to receive it, in this instance the appellant herein. These avowed

1965  
 GRAND  
 MARAIS  
 DEVELOP-  
 MENT  
 Co. LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE  
 Cattanach J.

1965  
 GRAND  
 MARAIS  
 DEVELOP-  
 PMENT  
 Co. LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE  
 Cattanach J.

purposes were (1) to separate what he termed "commercial long time investment property" from the trading assets of Economy Windsor and (2) to separate the commercial property from the trading liabilities of Economy Windsor and from the land commitments and liabilities involved in the purchase of land by Economy Windsor.

The principal of Mr. Slutzky's many enterprises was undoubtedly that of home building conducted by Economy Windsor and to a lesser extent by Economy London. The financing of the operations of these respective companies was by means of a line of credit or overdraft from the companies' banker to the total amount of \$350,000, \$250,000 being allocated to Economy Windsor and \$100,000 to Economy London.

Mr. Slutzky stated that the building companies enjoyed their peak production in 1955 and at that time acquired by agreements for purchase lands ten times in excess of their normal requirements. As intimated before, it was the invariable practice of Mr. Slutzky, when land had been purchased for the eventual use by the home building companies, that such land was vested in a separate corporate entity set up to purchase and hold such lands. I assumed from the evidence of Mr. Slutzky that the funds for the initial payment on property so purchased were loaned by Economy Windsor or Economy London to the holding company and that subsequent payments, when they fell due, were also advanced by Economy. Mr. Slutzky also stated that in 1955 Economy Windsor was over extended and liable for payments falling due in 1956 which he estimated as amounting to between \$750,000 and \$1,000,000. At this point I must confess that I was unable to obtain a clear and precise statement of the exact commitment of Economy Windsor and its associated holding companies and what companies were responsible for payments on the purchase of lands, or whether such purchases could be abandoned with a consequent loss of deposits or payments already made since Mr. Slutzky persisted in talking in generalities. He included in his estimate of liabilities an obligation to install a sewage treatment plant in accordance with the regulations of Central Mortgage and Housing Corporation prior to the commencement of a house building project in which Economy Windsor was to engage

thereby increasing the cost thereof by \$125,000. However, I am certain that Economy Windsor and its associated companies were faced with substantial liabilities in 1955 which by reason of their precarious financial position and the under capitalization of Economy Windsor they would have great difficulty in meeting.

As mentioned before, the building operations of Economy Windsor and Economy London were conducted by means of bank financing which the bank never permitted to exceed \$350,000 and which the two companies utilized to the maximum. It was established that the constant practice throughout 1955, which was a peak year in the companies' affairs, officers of Economy Windsor were received in the bank after normal banking hours to make deposits from the proceeds of sales received during the day to cover cheques which had been written so as to ensure that the bank overdraft did not exceed the prescribed maximum. Furthermore, the obligations of Economy Windsor to its bank were guaranteed by each and every company in the Economy group, including the appellant, as well as by Mr. Slutzky personally.

Mr. Babcock, the manager of the branch of the bank through which Mr. Slutzky conducted his business as well as that of the Economy group of companies testified that from 1950 to 1955 the account was considered as satisfactory, but also testified that the account was under pressure for some time prior to the spring of 1955. He added that because of a tight money policy beginning in the third quarter of 1955 which resulted in a definite restriction of credit, the Economy group account was reviewed. Mr. Slutzky was told by him that the operations of the companies were not generating sufficient money to meet the payments and he was accordingly advised to sell some properties in order to place Economy Windsor in a better financial position. In June 1956 Mr. Slutzky and Mr. Babcock attended at the head office of the bank, which was concerned about the standing of the account, at which meeting officers of the bank insisted that Mr. Slutzky begin an immediate policy of retrenchment.

This Mr. Slutzky did. He conducted what might be termed a salvage operation abandoning some properties, disposing of other properties and businesses and attempting to raise money by placing mortgages on still others in order

1965  
 GRAND  
 MARAIS  
 DEVELOP-  
 MENT  
 Co. LTD.  
 v.

MINISTER OF  
 NATIONAL  
 REVENUE

Cattanach J.



1965  
 GRAND  
 MARAIS  
 DEVELOP-  
 MENT  
 Co. LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE  
 Cattanach J.

to cut down on liabilities and raise further funds, the whole to be devoted to shoring up the financial position of and maintaining Economy Windsor as a going concern.

Included in this realization of assets was the property held by the appellant. The buildings on the lands owned by the appellant occupied one-third of the total area and the remaining two-thirds was vacant land. If I understood the evidence correctly, the land upon which the buildings stood was subject to the first mortgage in favour of Sterling Construction Co. Ltd. in the amount of \$20,000 and the balance was subject to the mortgage to Economy Windsor in the amount of \$76,797.54. However, prior to the meeting at the head office of the bank, Mr. Slutzky had already arranged for a short term mortgage on the vacant property held by the appellant in the amount of \$25,000 at a very high rate of interest, the proceeds of which were turned over to Economy Windsor by the appellant.

The tenant of the supermarket had previously exhibited an interest in purchasing the premises that it occupied but this was not considered by the appellant.

However, on July 11, 1956 the appellant sold that part of its property to the proprietor of the supermarket, through a nominee, whereby the appellant realized a profit of \$44,881.80. At the time of this sale the purchaser was given the opportunity of first refusal on a further portion of the appellant's property which it wished to purchase but was unable to do so at that time for lack of funds.

On December 31, 1956 the appellant sold a further part of its property to Spence's Markets Ltd. and realized a profit of \$30,070.22.

On December 10, 1957 the firm who was the purchaser in the transaction of July 11, 1956 exercised the right of first opportunity to purchase further property that it might require, given to it by that transaction. From this sale the appellant realized a profit of \$46,300.

The Minister added the profits from these three transactions to the appellant's incomes for the years in question, which additions constitute the basis of the present appeal.

The balance of the property, being three vacant lots on the North side of Grand Marais Road, remained in the possession of the appellant and these lots were subsequently expropriated for a municipal library.

The proceeds of these three sales, if received in cash, were loaned to Economy Windsor and, if received in securities, were made available to Economy Windsor to improve its financial position with its banker by way of reduction of its indebtedness or collateral.

During the trial I raised with counsel the question whether the three sales above mentioned might be subject to different considerations. They both took the position that when the appellant's decision to sell was taken it was tantamount to the entire project being liquidated and the second and third sales followed consequentially upon the first. Therefore, the three sales were part and parcel of one overall decision by the appellant and each individual sale was a piecemeal realization of the appellant's decision to sell the whole or as much of the whole as was possible. Each of the three sales is accordingly subject to the same considerations and each forms, in effect, steps in one overall plan.

A corporation, being an incorporeal body, can only act through the agency of natural persons. In the present instance, throughout the existence of the appellant company, its interests and its intentions were identical with those of Mr. Slutzky, its principal shareholder and its president. There is no question that his decisions became the decisions of the appellant and were implemented by it. Similarly the intention and decisions of Economy Windsor were also identical with those of Mr. Slutzky as were those of all other companies in the Economy Group.

On behalf of the appellant it was submitted that its intention when purchasing the commercial buildings in question and the adjacent land was to retain and hold those properties for rental income and to further develop the lands for that same purpose and that such an intention is confirmed by the purposes and objects as set forth in the Letters Patent incorporating the appellant under date of November 30, 1953. Although the actual purchase of the lands by the appellant did not occur until September 1, 1955, Economy Windsor erected revenue producing buildings thereon so that what the appellant did acquire was revenue producing and the appellant did, in fact, receive revenue therefrom. As further indications of such an intention, reference was made to the long term leases entered into by Economy Windsor with provision for increased

1965

GRAND  
MARAIS  
DEVELOP-  
MENT  
CO. LTD.

v.

MINISTER OF  
NATIONAL  
REVENUE

Cattanach J.

1965  
 GRAND  
 MARAIS  
 DEVELOP-  
 PMENT  
 Co. LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE  
 Cattanach J.

rentals and that when it became necessary to raise funds to relieve Economy Windsor from its financial straits resort was first made to raising funds by way of mortgage.

For such reasons it was submitted that there was no evidence of intention to sell the property at the time it was acquired by the appellant and that the decision to sell was occasioned by the dire and unforeseen financial stringencies which affected Slutzky in his capacity as principal shareholder of Economy Windsor thereby depriving him of the "pension" he sought to secure for himself through the medium of the appellant.

It is axiomatic that a taxpayer's intention is most accurately deduced from what it actually did. Here the appellant acquired the property on September 1, 1955 and shortly thereafter sold the same. The logical inference to be drawn from such specific and incontrovertible facts is that the possibility of sale was present from the outset unless some convincing reason is advanced to explain the sale. In so stating I have not overlooked the many circumstances cited as *indicia* of the appellant's intentions to retain the property, to derive revenue therefrom but, as is so often the case, these circumstances are susceptible of interpretation either way and are accordingly not conclusive.

As Duff J. pointed out in *Anderson Logging Company v. The King*<sup>1</sup>, if a transaction is within the business of the company as contemplated by the objects, then *prima facie* any profit derived is profit from the business of the company, the company being presumed to have a business and to carry it on. However, in the present appeal the exact converse is the case. The purposes and objects of the appellant are those of an investment company. The question to be determined is not what the appellant was authorized to do by its Letters Patent, but rather what, in fact, it did do (*Sutton Lumber and Trading Co., Ltd. v. M.N.R.*)<sup>2</sup>.

As intimated before I cannot accept the explanation put forward by Mr. Slutzky that the delay from November 30, 1953 to September 1, 1955 in the appellant's purchase of the property as being attributable to his solicitor's neglect. I am inclined rather to attribute it to the circumstance that title to the property was not acquired until 1955 and that

<sup>1</sup> [1925] S.C.R. 45.

<sup>2</sup> [1953] 2 S.C.R. 77.

at that time another shareholder was to participate in Economy Windsor, but not in the commercial property, for which reason the property was then transferred to the appellant. Therefore, the material date at which the appellant's intention must be determined is September 1, 1955, being the date of the actual acquisition of the property rather than the date of incorporation on November 30, 1953.

1965  
 GRAND  
 MARAIS  
 DEVELOP-  
 MENT  
 Co. LTD.  
 v.  
 MINISTER OF  
 NATIONAL  
 REVENUE  
 Cattanach J.

Neither do I find convincing Mr. Slutzky's explanation of vesting the property in the appellant to protect it from the liabilities of Economy Windsor because immediately upon the property being transferred to the appellant, the appellant joined in a guarantee to the bank for Economy Windsor's overdraft as had all other companies in the group.

In order to obtain a realistic appreciation of the circumstances it is impossible to look solely to the activities of the appellant company, but rather the activities of all companies in the group must be considered together with those of Mr. Slutzky.

Because of the precarious financial position of the Economy group at the time of the acquisition of the property in question, which precarious position was the direct cause of the sale, and because of the sale of the property within ten and one-half months after its acquisition, I conclude that the possibility of sale was present from the outset. From this conclusion it follows that the reason advanced for the sale must be considered. The reason so advanced was the unforeseen and stringent financial straits in which Economy Windsor found itself and the consequent pressure from its bankers for that company to assume a more liquid position resulting in a general retrenchment of Mr. Slutzky's enterprises as a whole and a realization of as many assets as possible to preserve Economy Windsor which was Mr. Slutzky's principal enterprise.

However, I cannot accept the submission that this eventuality was either sudden or unforeseen. Economy Windsor in conducting its business operations, did so to the very maximum of its banking credit. Its difficulty with its overdraft was of a continuing nature. The bank manager testified that the account had been under constant pressure

1965  
GRAND  
MARAIS  
DEVELOP-  
MENT  
CO. LTD.  
v.  
MINISTER OF  
NATIONAL  
REVENUE  
Cattanach J.

throughout 1955 and accordingly it does not follow that the pressure from the bank was suddenly exerted at the time of the meeting at the Head office in June 1956. Mr. Slutzky was aware of his precarious financial position and it accordingly follows that the likelihood of the guarantors of the bank's indebtedness being called upon was neither remote nor can it be said that the pressure brought to bear by the bank was unexpected.

The cumulative effect of all surrounding circumstances leads me to the inference that the appellant's sole intention was not necessarily the retention of the property for the purpose of producing rental income, but that the possibility of the sale of the appellant's property must have been present from the outset in view of the likelihood of it becoming necessary to effect a retrenchment of the Economy group of companies of which the appellant formed a part.

After having given careful consideration to all the evidence, I am not satisfied that there is a balance of probability that the appellant acquired the property for the purpose of deriving rental income therefrom to the exclusion of any purpose of disposition at a profit. Accordingly it cannot be said that the Minister was not warranted in assessing the appellant as he did.

The appeal is, therefore, dismissed with costs.