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BETWEEN:

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

MARY ORLANDO .... RESPONDENT.

Revenue—Income—Income Tax Act—Sale of topsoil from property liable to expropriation proceedings—Whether proceeds capital gain or taxable income—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 6(j), 139(1)(e).

The respondent in 1944 purchased a run-down farm on the outskirts of Toronto. The purchase was made as a long term investment in the belief the land would increase in value and also that it might be used for a mushroom farm, if the mushroom company owned by her husband in which she was a shareholder and then operating within the city limits, should be obliged to relocate. Between the years 1945-1953 the farm itself was operated at a loss but from 1945 to 1948 and from 1950 to 1952, respondent sold topsoil from the farm to the mushroom company but refused to sell to other would-be purchasers. In 1953 the Ontario Department of Highways notified her that it would require the 37 acres of the north part of the farm for highway purposes and offered her $1,500 an acre with the alternative of expropriation proceedings in the event of refusal. Shortly after receiving the notice she sold the parcel in question to a paving company and as part of the consideration the purchaser agreed to remove the topsoil therefrom to the unsold portion of the farm. The respondent then sold the topsoil so removed, realizing $18,500 in 1953 and $1,500 in 1954. The Minister assessed the amounts so received as income within the meaning of the *Income Tax Act*. On an appeal from a judgment of the Income Tax Appeal Board allowing the respondent's appeal from the assessment.

Held: That the whole course of the taxpayer's dealing with the topsoil indicated that she was disposing of it in a way capable of producing a profit and, with that object in view, the transactions were of the same kind and carried on in the same way as those of ordinary trading in the commodity and she therefore was engaged in an adventure or concern in the nature of a trade or scheme of profit making.

2. That the sums received from the sale of topsoil in the years 1953 and 1954 were income within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act* and subject to taxation.

THE APPEAL was heard by the Honourable Mr. Justice Fournier at Toronto.

V. K. Colebourn and *W. R. Latimer* for appellant.

Hon. S. A. Hayden, Q.C. and *John G. McDonald* for respondent.

FOURNIER J. now (March 14, 1960) delivered the following judgment:

1960
MINISTER OF NATIONAL REVENUE v. ORLANDO
Fournier J.

This is an appeal from the judgment of the Income Tax Appeal Board[1] allowing an appeal by the respondent herein (appellant before the board) from income tax reassessments by the Minister of National Revenue for the years 1953 and 1954. The issue before the Court is whether the sums of $18,500 and $1,500 having been respectively realized in 1953 and 1954 by the respondent on the sale of topsoil, under the circumstances of the transactions, were income for the purposes of the *Income Tax Act,* R.S.C. 1952, c. 148, or capital gains.

The appellant contends that the sums of $18,500 and $1,500 received by the respondent in the 1953 and 1954 taxation years constitute income from a business within the meaning of ss. 3 and 4 of the *Income Tax Act.* He further contends that these sums constitute income from an adventure or concern in the nature of a trade and, therefore, income from a business by virtue of s. 139(1)(*e*) of the Act. As an alternative, the appellant submitted that the amounts received by the taxpayer were dependent upon use of or production from the property and therefore taxable under s. 6(*j*) of the Act.

The respondent disputes the appellant's contention on the ground that the sale of the topsoil was fortuitous and merely represented the advantageous disposition of a valuable capital asset upon the compulsory taking of a portion of land that had been held for a decade as a permanent investment. The respondent contends that the provisions of s. 6(*j*) do not apply because the amounts received were payments for a portion of the land sold to the purchaser.

As to the facts of the case, it is incumbent upon the respondent to establish, to the satisfaction of the Court, that the sums received were not profits from a business nor from an adventure or concern in the nature of a trade.

Here are the facts of the case. In 1944 the respondent was a shareholder of Maple Leaf Farm Limited of which her late husband was the majority shareholder and president. The company's mushroom farm was located in the metropolitan area of the city of Toronto. The rapid development and growth of this district and the continuous increase of its population gave her the idea that the company in which

[1] [1958] D.T.C. 534.

she was interested and from which her husband derived his livelihood would have some day to relocate its establishment and activities on a site farther away from the city and its dense population. The nature of the material and fertilizers used for the growing of mushrooms had an offensive odor which spread far and large. She thought this would not be tolerated forever by the authorities and the people of the community. For those reasons and also the fact that she believed the land situate not too far away from Toronto would eventually increase in value, she decided to invest in a farm 4½ miles distant from the mushroom farm.

She acquired a farm in Agincourt, Township of Scarboro, for the sum of $18,000. If it ever became necessary to discontinue the growing of mushrooms on the Company's land, its operations could be resumed on the property she had acquired. As a stockholder she was most interested in the continuous and successful operations of the company. In addition, its operation was her husband's chief occupation and source of revenue. On the farm that she bought was a stone house, a cattle barn with hay-loft, a silo and other smaller buildings or sheds. It was provided with all the necessary implements for raising crops and was well equipped for cattle raising. At the time, the only crop on the farm was hay; in season, she hired men to harvest and bale it. She sold the hay. The land being in poor condition, she left it in summer fallow for a while. Then she hired a man part time to take care of the buildings and attend to the chores on the property. He did the plowing, sowing and harvesting. Wheat was grown and it gave a fairly good crop. This went on from 1944 to 1953.

From 1945 to 1948 and from 1950 to 1952, inclusive, the respondent sold topsoil to the Maple Leaf Mushroom Farm Company. The receipts for the sales are enumerated in the reply to the notice of appeal and were admitted as accurate by the appellant.

The respondent explains how these sales came about. Every year, the company had been buying, from different parties, topsoil which it conditioned and used for the growing of mushrooms. After she had purchased the above property, her husband had suggested that if she were willing

1960
MINISTER OF NATIONAL REVENUE
v.
ORLANDO
Fournier J.

he would test the topsoil on parts of her farm and that if the tests established that the loam was suitable for the growing of mushrooms the company would consider buying some of the topsoil. She agreed that the experiments could be made and when the results became known she consented to sell to the company some topsoil from a designated area of the property. The company undertook to remove, condition and cart away the topsoil, paying $2 per cubic yard for same. Those were the only sales of topsoil from her property that were ever made by her. She was never engaged in the business of selling topsoil. She was not equipped to do so and was not interested. As a matter of fact she was approached by gardeners and landscapers in need of topsoil; she always refused to sell because she had acquired the farm as a long term investment and to replace the company's farm if it became necessary to do so. This went on for nearly ten years and, as appears on a summary of the farm operations for 1948 to 1954, at a loss most of the time for the respondent.

In 1953, the Government of the Province of Ontario decided to build a 4-lane highway to by-pass the City of Toronto. The highway was to cross quite a portion of the respondent's farm. She received a letter from the Department of Highways of the Province of Ontario advising her that it required 37 acres of her land and offering her $1,500 per acre for the necessary land. In the event of her refusal of the offer, the land would be expropriated. The amount offered was far less than what she thought her land was worth. Shortly after receiving the above notice and offer she was approached by a contracting firm which had been awarded a contract for building part of Highway 401. Miller Paving Ltd. offered to buy the 37 acres of land. After negotiations she agreed to sell, subject to certain conditions, a portion of her land.

Her farm was intersected in two parts by some land which had been expropriated by the Provincial Government for its highway and by a right-of-way of the Canadian Pacific

Railway. The sale to Miller Paving Ltd. was the portion north of the intersection. The agreement contains the following stipulations:

> And whereas the vendor and the purchasers have entered into a contract for the sale and purchase of the North Parcel and as part of the consideration therefor the Purchaser has agreed to remove topsoil therefrom to the South Parcel as hereinafter set forth.
>
> Notwithstanding anything herein contained, the purchaser will not use the North Parcel or any part thereof for the purpose of obtaining subsoil until the removal of the topsoil in accordance with the provisions of the next preceding paragraph.

After the above mentioned agreement had been signed, sealed and delivered, the respondent proceeded to dispose of the topsoil covering the 37 acres of land sold to Miller Paving Ltd., this at the rate of $500 per acre, or a total sum of $18,500. The appellant claimed this amount of $18,500 to be income within the meaning of ss. 3, 4 and 139(1)(*e*) of the Act in respect of the respondent's taxation year 1953. Though these facts are the important ones, other facts will be noted in considering the reasons for judgment.

The sections of the Act on which the appellant relies read as follows:

> 3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all
>
> (*a*) businesses,
>
> (*b*) property, and
>
> (*c*) offices and employments.
>
> 4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.
>
> 139(1)(*e*) "Business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment.

The above sections particularize the meaning of the words "a taxpayer's income". In a word, it is stated that his income includes his profits from a business and that an adventure or concern in the nature of a trade should be considered as a business. The definition of business includes also a profession, calling, trade, manufacture, or undertaking of any kind whatsoever. The definition, as indicated by the words "undertaking of any kind whatsoever", does cover a very wide field and is not limitative. It goes far afield and extends the meaning of carrying on a business.

1960

MINISTER OF NATIONAL REVENUE v. ORLANDO

Fournier J.

It follows that any profit realized from an "undertaking of any kind whatsoever", unless otherwise excluded by the Act, must be considered as income. Under our *Income Tax Act,* though "capital gain" is not defined, it is generally recognized that the only receipts which do not attract taxation are the profits derived from the realization of an investment. The difficulty is that the distinction between an income receipt and a capital receipt is not always easily determined. In such cases the taxing authorities generally assess the receipts and the taxpayer is bound to show that the profit was derived from the disposal of a capital asset and not from a business.

In *Californian Copper Syndicate v. Harris*[1], the Lord Justice Clerk said:

> What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

Where in doubt, to find the solution of the problem two main tests should be applied to the facts of the case. The intention test must not be limited to the object the taxpayer had in mind at the time of the purchase of a property but must extend to the time when it was disposed of. In other words the test should be applied to the investment from its inception to its termination. That is why the taxpayer's whole course of conduct in dealing with the investment must be scrutinized. The taxpayer's intention at the outset may have changed during the life of the investment or at its disposition.

In the present instance, at the time the respondent bought the property she was a shareholder and secretary of the Maple Leaf Mushroom Farm Ltd., a corporation which had to purchase regularly topsoil for the growing of mushrooms. Her husband was the principal shareholder and president of the above company. She was also a shareholder or partner in Scorsone Fruit Co. Ltd., which specialized in the purchase and sale of fruits and vegetables.

[1] (1904) 5 T.C. 159 at 166.

She stated that she had acquired the farm as an investment, believing that the property would increase in value and that eventually she would sell it to the company to replace the farm which the company operated to produce mushrooms for commercial purposes. Pending that time, she would maintain the property in a good condition and farm the land on a moderate scale. This she did, so at the outset it may be said that her intention was to keep the property for the purposes above mentioned. My opinion on this point is strengthened by the fact that after nearly ten years, and not of her free will, she did dispose of a portion of the farm and obtained a greater price for it than she had paid. She thus realized on the enhanced value of her investment a profit which in my view was a capital gain. But this is not the issue before the Court.

The gist of the dispute is the fact that, say one year after she bought the farm, she agreed to sell to the Maple Leaf Mushroom Farm Ltd. topsoil from her property at a price of $2 per cubic yard. As I have said, the company in which she had an interest was in need of topsoil for its gardening operations. Before the respondent had purchased her farm, the company bought its topsoil from different parties and this to the respondent's knowledge. Having acquired the farm as an eventual replacement of the company's establishment, it is logical to conclude that she knew that its topsoil was suitable for the growing of mushrooms. At all events, during the years 1945 to 1948, inclusively, and from 1950 to 1953, she sold topsoil to this one customer.

As established by the evidence, in 1953 the respondent sold a parcel of some 37 acres of her farm to a road construction company. As part of the consideration, the purchaser agreed to remove, at its own expense, from the land it bought the topsoil to a maximum depth of six inches and deposit and spread the same over on a part of the remaining portion of the respondent's property. After the signing of this agreement, the respondent sold this topsoil to the mushroom farm company for a sum of $18,500. The company, at its own expense, undertook to condition this topsoil deposited on the respondent's property and to cart it away. The sum of $18,500, price of the topsoil, was received

1960

MINISTER OF NATIONAL REVENUE v. ORLANDO

Fournier J.

by the respondent in the year 1953. In the same year, the respondent had sold topsoil to the company for an amount of $1,500. This sum was received by the respondent in 1954.

So part of the consideration for the disposal of a parcel of her land was a sum of money paid by the purchaser and a mortgage guaranteeing the payment of the balance of the sale price. The other consideration was the removal of the topsoil of the parcel sold to the remaining part of the respondent's property. I repeat, the profit realized from the transaction seems to me to have been considered as a capital gain. Now, what happened to the monetary consideration is not known; but what became of the topsoil, a marketable commodity in the district, is revealed by the evidence.

This topsoil, after its removal to the respondent's property, could have been incorporated to her land, become part thereof and enhance the value of her remaining farm. This was not done. When she agreed to sell the 37 acres and insisted that the topsoil be removed to her property, she knew that she could readily dispose of it. She had been selling topsoil to the mushroom farm for years and had on several occasions been approached by landscapers and market gardeners who wished to buy topsoil. She had refused these offers, but decided, under the prevailing circumstances at the time, to sell the commodity to the Maple Leaf Mushroom Farm Co.

Though the respondent acquired the farm as an investment, the manner in which she dealt with the asset in the period during which she held it is an important test to determine if the profits realized from its disposal are of an income or of a capital nature. Here we have a case where the respondent began selling topsoil from her farm about one year after its purchase. She repeated the same transactions year in and year out from 1945 to 1952 inclusively with the exception of 1949. In that year she did not sell topsoil to the mushroom farm, but in 1950 she sold topsoil in an amount of $2,600, twice the yearly average sold to the same party in the other years up to 1952. How should one consider repeated transactions when deciding if a party is carrying on a business or is engaged in a scheme for profit making?

Here is what Lord Hanworth had to say on this point in the case of *Pickford v. Quirke*[1] (p. 269, *in fine*):

> . . . Now you may have an isolated transaction so independent and separate that it does not give you any indication of carrying on a trade. . . . When, however, you come to look at four successive transactions you may hold that what was, considered separately and apart, a transaction to which the words "trade or concern in the nature of trade" could not be applied, yet when you have that transaction repeated, not once nor twice but three times, at least, you may draw a completely different inference from those incidents taken together.

In the *Cragg* and *Minister of National Revenue*[2] case, the President of this Court, Honourable J. T. Thorson, discussing the question of multiple transactions in which each of the profits realized could, by itself, have been properly considered a capital gain had become a profit or gain from business, said:

> . . . Such a decision cannot depend solely on the number of transactions in the series, or the period of time in which they occurred, or the amount of profit made, or the kind of property involved. Nor can it rest on statements of intention on the part of the taxpayer. The question in each case is what is the proper deduction to be drawn from the taxpayer's whole course of conduct viewed in the light of all the circumstances.

When the whole course of conduct of a taxpayer who had an investment in a farm indicates that in dealing with the topsoil of his property he is disposing of it in a way capable of producing profits and with that object in view and that the transactions are of the same kind and carried on in the same way as those of ordinary trading in that commodity, I am of opinion that he is engaged in an adventure or concern in the nature of a trade or in a scheme of profit making. In my view the fact that he is not advertising his goods nor selling them to the public at large is immaterial. On many occasions it has been held that a single transaction having the badges of an adventure or concern in the nature of a trade was sufficient to attract tax on the income realized therefrom.

The repeated sales of the topsoil in the manner described by the respondent, in my opinion, had, with some refinement, all the characteristics of ordinary trading in the commodity in question. She did not buy the topsoil and sell it, but she acquired a farm the topsoil of which was found suitable for the producing of mushrooms and she sold it to

[1] (1927) 13 T.C. 252.

[2] [1952] Ex. C.R. 40 at 46.

1960
MINISTER OF NATIONAL REVENUE
v.
ORLANDO
Fournier J.

the owners of a mushroom farm. She sold it on the property at $2 per cubic yard and the buyers undertook to take delivery on the farm at designated places, to condition it and cart it away. She incurred no expense in the operations involved and the sales went on for years.

When she had to dispose of a parcel of her farm, the agreement provided that the topsoil would be removed by the purchaser to another part of her land and this at his expense. This being done, she sold it at a fixed price on the condition that it be removed from her property at the purchaser's expense. There again there was no expense to the respondent in the operations involved.

In the final analysis, the respondent, when dealing with the Maple Leaf Mushroom Farm Ltd. in 1953, was not disposing of her land but was dealing with a commodity which had been deposited on her property and which was delivered, carted away and paid for by the buyers. As this transaction was preceded by many other sales during a long period of time and at a price and in a manner which could produce a profit, it cannot be said that the profit realized from the sale was a casual profit made on an isolated sale. The respondent incurred no expense nor made any outlay in these trading operations. The 1953 sale was one of many which from the moment when merged with all the others, in my view, clearly indicates that the respondent had embarked on a scheme for profit making, the profits of which are subject to taxation.

My conclusion is that the sums of $18,500 and $1,500 received by the respondent in the taxation years 1953 and 1954 were profits derived from an adventure or concern in the nature of a trade and not capital gains. They were income within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act* and subject to taxation. I see no need of considering the alternative submitted by the appellant.

Therefore, the appeal is allowed with costs.

Judgment accordingly.