1955
Sept. 13
Nov. 21

BETWEEN:

BEN ROSENBLAT ..... APPELLANT;

AND

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

Revenue—Income—Income tax—Option to buy land sold at a profit—Profit not reported in taxpayer's income tax return—Subsequent transactions to buy land—Facts on which assessment is based—Matters arising subsequent to assessment—Whether profit from first transaction taxable—Whether evidence of subsequent transactions admissible—The Income War Tax Act, R.S.C. 1927, c. 97, s. 3(1)—The Income Tax Act, S. of C. 1948, c. 52, ss. 3 and 4—Income from business—Appeal from Income Tax Appeal Board dismissed.

In 1945 appellant, then engaged in the coal and builders' supply business, secured from a municipality for $1,500, an option to purchase a tract of land which he intended to develop into a housing subdivision. He sold the option the same year for $36,000 to a company in which his brother was one of the promoters, receiving $1,500 in cash, the balance being paid to him in 1948 and 1949 in two instalments of $18,000 and $16,500 respectively. Appellant did not report the two latter amounts in his tax returns for those two years. Subsequently through three successive agreements with the same municipality carrying the same covenants and obligations as those contained in the 1945 option, appellant secured further options which he sold in 1949 and 1950 to the same company. In 1952 appellant was re-assessed for the 1948 and

1949 taxation years on the ground that the amounts then received by him as a result of the sale of the 1945 option amounted to annual net profits or gains from a trade or business. An appeal to the Income Tax Appeal Board from the Minister's reassessments was dismissed and appellant now appeals from the Board's decision to this Court.

Held: That to determine whether an assessment or reassessment is justified evidence can be heard in respect to all the facts on which the assessment or reassessment is based and in respect to matters arising subsequent to the assessment or reassessment, provided such matters are relevant. *Nicholson Limited* v. *The Minister of National Revenue* [1945] Ex. C.R. 191 at 201; *Lincolnshire Sugar Co. Ltd.* v. *Smart* [1937] 1 All. E.R. (H. of L.) 413. Here evidence respecting subsequent transactions is admissible in order to establish that the 1945 transaction marked the commencement of a series of similar transactions or of a course of conduct in the nature of a trade or business. The last transaction in respect of which evidence was given was entered into on June 19, 1950 two years before the reassessment made by the Minister on June 25, 1952. The reassessment was made having regard to the information available to the Minister at that date.

2. That appellant's securing the first transaction option and his assigning it to the company at a profit, standing by itself, constituted an adventure in the nature of trade or business and that the second, third and fourth transactions definitely establish a course of conduct indicating a continuance of that trade or business. *Atlantic Sugar Refineries Limited* v. *The Minister of National Revenue* [1949] S.C.R. 706; *Edwards (Inspector of Taxes)* v. *Bairstow and Another* [1955] 3 All E.R. 48 at 53 and 58.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Ritchie at Winnipeg.

A. M. Shinbane, Q.C. for appellant.

W. S. McEwen, Q.C., C. C. Henderson and *A. L. DeWolf* for respondent.

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

RITCHIE J. now (November 21, 1955) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board (1), dated January 29, 1954, dismissing the appellant's appeal from income tax reassessments for the 1948 and 1949 taxation years.

(1) 10 Tax A. B. C. 41.

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By the reassessments the Minister added to the taxable income of the appellant monies received by him in the 1948 and 1949 taxation years in payment of the consideration for which in 1946 he had assigned an option entitling him to purchase lands for subdivision purposes.

The appellant submits that an intention formed by him in 1945 to embark in the business of developing a housing subdivision was frustrated and that the monies in excess of his cost received on the disposal of the asset are a capital gain or non-taxable income.

The Minister submits the profits received by the appellant in 1948 and 1949 as a result of his having sold or assigned his option to buy the land amounted to annual net profits or gains from a trade or business.

Because the course of conduct followed by the appellant is, in my view, relevant to the question of whether his sale or assignment of the option to purchase land was a transaction in the course of carrying on a trade or business I will set out in some detail and in chronological order the transactions and the nature of the transactions which the Minister contends support his submission that the 1948 and 1949 receipts constitute taxable income.

During the year of 1945 the appellant learned of the Dominion Government policy of assisting housing developments through the agency of Central Mortgage and Housing Corporation, thought the scheme looked interesting and so, as a matter of business, secured under date of August 31, 1945, from the Rural Municipality of West Kildonan, hereinafter referred to as "the municipality", an option (Exhibit 1), effective until November 15, 1945, to purchase a tract of land estimated to be of sufficient size to permit subdivision into three hundred building lots. This option agreement is sometimes hereinafter referred to as "the first transaction option".

The appellant in 1945 was in the "coal and builders' supply business" in partnership with his father and had not prior thereto been engaged in the business of buying and selling real estate or building houses.

The terms of the first transaction option were such that acceptance by the appellant would create automatically an

agreement of sale and purchase requiring the appellant to pay the sum of $1,500 in cash and further obligating him to

(*a*) subdivide the land so as to provide building lots at least forty feet in width, streets at least sixty-six feet in width and lanes at least twenty feet in width;

(*b*) construct streets having a sufficient depth of crushed stone to provide an all-weather surface and install cement sidewalks, sewers, water mains and hydrants on all the streets; and

(*c*) completely develop the subdivision by the erection of single family dwellings of four, five and six rooms each, ranging in value from at least $4,800 to at least $6,000 and duplex dwellings having a value of at least $9,000.

The obligation in respect to the erection of houses called for the completion of fifty single family dwellings within one year after the date of entering into an agreement with the Dominion Government and the erection of dwellings on all building lots in the subdivision within four years after that date.

I am satisfied that, at the time of executing the first transaction option, the defendant, as a business man, knew just how onerous were the terms contained in it and how much money was involved in performing the obligations which acceptance of the option would impose upon him.

After execution of the first transaction option, the appellant commenced discussions with Central Mortgage and Housing Corporation and ascertained he could negotiate an agreement covering the erection of fifty houses. The appellant then approached his banker in respect to financing the project, the first phase of which was estimated to cost approximately $480,000, in cash and mortgage liability. The testimony did not indicate how much risk equity capital was required. The appellant says that because his banker indicated little liking for the proposal and pointed to the complications which might develop by reason of material shortages, he began to doubt the wisdom of proceeding alone and approached three or four contractors in an effort to have them become associated with him and share the risk involved in the development of the property. The approaches so made to contractors were unsuccessful.

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According to his own testimony the appellant, following his unsuccessful efforts to interest contractors in becoming associated with him, became convinced the proposition involved too much money for him to finance alone and discussed the situation with his brother Edward Rosenblat who, in association with some other parties, caused to be incorporated a new company, under the name Modern Housing Limited, hereinafter sometimes referred to as "the company", which agreed to pay the appellant the sum of $36,000 in consideration of his assigning to it all his rights under the first transaction option.

Edward Rosenblat, who in 1946 became a partner in the coal and builders' supply business, apparently had little difficulty, despite the prior failure of the appellant, in locating associates willing to assume part of the risk involved in the Kildonan housing development.

The appellant says that after he began to doubt his ability to finance the project alone and realized the necessity of having associates to share the risk, he, under date of November 1, 1945, addressed a letter (Exhibit 2) to the secretary of the municipality requesting an extension of the option until December 31, 1945 and gave as a reason for his request the necessity of having sufficient time to conclude negotiations with the Dominion Government. Exhibit 2 includes a statement to the effect that a further meeting with the federal authorities at Ottawa had been arranged for November 13 and at that meeting it was hoped to arrange a contract for the erection of at least fifty houses. The extension requested was granted on November 6, 1945 (Exhibit 5).

On December 29, 1945 the appellant entered into an agreement with the company where, for a consideration of $36,000, he sold and assigned to the company all his right, title and interest in the first transaction option. Paragraph 5 of the statement of facts contained in the notice of appeal refers to the December 29, 1945 assignment having been in writing but it was not filed as an exhibit at the hearing of this appeal. The $1500 covering the cash part of the purchase price of the land was paid by the company but payment of the balance of the $36,000 payable to the appellant was deferred.

The appellant's solicitor, on December 31, 1945, addressed a letter (Exhibit 3) to the secretary of the municipality, accepting the first transaction option, enclosing a cheque to cover the cash portion of the consideration, advising the proposed agreement with the Dominion Government had been concluded, stating that the housing development would be proceeded with by the company, and enclosing for the approval of the municipality an assignment to the company of the appellant's interest in the lands covered by the option. The terms of the assignment (Exhibit 4) executed by the appellant, the company, and the municipality, as of January 9, 1946, included, *inter alia,* the following:

(*a*) the appellant assigned to the company all his interest in the lands;

(*b*) the company agreed to pay all moneys payable by the appellant under the terms of the option and to do and perform all other acts and things which, under the terms of the option, the appellant was obligated to do and perform;

(*c*) the appellant agreed that neither the execution of the assignment nor the approval of the assignment by the municipality would in any way release the appellant from his obligations under the option; and

(*d*) the municipality consented to the assignment of the appellant's rights to the company.

No payments, other than the $1,500 to cover the cash payable to the municipality, were made by the company on account of the purchase price of the first transaction until the 1948 taxation year, when $18,000 was received by the appellant.

The appellant's income tax return for the 1948 taxation year, certified under date of April 9, 1949, made no reference to the $18,000 he had received from the company on account of the purchase price of the first transaction option. The income tax assessment of the appellant for the 1948 taxation year was substantially on the basis of the return as filed.

On June 25, 1949 the appellant entered into an agreement of sale and purchase with the municipality (Exhibit A), hereinafter referred to as "the second transaction", whereby he agreed to buy seventy-one lots from the municipality for

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a consideration of $1,000 and the performance of covenants and obligations similar to those contained in the first transaction option.

Under date of July 13, 1949 the appellant, the company and the municipality executed an agreement (Exhibit B) in terms similar to Exhibit 4 under which the appellant, for an expressed consideration of $1.00, assigned to the company all his interest in the lands included in the second transaction. Again the appellant covenated that the assignment to the company would not release him from any of the obligations contained in his agreement to purchase the seventy-one lots. No evidence was tendered as to the actual consideration for this assignment. The second transaction agreement of sale was assigned to the company just eighteen days after its execution.

In the 1949 taxation year the appellant received $16,500 from Modern Housing Limited in payment of the balance of the purchase price of the first transaction option.

The income tax return of the appellant for the 1949 taxation year, completed on April 15, 1950, included no reference to the $16,500 received from the company in payment of the balance owing on the assignment of his rights under the first transaction. The income tax assessment of the appellant for the 1949 taxation year was made in due course.

On June 1, 1950 the appellant entered into another agreement with the municipality, hereinafter referred to as the third transaction, under which he agreed to purchase a further sixty-five lots for a consideration of $1,500 and the performance of obligations similar to those contained in the first transaction option.

On June 19, 1950 the appellant entered into a further agreement with the municipality (Exhibit E), hereinafter referred to as the fourth transaction, under which he obtained an option to purchase further lands for a consideration of $1,000 and the performance of obligations similar to those contained in the first transaction option.

The appellant, on June 19, 1950, (Exhibit D), for an expressed consideration of $1 assigned to the company all his interest in the lands included in the third and fourth transactions. No evidence was given as to the actual consideration for this assignment.

The Minister of National Revenue, under date of June 25, 1952, issued reassessments under which he added to the income of the appellant for the 1948 taxation year the $18,000 he had received in that year from the company and to the income of the appellant for the 1950 taxation year added the $16,500 he had received from the company during that taxation year.

Section 3 of the Income War Tax Act, upon which the Minister relied in confirming the assessment in respect to 1948 income, reads as follows:

3. For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Canada or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source including . . .

Sections 3 and 4 of the Income Tax Act, upon which the Minister relied in confirming the reassessment for the 1949 taxation year, 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.

The appellant argued the first transaction, standing by itself, was not of a kind as to make taxable any gain resulting therefrom and that evidence of the subsequent transactions was not admissible and further, that even if admissible, such transactions had no probative value and should not be considered in determining the question as to whether a gain resulting from the first transaction is taxable.

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The president of this Court in *Nicholson Limited* v. *The Minister of National Revenue* (1) said at page 201:

> The extent of the Court's jurisdiction under section 66 of the Act is very wide. Subject to the provisions of the Act it has exclusive jurisdiction to hear and determine all questions that may arise in connection with the assessment. It may, therefore, deal with issues of fact as well as questions of law. Nor is its jurisdiction restricted to questions arising subsequent to the assessment; it may deal with all questions, whether they arise before or after the assessment, provided they are connected with it.

In *Lincolnshire Sugar Co. Ltd.* v. *Smart* (2) Lord Macmillan said at page 419:

> It may be a question whether it is legitimate to have regard to the fact that it is now known that the payments are irrevocable and that the contingency of repayment can now never arise. The question might have had to be decided before this was known. There are observations by noble and learned Lords in *Bwllfa & Merthyr Dare Steam Collieries* (1891) *Ltd.* v. *Montypridd Waterworks Co.* [1903] A.C. 426; 11 Digest 129, *186,* to the effect that a court ought not to shut its eyes to the true facts if it subsequently knows them, although these facts could not have been known when the question originally arose, and ought not to resort to guessing when certainty is available. I have sympathy with this view, and with what *Lord Wright* and *Greene,* L.J., have to say on the point.

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. The last transaction in respect of which evidence was given was entered into on June 19, 1950 (Exhibit E), two years before the reassessment made by the Minister on June 25, 1952.

The reassessment was made having regard to the information available to the Minister at that date. To determine whether an assessment or a reassessment is justified evidence can be heard in respect to all the facts on which the assessment or reassessment is based and in respect to matters arising subsequent to the assessment or reassessment, provided such matters are relevant.

In *Atlantic Sugar Refineries Limited* v. *The Minister of National Revenue* (3) Kerwin J., as he then was, quoted, at

(1) [1945] Ex. C.R. 191 at 201. (2) [1937] (H. of L.) 1 All E.R. 413.

(3) [1949] S.C.R. 706.

page 708, from the judgment of Duff J., as he then was, in *Anderson Logging Co.* v. *The King* (1) the following two paragraphs:

It is common ground that a company, if a trading company and making profit, is assessable to income tax for that profit. The principle is correctly stated in the Scottish case quoted, *California Copper Syndicate* v. *Harris*, 6 F., 894; (1904) 5 T.C. 159. It is quite a well settled principle in dealing with questions of income tax that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of schedule D of the Income Tax Act of 1842 assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business;

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 realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

The rule quoted from *California Copper Syndicate* v. *Harris* (2), seems particularly appropriate to the circumstances pertaining to the case presently presented for consideration.

A recent House of Lords decision also having particular application to the instant case is *Edwards* (*Inspector of Taxes*) v. *Bairstow and Another* (3), in which Lord Radcliffe said at page 58:

If I apply what I regard as the accepted test to the facts found in the present case, I am bound to say, with all respect to the judgments under appeal, that I can see only one true and reasonable conclusion. The profit from the set of operations that comprised the purchase and sales of the spinning plant was the profit of an adventure in the nature of trade. What other word is apt to describe the operations? Here are two gentlemen who put their money, or the money of one of them, into buying a lot of machinery. They have no intention of using it as machinery, so they do not buy it to hold as an income-producing asset. They do not buy it to consume or for the pleasure of enjoyment. On the contrary, they have no intention of holding their purchase at all. They are planning to sell the machinery even before they have bought it. And, in due course, they do sell it, in five separate lots, as events turned out. And, as they hoped and expected, they make a net profit on the deal, after charging all expenses such as repairs and replacements, commissions, wages, travelling and entertainment and incidentals, which do, in fact, represent the cost of organising the venture and carrying it through.

The contention that the first transaction standing by itself was not taxable is answered by a judgment of my brother Cameron in this Court and by another paragraph of

(1) [1925] S.C.R. 45. (2) 6 F. 894 (1904) 5 T.C. 159.
(3) [1955] 3 All E.R. 48.

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Lord Radcliffe's judgment in the *Edwards* v. *Bairstow* case (*supra*). In *McDonough* v. *The Minister of National Revenue* (1) Cameron J. said at page 312:

> But the mere fact that a transaction is an isolated one does not exclude it from the category of trading or business transactions of such a nature as to attract income tax to the profit therefrom.

At page 58 of his judgment in *Edwards* v. *Bairstow* (*supra*) Lord Radcliffe also said:

> There remains the fact which was avowedly the original ground of the commissioners' decision—"this was an isolated case". But, as we know, that circumstance does not prevent a transaction which bears the badges of trade from being in truth an adventure in the nature of trade. The true question in such cases is whether the operations constitute an adventure of that kind, not whether they by themselves, or they in conjunction with other operations, constitute the operator a person who carries on a trade. Dealing is, I think, essentially a trading adventure, and the respondents' operations were nothing but a deal or deals in plant and machinery.

Counsel for the appellant stressed the House of Lords judgment in *Jones* v. *Leeming* (2). That judgment was rendered "having regard to the finding of the Commissioners that the transaction was not a concern in the nature of trade". Both in the Court of Appeal (3) and in the House of Lords (*supra*) that finding of fact was accepted without review. In the Court of Appeal the Master of the Rolls intimated that had that Court not been bound by that finding of fact, the decision might have been otherwise. At page 292 he said:

> Now Rowlatt J., and I think this Court, might perhaps have taken the course of saying that having regard to what he had called attention to in this case, the particular facts, "of organizing the speculation, of maturing the property," and the diligence in discovering a second property to add to the first, "and the disposing of the property," there ought to be and there must be a finding that it was an adventure in the nature of trade; but Rowlatt J. refrained from so doing, and I think he was right, for however strongly one may feel as to the facts, the facts are for the Commissioners. It would make an inroad upon their sphere if one were to say in a case such as the present that there could be only one conclusion. The Commissioners are far better judges of these commercial transactions than the Courts, and although their attention has been drawn to what happened, they have in their final case negatived anything in the nature of an adventure or trade.

While in the instant case the facts are to be found by the Court I think it worthwhile to refer once more to *Edwards* (*Inspector of Taxes*) v. *Bairstow and Another* (*supra*) because in that case the Commissioners of Inland Revenue

(1) [1949] Ex. C.R. 300. (2) [1930] A.C. 415.
(3) [1930] 1 K.B. 279.

had held the transaction upon which was based the income tax assessment complained of "was not an adventure in the nature of trade", but the House of Lords, after considering *Jones* v. *Leeming* and other cases, set aside the finding of the Commissioners and allowed the appeal of the Inspector of Taxes. Viscount Simonds said at page 53:

> . . . The primary facts as they are sometimes called do not, in my opinion, justify the inference or conclusion which the commissioners have drawn; not only do they not justify it but they lead irresistibly to the opposite inference or conclusion. It is, therefore, a case in which, whether it be said of the commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand. I venture to put the matter thus strongly because I do not find in the careful and indeed exhaustive statements of facts any item which points to the transaction not being an adventure in the nature of trade. Everything pointed the other way. When I asked learned counsel on what, in his submission, the commissioners could have reasonably founded their decision, he could do no more than refer to the contentions which I have already mentioned. But these, on examination, seemed to help him not at all. For, if it is a characteristic of an adventure in the nature of trade that there should be an "organisation", I find that characteristic present here in the association of the two respondents and their subsequent operations. I find "activities which led to the maturing of the asset to be sold" and the search for opportunities for its sale, and, conspicuously, I find that the nature of the asset lent itself to commercial transactions. And by that I mean what I think Rowlatt, J. meant in *Leeming* v. *Jones* [1930] 1 K.B. 279; 99 L.J.K.B. 17; 141 L.T. 472; that a complete spinning plant is an asset which, unlike stocks or share, by itself produces no income and, unlike a picture, does not serve to adorn the drawing room of its owner. It is a commercial asset and nothing else.

It is difficult to reconcile the appellant's submission that his 1945 intention to engage in the business of subdividing land and the sale of houses erected thereon was frustrated because of his inability to finance the undertaking with the assignment, at a profit of $34,500, of the first transaction option to a company of which his brother was one of the promoters and the provision in the assignment approved by the municipality that he would not be released from any of his obligations to the municipality. The appellant, as a business man, knew just how onerous were his obligations under the option both when he executed it and when he agreed to continue to be bound thereunder notwithstanding its assignment to the company.

If the appellant did completely withdraw from his original scheme of housing development on December 29, 1945 then, when he assigned to the company his interest in

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the lands which were the subject of the first transaction option, he entered into a new, for him, type of business of dealing in options to purchase and agreements to purchase land.

The appellant's course of conduct in respect to the second, third and fourth transactions positively establish that he had embarked on a business scheme of acquiring options on and agreements to purchase land suitable for subdivision and turning over such lands to a development company, presumably at a profit.

I find that the appellant's securing the first transaction option and his assigning it to the company at a profit, standing by itself, constituted an adventure in the nature of trade or business and that the second, third and fourth transactions definitely establish a course of conduct indicating a continuance of that trade or business.

The appeal will be dismissed with costs.

Judgment accordingly.