BETWEEN:

BRAMPTON BRICK LIMITED .....APPELLANT;

AND

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

1962
Sept. 24
1963
Jan. 25

Revenue—Income tax—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e)—Land transactions apart from main business—Whether profit therefrom is income—Transaction not "an operation of business in carrying out a scheme of profit making"—Appeal allowed.

Appellant, in the business of manufacturing bricks for fifty years, in 1949 sought to expand production. It tried to acquire an additional 50 acres of suitable clay land from a nearby farmer but had to purchase the entire farm of 150 acres. Later it gave a mortgage for a substantial part of the price. A condition of the mortgage was that partial releases would be granted by the mortgagee in respect of portions of the land that might later be sold. The appellant used some of the land for the extraction of clay and began a dairy operation on another part of the land. In 1956, 8 acres were expropriated for a roadway and the appellant in 1958 sold for a service station a corner of the property which had become attractive for that purpose as a result of the expropriation. Later a corporation exercised an option to purchase 5 acres of the land, the remainder of the property being retained. Two other transactions in land were the purchase and retention of a nearby farm

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because its owner complained of rubble from the brickyard being dumped on it, and the purchase of another nearby farm in 1956 which was sold two years later at a profit which appellant conceded was taxable.

The Minister assessed the profit on the sale of the service station site for income tax and on appeal to this Court contended that the appellant's business had expanded to include dairy farming and dealing in land or, alternatively, that the transaction in question was a venture in the nature of trade. Appellant contended the profit was a capital gain.

Held: That in the absence of documentary proof of the objects of the incorporation of appellant it is to be inferred from the fact that the appellant prior to the purchase of the land had been engaged for many years in an operation consisting only of brickmaking that dealing in real estate was not one of the objects for which appellant was incorporated.

2. That the evidence preponderates in favor of the view that the purchase of the 150 acres was not made in the course of or for the purpose of expanding the appellant's business to include dealing in land and the sale of the service station site was not one made in the course of a business which included dealing in land.

3. That nothing in the conduct of the appellant in seeking a purchaser for the service station site or the manner in which the transaction was effected serves to characterize it as a trading transaction or "an operation of business in carrying out a scheme of profit making" and thus a venture in the nature of trade rather than the realization of an investment.

4. That the appeal be allowed.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Thurlow at Toronto.

W. D. Goodman for appellant.

F. J. Cross for respondent.

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

THURLOW J. now (January 25, 1963) delivered the following judgment:

This is an appeal from a re-assessment of income tax for the year 1958. The matter in issue is the liability of the appellant for income tax in respect of an amount of $34,467.43 which the Minister included in the computation of the appellant's income for the year as profit realized by the appellant from the sale of certain land in circumstances to be described. The Minister's case is that the amount was profit from a business as defined in s. 139 (1)(*e*) of the

Income Tax Act, R.S.C. 1952, c. 148 and therefore subject to tax as income under ss. 3 and 4 of the Act. The appellant's contention on the other hand is that the sale of the land was a mere realization of a capital asset and that the amount in question was not subject to tax as income under the Act.

The appeal came to trial before Fournier J. in June, 1960 when evidence was given by one witness called by the appellant and argument of counsel for both parties was heard but judgment had not been rendered when Fournier J. later died. Subsequently the parties agreed that the case be determined on the transcript of evidence given before Fournier J. and the matter then came on for oral argument before me.

The main facts may be briefly stated. The appellant carries on a brick manufacturing operation in the Township of Chinguacousy in Peel County some ten miles north of Brampton, Ontario and has been so engaged for more than 50 years. In or about the year 1949 at a time when the plant of the appellant company was in a run-down condition and its treasury depleted the shares of the company were acquired by four new owners who thereupon became its directors and assumed control of its affairs. These directors planned to make the operations more successful by expanding the appellant's production but it soon became apparent that the clay available for brick-making on the 17 acres of land then owned by the company, whereon its plant was situated, would be insufficient to maintain production on the increased scale and that it would be necessary to acquire an additional source of clay near at hand. With this in mind, the appellant sought to acquire 50 acres of land, on which clay was available, from what was known as the Calvert farm which adjoined the northern side of the appellant's property. The owner however was unwilling to sell a part of his land for such a purpose and insisted on selling the whole, which consisted of 150 acres, or none of it. In April, 1953 the appellant agreed to purchase the 150 acres and subsequently on March 1st, 1954 completed the purchase for a price of $150,000, $50,000 of which was paid on or before completion and the balance secured by a mortgage for $100,000 at 6 per cent interest repayable at the rate of $5,000 each half year for five years when the balance would be due

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but with a right for the appellant to extend the term for a further two and a half years. In the mortgage as well as in the purchase agreement there was provision that the appellant should be entitled to obtain partial releases of the mortgage in respect of any portions of the land that might be sold provided the sale was approved by the mortgagee and the price obtained on such sale was paid on account of the mortgage.

The 150 acres of land so acquired fronted on the eastern side of a paved road known as provincial highway No. 10 and also fronted on the southern side of what at the time of the purchase was a narrow gravelled road intersecting highway No. 10. The land contained enough clay to supply the appellant's operation for many years but there were portions of the property which were unlikely ever to be used for that purpose. In particular there was a municipal by-law which prohibited extraction of clay within 400 feet of the roads. When the property was purchased there were on it several cottages and a farm house which were occupied by tenants, and a large barn and sawmill, and some time after the purchase the appellant acquired a herd of cattle and began carrying on a dairy farm operation on the portion of the premises not immediately required for the extraction of clay.

In 1956 a portion of the property consisting of about eight and a half acres was expropriated by the municipal authorities for the purpose of developing the road bordering the northern side of the property into a highway for traffic by-passing the City of Brampton and as a result the corner of the property formed by the intersection of the roads became a valuable site for a service station. The appellant which still owed a considerable sum on the mortgage of the property thereupon endeavoured to sell the corner consisting of a lot 200 feet square to McColl-Frontenac Oil Company Limited for $60,000 and ultimately in September 1956 succeeded in doing so at $55,000, the transaction being completed in July, 1957. This occurred in the appellant's fiscal period which ended January 31st, 1958 and as appears from the Notice of Appeal and the Minister's reply it was this transaction which resulted in the alleged profit which is in issue in the appeal. In the meantime in 1954 the appellant had given to Peel Block Co. Ltd., a corporation organized and con-

trolled by close relatives of the individuals who controlled the appellant, an option to purchase five acres of the land at $2,000 per acre and in the 1958 taxation year the option was exercised and the transaction completed. Apart from the expropriated portion, the lot sold to McColl-Frontenac Oil Company Limited and the lot transferred to Peel Block Co. Ltd., the appellant still owned the whole of the property at the time of the hearing of the appeal, in 1960. At that time a portion of it was being used as a source of clay for the brickmaking operation, a portion of it was being used for the dairy farm operation, and the remaining dwellings (two had been situated on the corner lot sold to McColl-Frontenac Oil Company Limited) apparently were still yielding rentals. No effort had been made to sell any portion of the land other than that sold to the McColl-Frontenac Oil Company Limited.

Two other land transactions in which the appellant engaged should also be mentioned. Some time after the purchase of the Calvert property, the appellant purchased a property known as the Fleury farm which was located near the brick plant. The reason given for the purchase of this property was that its owners were complaining of rubble from the plant having been dumped on it and the appellant purchased the land to settle the controversy. It was still held by the appellant at the time of the trial of the appeal.

The other transaction was the purchase by the appellant in 1956 of what was known as the Zultak farm consisting of 101 acres in or near Brampton and the sale of it at a profit in 1958. The land had been bought at a "cut" price and had not been put to any use while held by the appellant and the appellant had no plans to use it in its operations. The purchase was apparently a speculation in real estate and counsel for the appellant stated that the profit realized on the sale was income subject to tax. The profit would, of course, be subject to tax only if it arose from a business within the meaning of s. 139 (1)(*e*) of the Act and the statement of counsel suggests either that the business of the appellant at that time included dealing in land or that the purchase and sale of the Zultak farm were transactions in the course of a venture in the nature of trade.

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The Minister's case for including the profit realized on the sale to McColl-Frontenac Oil Company Limited in the computation of the appellant's income as put forward in the argument was based on an assumption that at the time of the purchase of the 150 acres the business of the appellant which had formerly been merely that of brickmaking was expanded to include dairy farming and dealing in land and that the sale in question was a sale made in the course of that business. In the alternative it was submitted that the sale of the lot to McColl-Frontenac Oil Company Limited was itself an adventure in the nature of trade. In support of these contentions it was submitted that it had not been established that the objects for which the appellant was incorporated did not include dealing in land, that since the appellant could not expect to use all of the property for the purpose of extracting clay the sale of portions of the property must have been contemplated from the time of the purchase and that as early as 1954 the appellant had granted an option to Peel Block Co. Ltd. to purchase five acres of the property at $2,000 per acre which was twice the average cost per acre of the land to the appellant, that in 1956 the appellant had acquired the Zultak farm which was later sold for a profit without having been turned to any use in the meantime and that the proper inference from the facts was that in purchasing the property the appellant did so for the purpose of turning it to account for profit in any practical way that might arise including sale of it in whole or in part. Finally, it was submitted that whether or not the purchase of the land was made for the purposes of the brickmaking operation, the appellant had no intention of retaining the corner later sold to McColl-Frontenac Oil Company Limited for the purposes of that operation and that in endeavouring to sell the corner to the McColl-Frontenac Oil Company Limited, the appellant had acted in the same way as any land dealer would proceed, that it was not a case of the appellant receiving an offer that was too good to resist but one in which the appellant made the approach to the respective purchaser, obtained the permit for the gasoline outlet and actively promoted the sale from all of which it should be inferred that the sale was one made in the course of a venture in the nature of trade rather than a mere

realization of a capital asset not required for the purposes of the appellant's business operations.

In my judgment the Minister's contentions cannot succeed. No doubt the burden was on the appellant to establish that the Minister's assumptions were not true in fact but this onus may be met by a preponderance of evidence and as I view the case it has been discharged. While the admission that the profit from the appellant's transactions in connection with the Zultak farm was income suggests that the appellant had corporate power to trade in land, in the absence of documentary proof of the objects of the incorporation, which the respondent as well as the appellant might have offered if he regarded it as advisable to do so, I would infer from the fact that the appellant prior to the purchase had been engaged for many years in an operation consisting only of brickmaking that dealing in real estate was not one of the objects for which the apellant was incorporated. The salient facts with respect to the alleged business of dealing in land on which the appellant is said to have embarked when purchasing the 150 acre property are thus that dealing in land was not one of the objects for which the appellant was incorporated nor had its business previously included dealing in land, that in a period of more than three years following the purchase there was but one arm's length sale, that it was a sale of less than two acres of the land and that the chance of making that sale arose because of the widening and development of the cross-road into an important highway, an event which occurred some three years after the appellant had contracted for the purchase of the property. In the circumstances I do not regard the sale to the Peel Block Co. Ltd. or the expropriation or the prices secured in either transaction as affording any support for the Minister's contention and while the subsequent transactions of the appellant in purchasing and selling the Zultak farm do not help its position to my mind they are not of sufficient weight to affect the view I take of the nature of the purchase and sale here in question. Moreover I see no inherent improbability in and I regard as credible the explanation given at the trial that the appellant requiring further land

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from which to take clay for its brickmaking operation sought to acquire 50 acres of the Calvert farm and purchased the 150 acres simply because the owner would not sell the required portion alone. In the circumstances the owner might well have felt that the value of the remainder would be adversely affected by the proximity of the appellant's brickmaking operation and while I do not doubt that before acquiring the 150 acres the directors of the appellant considered what might be done with the portion that would not be required for the extraction of clay and how it might be turned to advantage whether by using it or disposing of it, on the evidence, I can discover no good reason for thinking that there were prospects at that time of selling such portions to advantage or that prospects of selling them at a profit even constituted a motive for making the purchase. Nor would I infer from the inclusion in the mortgage of provision for partial releases anything more than a purpose to protect the right of the appellant to dispose of portions of the property not required for its business and thus reduce its mortgage obligation if an opportunity should arise to sell at a reasonable price a portion of the land not required for the brick making operation. On the whole therefore I am of the opinion that the evidence preponderates in favor of the view that the purchase of the property was not made in the course of or for the purpose of expanding the appellant's business to include dealing in land and that the sale to McColl-Frontenac Oil Company Limited was not one made in the course of a business which included dealing in land. Nor do I think that anything in the conduct of the appellant in seeking a purchaser for the corner lot, which, following the purchase, had become useful as a site for a service station, or in the manner in which the transaction was effected would in the circumstances serve to characterize it as a trading transaction or "an operation of business in carrying out a scheme of profit making" (*Vide Californian Copper Syndicate (Limited and Reduced) v. Harris*[1]) and thus a venture in the nature of trade rather than a mere realization of an investment.

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

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I am accordingly of the opinion that the profit realized on the sale of the corner to McColl-Frontenac Oil Company Limited cannot properly be regarded as profit either from the appellant's business in the ordinary sense of the expression or from a venture in the nature of trade.

The appeal therefore succeeds and it will be allowed with costs and the re-assessment varied accordingly.

Judgment accordingly.