BETWEEN:

BEN LECHTER .....APPELLANT;

AND

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

1964
Mar. 17,
Apr. 3
Nov. 5

Revenue—Income—Income tax—Expropriation and sale of real property—Real property acquired for long-term investment or as an adventure or concern in nature of trade—Meaning of "taxation year"—Date of creation of obligation to pay in relation to date of payment—Reassessment within six years of original assessment—Income Tax Act, R.S.C. 1952, c. 148, ss. 46(1) and (4)(a) and (b), 139(1)(e) and 1139(2)(b)—Expropriation Act, R.S.C. 1952, c. 106, s. 9.

The appellant is a Montreal wholesale jeweller who has invested considerable sums in real estate partnerships and as a leading shareholder of Benaby Realties Co. and in his own private name and capacity. In 1952 he purchased lot 507 in the Parish of St. Laurent, district of Montreal. On April 13, 1953 he sold a parcel comprising about ten per cent of lot 507 to Canadian Aviation Electronics Limited. Later a portion of the part of lot 507 still owned by the appellant was expropriated by the Crown in right of Canada, the expropriation being effective from January 7, 1954, and a few months later the appellant was notified that additional parts of lot 507 would be required by the Canadian Government. As a consequence the appellant sold to the Crown in right of Canada those parts of lot 507 required by it, after which sale the appellant retained about twenty-five per cent of the said lot. This remaining part of lot 507 owned by the appellant was disposed of by him in 1956.

1964

LECHTER v. MINISTER OF NATIONAL REVENUE

The evidence disclosed that the sale by the appellant to the Canadian Government of the already expropriated part of lot 507, together with the additional part of the lot required by the Government was effected no later than July 1954.

The appellant received a notice of assessment dated March 15, 1962 which declared that certain sums of money were land profits arising out of lot 507.

Held: That the acquisition of lot 507 by the appellant, the initial sale to Canadian Aviation Electronics Limited and the 1954 expropriation by the Crown and the subsequent disposal of the remainder of lot 507 is really more germane than alien to the oft stated assessable pursuit included in s. 139(1)(*e*) of the *Income Tax Act*, "an adventure or concern in the nature of trade".

2. That the appellant may have entered upon the transactions in question on his own, without any company affiliation or partnership connections, and, nonetheless, have pursued a profit making scheme which the law renders liable to income taxation.

3. That the relevant taxation year must coincide with that during which a debt or an obligation to pay, legally enforceable, originated between the Crown and the appellant.

4. That the Treasury Board's authorization of payment of the sum agreed upon between the Crown and the appellant for the lands sold to the Crown did not create a debt but merely authorized payment of a pre-existing one.

5. That the respondent's notification of reassessment to the appellant, dated March 15, 1962, alleging no misrepresentation or fraud falls well beyond the prohibitory limit of six years and is illegal.

6. That the appeal is allowed.

APPEAL under the *Income Tax Act*.

The appeal was heard by the Honourable Mr. Justice Dumoulin at Montreal and Ottawa.

N. N. Genser, Q.C., P. F. Vineberg, Q.C. and *Sydney Phillips* for appellant.

Paul Boivin, Q.C., Ben Bernstein, Q.C. and *P. M. Ollivier, Q.C.* for respondent.

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

DUMOULIN J. now (November 5, 1964) delivered the following judgment:

The appellant, Mr. Ben Lechter, a successful Montreal wholesale jeweller, appeals from the decision of the Minister of National Revenue, dated October 16, 1962, in respect of the income tax re-assessment for the taxation year ended December 31, 1956.

Apart from his thriving jewellery trade, the appellant has invested considerable sums in real estate partnerships or as a leading shareholder of Benaby Realties Co. and, as presently, in his own private name and capacity.

On March 5, 1952, Ben Lechter purchased land in the Parish of St. Laurent, district of Montreal, known and designated as lot 507 on the official plan and book of references of the aforesaid Parish. The total area thus bought was approximately 2,800,000 sq. ft. and the price thereof $125,000 (cf. exhibit 1).

This property was allegedly acquired "for the express purpose of long range investment through extensive development". Conformably to these intentions, Mr. Lechter approached Canadian Aviation Electronics Limited (hereinafter abbreviated to CAE), a progressive manufacturing concern, with an offer to erect and rent a building suitable to all the company's requirements (see exhibits 7, 8, 9). The proposed agreement also extended to CAE an "option to purchase", subsequently accepted as stated in exhibit 9, a letter from K. R. Patrick, President of CAE, dated October 5, 1953. Lechter submitted several tentative plans but, for some undisclosed reason, the rental proposal was dropped and an outright purchase substituted. On April 13, 1953, appellant sold to CAE 270,000 sq. ft. out of lot 507, as appears on plan exhibit 12.

This sale, according to paragraph 6 of the Notice of Appeal, was expected "to bring greater prestige to the balance of appellant's holdings and further his plans for extensive building thereon".

On January 15, 1954, Mr. Lechter received a letter from the Department of Transport, advising him that a portion of lot 507 had been expropriated under authority of the *Expropriation Act* (1952, R.S.C., c. 106, s. 9), and, accordingly, that title thereto vested in the Crown from January 7, 1954. (cf. Notice of Appeal, para. 11, and exhibit 13).

A few months later, the Department of Transport realized its previous expropriation of part of lot 507 was insufficient and, by the intermediary of the District Land Agent, Mr. Mr. Jean Paul Adam, duly authorized in virtue of a power of attorney from Mr. George C. Marler, then Minister of Transport for Canada, (exhibit 18), informed Lechter that additional ground would be taken by the government. As a

1964

LECHTER v. MINISTER OF NATIONAL REVENUE

Dumoulin J.

matter of convenience to both parties and to avoid a second expropriation, Mr. Lechter agreed to sell outright.

Exhibit 15, a registered letter dated at Montreal July 13, 1954, signed J. P. Adam and addressed to Mr. Ben Lechter, declares that:

> Pursuant to the expropriation of January 7th, 1954 affecting part of lot 507 in the Parish of St. Laurent, we are now authorized to make you a formal offer of settlement in the amount of $318,776 in full compensation for the area expropriated, that part of lot 507 severed by reason of the expropriation, and all damages arising from the said expropriation. The foregoing is all without prejudice to the rights of the Crown.
> Would you kindly advise us as soon as possible of your decision with respect to this offer.

This tender was accepted in lightning-quick time as evidenced in exhibit 16, a registered communication of July 14, 1954, addressed by Ben H. Lechter to the attention of Mr. J. P. Adam and worded thus:

> In reply to your letter of the 13th instant, I wish to notify you that I accept your formal offer of settlement in the amount of three hundred and eighteen thousand seven hundred and seventy-six dollars ($318,776) in full compensation for all damages arising out of the expropriation of January 7th, 1954 affecting part of my property bearing lot No. 507 Parish of St. Laurent.
>
> In view of the expropriation having been filed six months ago, I would appreciate payment within the next sixty days.

This parcel of land sold to Her Majesty consisted of 32.25 arpents.

Two notarial deeds of sale, respectively filed as exhibits 17 and 18, executed the same day, May 13, 1955, drawn up by Emile Massicotte, notary public for the Province of Quebec, relate to the expropriation of January 7, 1954, and the direct purchase, the exact date of which, though unspecified, must necessarily be set no later than the first days of July.

It should be noted, now, that the outright sale attained its legal validity the moment it was definitely agreed upon by the interested parties, in keeping with art. 1472 of the *Civil Code* enacting that sale "is perfected by the consent alone of the parties, although the things sold be not then delivered..."

The compensation amount paid for expropriation was $140,783 and for the voluntary sale $177,993, a total of $318,776.

In consequence of the above transactions, a plan, exhibit 12, drawn by Mr. Pierre Lapointe, Quebec Land Surveyor

in the employ of the Department of Transport, shows that, as of September 1, 1954, only 728,600 sq. ft. out of a former holding of 2,800,000 sq. ft. were still owned by Ben Lechter.

The appellant further states that "in the taxation year 1956, [he] also was forced to dispose of other parcels of land which were no longer suitable for the purpose of investment for which they were acquired".

Reverting now to the expropriation and ensuing deals of 1954, the appellant "under date of March 15, 1962, received a notice of assessment which in part declares that an amount of $109,406.55 and a further amount of $125,100.36 were land profits arising out of the said lot 507".

The first ground of appeal relied upon by Mr. Lechter is that the profits derived from the expropriation and the several sales previously mentioned were enhancements of capital investments. With this, the Court can hardly agree since the over-all picture of the case, i.e., the acquisition of lot 507 on March 5, 1952, the initial sale to CAE in December of that year, then, omitting for the time being the expropriation, the 1954 sale to the respondent and subsequent disposals to private parties, is really more germane than alien to the oft stated assessable pursuit included in s. 139(1)(*e*) of our Act "an adventure or concern in the nature of trade".

Mr. Lechter may, so he testified, have entered upon this deal on his own, without any company affiliation or partnership connections, and, nonetheless, have pursued a profit making scheme which the law renders liable to income taxation.

It would seem purposeless to quote any specific precedent because most would, I believe, support this opinion, and all of these might also offer some factual differences. The jurisprudence in the matter unanimously suggests that each problem be viewed in the light of its own specific incidents. Consequently, I probably would have considered the appellant as engaged in a profit-making scheme or venture in the nature of trade if this question were the only one raised in the instant suit.

1964

LECHTER v. MINISTER OF NATIONAL REVENUE

Dumoulin J.

That other point, a decisive one herein, consists in the applicability of the prescriptible immunity to re-assessment, obtained by taxpayers at the expiry of the statutory period declared by s. 46 (4) (*a*) (*b*) of 1954 the pertinent year, as will be hereafter shown. This provision enacts that:

> 46. (4) The Minister may at any time assess tax, interest or penalties and may
>
> (*a*) at any time, if the taxpayer or person filing the return has made any misrepresentation or committed any fraud in filing the return or supplying information under this Act, and
>
> (*b*) within 6 years from the day of an original assessment in any other case,
>
> re-assess or make additional assessments.

Section 46 (1), albeit first in numbering, is really complementary to 46 (4); it reads:

> 46. (1) The Minister shall, with all due despatch, examine each return of income *and assess the tax for the taxation year* and the interest and penalties, if any, payable. (emphasis not in text).

Obviously, the issue before the Court calls for a determination of the period constituting the true "taxation year", particularly so because respondent nowhere alleges "misrepresentation or fraud", vitiating factors which, if pleaded and proved, relieve the Minister from all limitations as to time.

Paragraph 22 of the Notice of Appeal invokes this defence in law, when it argues that:

> 22. Further, the assessment with respect to the taxation year 1956 was made in March, 1962, a delay which is completely contrary to the provisions of Section 46 (1), (*supra*) of the Income Tax Act, and such assessment is illegal and should be dismissed on such grounds alone.

A statutory definition is in order, as also a restatement of certain dates and facts, before I attempt to solve this objection.

To start with, "taxation year" in the language of s. 139 (2) (*b*) is defined in these terms:

> 139. (2) For the purpose of this Act, a "taxation year" is
>
> (*a*) . . .
>
> (*b*) in the case of an individual, a calendar year,
>
> and when a taxation year is referred to by reference to a calendar year *the reference is to the taxation year or years coinciding with, or ending in, that year.* (italics are mine).

Should I add a superfluous reminder that "calendar year" comprises "the period from January 1 to December 31 inclusive". (Black's Law Dictionary, 4th ed.)

The approach to the problem resorted to by the respondent in para. 13 of the Reply argues that:

13. . . . in assessing the appellant for the taxation year 1956, he (respondent) relied on the assumption that:

(a) the Appellant was a dealer in real estate;

(b) the land purchased formed part of the taxpayer's real estate inventory or stock-in-trade;

(c) the profit realized on sale was income from a business within the meaning of sections 3, 4 and 139 (1) (e) of the Income Tax Act.

As already said, no allegation whatsoever of misrepresentation or fraud is found in respondent's pleadings, nor was anything of the kind hinted at during the trial, which would, indeed, have seemed a belated and illegal proceeding. Misrepresentation or fraud must be both alleged and proved. In this respect, Mr. Justice Cameron's pronouncement in *Minister of National Revenue v. Maurice Taylor*[1] will afford ample justification.

Next come the essential dates:

(a) that of the Notice of Expropriation filed in the office of the Montreal Registrar of Deeds on January 7, 1954; exhibit 13.

(b) the "formal offer of settlement in the amount of $318,776" in full compensation for the area expropriated and that bought in a free sale, tendered by the duly authorized agent of the Minister of Transport; exhibit 15.

(c) the acceptance of the above offer by Ben H. Lechter on July 14, 1954; exhibit 16.

(d) the two notarial conveyances of May 13, 1955, exhibits 17 and 18, describing topographically the parts of lot 507 expropriated or directly sold and the price paid therefor but nowise constitutive of the obligation previously incurred by the Government of Canada.

(e) an extract from the minutes of the Treasury Board held at Ottawa on February 11, 1955, authorizing payment of $318,776 "to Ben H. Lechter in full and final settlement of all claims other than claims of the Bell Telephone Company of Canada, arising out of the expropriation of approximately 703,915 square feet of land, and as compensation for the purchase of approximately 1,186,620 square feet severed by the expropriation, all located in Lot 507, Parish of St. Laurent, Quebec"; exhibit F.

The text of this document incontrovertibly establishes that it does not purport to create a debt but merely acquits one "arising out of the expropriation . . . and as compensation for the purchase . . . " of land.

[1] [1961] Ex.C.R. 318 at 319, 320, 322, 327.

1964

LECHTER v. MINISTER OF NATIONAL REVENUE

Dumoulin J.

In the notes submitted by the respondent, the latter's view of the case is expressed in these lines:

> As appears from the balance sheet attached to the Appellant's Return for the year 1956, the Appellant's fiscal period ends on January 31st. It follows that any income received or receivable by the Appellant between February 1st 1955 and January 31st 1956 is properly assessable in the taxation year 1956.

And, again, in the ensuing paragraph on page 3:

> Respondent submits that the approval of the Treasury Board was a prerequisite to the existence of a binding agreement between the Crown and the Appellant and that prior to such authority being granted on February the 11th 1955, there was no legal obligation binding on the Crown to pay the amount in question . . .

The relevant taxation year must coincide with that during which a debt or an obligation to pay, legally enforceable, originated between respondent and appellant.

No doubt can exist regarding the expropriation since s. 9 of the *Expropriation Act* expressly vests in Her Majesty the Queen all land expropriated from the day a plan and description are deposited of record in the Registration office, and this formality was duly effected on January 7, 1954. It is equally assured that the appropriation by private sale of the second part of lot 507 must have occurred during the intervening period up to July 13 and 14, when the departmental offer of payment was made to the appellant and immediately accepted (cf. exhibits 15 and 16).

The voluntary sale of 1954 required no other essential element than the mutual consent of the parties; the transmission of property due to expropriation intervened by the sole authority of the law.

The respondent appears to confuse two completely different components of all transactions: the creation of a debt receivable and a payment ultimately received.

In Simon's *Income Tax*, 2nd ed., vol. II, 153, the distinction is made quite clear, I quote:

> Normally an item becomes a trade receipt on the day when it is receivable even though the date of receipt is postponed. Equally, an item becomes an admissible deduction for tax purposes on the date on which it becomes a debt due from the business, irrespective of the date of its actual payment.
>
> Accordingly, when a sale is made, the sale price has to be brought into account at that date, and it will form part of the total of the sales in the profit and loss account for the then current periods; and that will be so even if the sum is not paid to the trader until after the end of the current accounting period. The fact that the consideration for a sale

is other than money, or is an asset not immediately realisable, is no reason for excluding it. It should be included at the relevant accounting date as its then value.

I would also cite Mr. Justice Cameron's interpretation of s. 85 (*b*) of the *Income Tax Act*, in *Wilson and Wilson Ltd. v. Minister of National Revenue*[1]:

> The proviso in the paragraph quoted is not here applicable. The all important word "receivable" is not defined in the Act but after a most careful consideration of the paragraph, I have come to the conclusion that in both places where that word is used, it bears the ordinary meaning "to be received". It would appear, therefore, that in enacting this subsection, Parliament has extended somewhat the ordinary concept of "income" in relation to a business in which property is sold or services rendered and that from and including the 1953 taxation year, every amount to be received in respect of property sold or services rendered in the course of the business in the year shall be included notwithstanding that the amount is not to be received until a subsequent year, subject, of course, to the proviso and to the provisions of para. (*d*) thereof relating to the deduction of a reasonable amount as a reserve in some cases. The paragraph is drawn in very wide terms so as to include every amount so receivable and such amounts are to be brought into the computation of income for the year in which the property was sold or the services rendered.

For these reasons, I hardly hesitate to conclude that the proper taxation year of these transactions could be none other than 1954, the calendar year of their inception. Payment may have been delayed until a later period but remained an enforceable obligation from the moment the expropriation and sale occurred. The Treasury Board's authorization for payment did not create a debt but merely paid a pre-existing one.

For income tax purposes, Ben Lechter was admittedly under the accrual system, his fiscal year ending on January 31, and respondent vainly strove to derive some advantage from this. The Minister mistakenly transposed in taxation year 1956 a gain accruing in 1954, which I will regard as the start of the six years' delay extended to re-assessment operations. My understanding of the expression "taxation year" obtaining in s. 139 (2), leads me to hold that the revisionary period ended on December 31, 1960; however, should the respondent's contention prevail, which would then extend the bar to January 31, 1955, the situation would continue unchanged, with the limitation only put off until February 1, 1961. Therefore, the department's notification

[1] [1960] Ex.C.R. 205 at 213.

1964

LECHTER v. MINISTER OF NATIONAL REVENUE

Dumoulin J.

to appellant, dated February 15, 1962, falls well beyond the prohibitory limit of six years, and is illegal.

CONSEQUENTLY, the appeal is allowed and respondent's re-assessment of February 15, 1962, annulled and set aside. The appellant will be entitled to recover its costs after taxation.

Judgment accordingly.