THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

1956
Sept. 26
1957
Apr. 8

AND

RUSSEL E. GIBSON ..... RESPONDENT.

Revenue—Income—Income Tax—No distinction between profits on sale of subdivision lots and on houses erected thereon—Lots and houses both part of building contractor's inventory—Profits from both income from a "business" and taxable—Income War Tax Act, R.S.C. 1927, c. 98, s. 3 —The Income Tax Act, S. of C. 1948, c. 52, ss. 3, 4, 127(1)(e)—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).

The respondent, a coal dealer, in order to secure a site on which to build a home, in 1939 purchased 29 acres of orchard land on the eastern boundary of the town of Simcoe, subdivided it into lots and registered the plan of the subdivision as "Simcoe Heights". Up until 1947 respondent did little to improve the orchard or to sell lots but when the town annexed the property in that year he entered into an agreement with a building contractor to finance him in building houses on the property and share the profits arising from their sale. Building operations were carried on accordingly from 1947 to 1953 and the respondent in his annual declarations of income included his share of such profits but not his profits on the sale of the lots themselves. On reassessing the respondent for the period the Minister added $29,690.50 to the respondent's declared income to cover the total profit realized on the sale of the lots. The respondent appealed in respect of the addition to the Income Tax Appeal Board on the grounds that the proceeds from the sale of the lots was a capital gain and not income. The Board allowed his appeal and the Minister appealed from the decision.

In 1952 the respondent purchased a property known as the Booth farm for the purpose of putting on a plan of subdivision and realizing a profit on the sale of lots or of houses he proposed erecting thereon with his associate the building contractor. Only about half the land was suitable for a housing project. The remainder was swamp land and for a time the respondent thought it worthless and offered it to the town as a gift for a park. His offer was not accepted but shortly thereafter when the respondent found a valuable deposit of black muck on it and proposed removing it, the town, believing its water supply might thereby be impaired, paid him $20,000 for it. The payment, made in 1953, was treated by the respondent as a capital gain but the Minister considered it taxable and added it to the respondent's declared taxable income. The respondent appealed from that portion of the reassessment. His appeal was disallowed by the Income Tax Appeal Board and he cross-appealed to this Court.

Held: That the only reasonable conclusion to be drawn from the established facts was that the respondent fully intended at the time he purchased the Simcoe Heights property to dispose of the lots as soon as conditions were favorable for him to do so. This was indicated by his arranging for the preparation of the subdivision plan prior to completing his purchase and to its registration at considerable cost immediately after the purchase was made. *McGuire v. Minister of National Revenue,* [1956] Ex. C.R. 264, distinguished.

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2. That no distinction was to be drawn between the profits realized on the sale of the buildings and the profits realized on the sale of the lands on which the buildings were erected. Both were profits from carrying on the business of a building contractor both under the *Income War Tax Act* and *The Income Tax Act*.

3. That the respondent was admittedly carrying on the business of a building contractor in each of the years in question and the operations carried out clearly fell within the term of "business" both in the *Income War Tax Act* and *The Income Tax Act*.

4. That the sale of the lots and the sale of the buildings could not be segregated. They formed a necessary part of the building operation as a whole and were part of the respondent's inventory in carrying on that business and since the respondent in the sales in question was using the property for the purposes of his trade or business the profits therefrom were properly taken into account in computing his taxable income. *Hudson's Bay Co. v. Stevens*, 5 T.C. 424, referred to.

5. That no distinction could be drawn between the low ground and the other portion of the Booth farm. The whole property constituted the respondent's inventory and the profits arising from the purchase and sale of each constituted income from a "business" within the meaning of that term in ss. 3 and 4 as further defined in s. 139(*e*) of *The Income Tax Act*.

APPEAL from a decision of the Income Tax Appeal Board.

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

E. D. Hickey and *J. D. C. Boland* for appellant.

N. E. Byrne for respondent.

CAMERON J.:—This is an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board (1) dated November 25, 1955 allowing the respondent's appeals from re-assessments made upon him for the years 1947 to 1952, both inclusive, and allowing his appeal in part for the year 1953. There is also a cross-appeal by the respondent in respect of his appeal from that portion of the re-assessment for the year 1953 which was disallowed by the Board. Certain profits were received by the respondent in each of these years upon the sales of real estate and the question for determination is the familiar—but frequently difficult—one of determining whether such profits are of a capital nature as contended for by the respondent, or constitute taxable income as submitted by the appellant.

(1) (1955) 14 Tax A.B.C. 110; 9 D.T.C. 618.

In this type of case it is necessary to consider the whole course of conduct of the taxpayer viewed in the light of all the surrounding circumstances. It is desirable, therefore, to record at once certain facts which are either admitted in the pleadings or are fully established by the evidence. At all material times the respondent has resided at Simcoe, Ontario, where he has carried on the business of a coal dealer. In August, 1939, he purchased for $4,500 the orchard portion of a farm comprising about 29 acres and situated on the eastern boundary of the town of Simcoe. Prior to the completion of the purchase, the respondent had made arrangements with a friend—the witness M. T. Gray, who was a land surveyor—to complete a survey and lay out a plan of the property. Exhibit 1, introduced by the respondent, is a copy of the "Plan of Simcoe Heights (the name given the property by the respondent), being a subdivision of part of Lot No. 1 . . . ." It was registered in the County Registry Office on November 17, 1939. Undoubtedly, the survey and the preparation of the plan were undertaken at or immediately after the purchase was completed.

Exhibit 1 shows that the property was subdivided into some 121 lots, that streets were laid out, that wooden stakes were placed to mark the corners of each lot and that more substantial iron bars of the type used by surveyors were placed at street intersections and other necessary places. It also shows that prior to registration the respondent had secured the assent of all necessary parties, namely, the Municipal Council of the town of Simcoe, the Highway Department of Ontario, the Municipal Council of the township of Woodhouse (in which township the property was then located), and the Ontario Municipal Board. Then there are the usual certificates by the surveyor and the owner, in the latter of which the respondent stated that all the streets within the survey "are hereby dedicated as public highways". The total cost to the respondent of the survey, plan, legal expenses, securing the necessary consents and similar disbursements leading up to the registration of the plan, was approximately $3,600, of which amount $800 was paid to the surveyor Gray.

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Shortly after the end of the second World War, there was an increased demand for building lots and in each of the years 1945 and 1946 the respondent sold 4 of the lots on Simcoe Heights. As the present appeals do not relate to those years, I merely record the sales as part of the respondent's activities in regard to Simcoe Heights.

In 1947 several matters of importance to the respondent occurred. Due to the increase in population of Simcoe, there was a great demand for building lots and residences. As of January 1, 1947, the whole of Simcoe Heights (except one lot) was incorporated into the town of Simcoe; the respondent states that he took no part in the annexation proceedings. In the same year the respondent entered into an agreement with the town of Simcoe by which Lots 1 to 12 inclusive on Simcoe Heights, Subdivision 191 and adjacent property of the town of Simcoe, were re-subdivided. Exhibit 3 is substantially the plan of such re-subdivision, registered on April 28, 1947, as Plan 267. It may be noted that Exhibit 3 is dated the 17th of September, 1946. In the same year the respondent exchanged 6 or 7 of the lots in Simcoe Heights for other lots owned by the town. The matter is not quite clear, but I infer from the respondent's evidence and the particulars listed on Exhibit 6 that after the exchange he was the owner of all of the lots on Plan 267, except small portions previously sold by him. In that year, also, the respondent decided to interest himself in the construction and sale of houses on his property. Accordingly, he entered into an arrangement with a building contractor, one Ryerse. No written agreement was produced but I infer from the evidence that Ryerse was to supervise the construction and the respondent was to arrange for all financial matters and purchase of all material. Ryerse was to receive his wages and also 25 per cent. of the "patronage dividends" and the same proportion of the net profits arising from the sale of the *buildings;* the balance was to be retained by the respondent as his profits. The profits, however, were confined to the profits on buildings only, the respondent considering the land to be his own separate asset.

In pursuance of this plan, the respondent and Ryerse built and sold a substantial number of houses on Plan 267 in 1947 and 1948. Exhibit 6, which is the list of sales made from that plan in the years 1946 to 1948 inclusive, lists 10 sales in 1947 and 3 in 1948. The respondent's evidence is that of the 13 lots owned by him at the time Plan 267 was registered, 11 were sold with houses erected by him and his associate; one was sold as a lot and at the date of the hearing he had one lot still unsold.

Precisely the same operations were carried out in regard to the orchard property shown on Exhibit 1. Buildings were erected and sold. Exhibit 5 is a list of such sales for 1945 to 1953 inclusive. Excluding those made in 1945 and 1946, the annual sales from Plan 191 were as follows:

1947	14
1948	8
1949	3
1950	8
1951	2
1952	3
1953	4

A small number of sales were also made in 1954, 1955 and 1956. The evidence is not clear as to how many of these sales were of lots only, but I infer from the evidence as a whole that a very substantial number, if not all, were sales of lots on which the respondent and his associate had built and sold houses.

It may be noted here that following the annexation of Simcoe Heights in 1947, the respondent in that and the next year expended about $2,500 in grading the roads and clearing the property. From 1947 to 1951 the municipality installed sewers and water supplies.

The respondent stated that in 1947 he first acquired income from the contracting business. It is apparent that he considered the profits which he realized from the construction and sale of houses to be taxable profits as in all of the years in question he included in his declared income his share of the profits from such sales, excluding therefrom, however, any profit realized on the sale of the *lots* which are on Plan 191 or Plan 267. There is some suggestion in his evidence that he may have included such profit

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in and after 1951. In any event, the pleadings in this Court make it clear that in re-assessing the respondent for the years in question, the appellant added certain amounts to the declared income of the respondent, the amounts stated for each of the years "for the sale of seventy-two and one-half lots of land known as Simcoe Heights". That is admitted in the Reply to the Notice of Appeal; and at the hearing counsel agreed that there was now no dispute as to the various amounts added (a total of $29,690.50) should it be found that they constituted taxable income. The respondent's appeal to the Income Tax Appeal Board in respect of the addition of these amounts to the respondent's declared income was allowed and from that decision the Minister has appealed to this Court.

Before considering this appeal, I think it advisable to now record another transaction of the respondent relating to his cross-appeal.

The respondent stated that in 1952 there was a heavy demand in Simcoe for building lots and residences. In July of that year he bought for $35,000 the Booth farm, consisting of about 88 acres, situated immediately adjacent to the west boundary of the town of Simcoe. His purpose in buying the property was admittedly to put on a plan of subdivision and to realize a profit on the sale of lots or of houses which he later constructed in cooperation with his building contractor, in the same manner as had been done on the Simcoe Heights property. Part of the Booth farm was on high ground and suitable for residences. On this portion he laid out and registered three plans, the whole comprising about 185 lots. On sales made in 1952 and 1953 he says he reported his entire profits thereon as income and was taxed accordingly.

The remaining portion of about 46 acres was low-lying and swampy and unsuitable for building purposes. At one time he considered it valueless and offered it to the municipality as a gift for use as a park, but his offer was not accepted. Later, a quantity of valuable black muck was found thereon; he proposed to drain this portion so that the muck could be removed and sold, but as this operation would have interfered with the town waterworks system he was not allowed to do so. In December, 1952, he sold the

low-lying part to the town of Simcoe for $20,000, receiving payment therefor in January, 1953. As he considered it a capital gain, he did not include any portion of this amount as income for the year. The Minister, however, considered that it was taxable income and took it into consideration when re-assessing him for that year, adding an additional sum (the amount of which is not now in dispute) to his taxable income. The respondent appealed also from that portion of the re-assessment but his appeal was disallowed by the Board. He now cross-appeals to this Court in regard to that item.

I shall first consider the cross-appeal relating to the $20,000 received in 1953 upon the sale of the unsubdivided portion of the Booth farm. The Minister, asserting that it was income from a business, relies on certain sections of *The Income Tax Act* which in 1953 were 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) In this Act,

(*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;

Now the respondent stated quite clearly in evidence that he purchased the Booth farm for the purpose of putting on a plan and disposing of it at a profit. He says, also, that he considered the lower part quite valueless. In his Notice by Way of Cross-Appeal, he alleged that the vendor would not separate the land and that he was obliged to buy the entire farm or none at all. In evidence, however, he said that he could have purchased only the high land but that as the price would have been the same as for the entire farm, he purchased the whole. In connection with the sale of the lots and buildings on the Booth subdivision, he says he "pushed" the sales in the usual way by advertising, interviews and the like. Admittedly, as to the purchase and sale of the high ground, the respondent

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was in business and his profits on that part of the operation were properly considered by him as taxable profits. I can perceive no distinction between this operation and that relating to the other portion of the Booth farm. There is nothing to indicate that the low ground was in any proper sense to be held as an investment. Only a few months elapsed between its purchase and sale and in the meantime the respondent had been endeavouring to dispose of it or to turn it to account in some way. I am quite satisfied that even at the time of purchase, it was in the respondent's mind that he would not retain any part of the Booth property but would dispose of it in some convenient way, and, if possible, at a profit. The whole property constituted his inventory. It is not unusual for a purchaser of land to find that not all of his property is adapted to subdivision and that he must find other ways of disposing of the surplus. That was the case here and the fact that the low-lying land was sold *en bloc* does not affect the matter in any way.

I am quite satisfied that the profits arising from the purchase of the Booth farm and the sale of the large portion of the subdivided part and of the low-lying part, constituted income from a "business" within the meaning of that term in sections 3 and 4 as further defined in section 139(1)(*e*). Accordingly the cross-appeal will be dismissed.

The main appeal remains to be considered. As with the cross-appeal, the onus of proving the re-assessment to be erroneous is on the respondent (*Minister of National Revenue v. Simpson's Limited* (1)). The appeals relate to the years 1947 to 1953. For the respondent it is submitted that the profits realized were not income, but merely the proceeds of the realization of a capital asset, namely, the Simcoe Heights property. The appellant says that the profits in question were profits from a business.

For the years 1947 and 1948 the matter is to be determined under the then provisions of the *Income War Tax Act*, which was 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

(1) [1953] Ex. C.R. 93.

or other business or calling directly or indirectly received by a person . . . or from any trade, manufacture or business . . .; and shall include . . . and also the annual profit or gain from any other source including

For the years 1949 to 1953 *The Income Tax Act* applied. I have set out above the provisions of s. 3 and 4 thereof which were the same throughout the entire period. Section 139(1)(*e*), also set out above, appeared as s. 127(1)(*e*) in the years 1949 to 1952.

The respondent states that for some time prior to 1939, he had been considering the purchase of a lot on which to erect a residence for himself; for that purpose he required only about one-half acre. The owner of the farm on which the orchard was located would not agree to selling such a small portion but was willing to sell the farm as a whole, or the orchard. As the respondent's wife approved of that particular location, the respondent bought the orchard.

He says he acquired the property with the intention of erecting a residence for his own use on a portion thereof and of retaining the rest as an investment; the trees in the orchard had been badly neglected and he planned to bring them back into production and thereby increase his income. At the hearing he stated that he could not say that in 1939 there was no market for the lots but added that there was little likelihood of disposing of them then as only a small portion thereof was accessible to a public highway and there were no sewers or water mains. In furtherance of his plan, he entered into an agreement with a nurseryman—the witness Piggott—to care for the trees; the development, he says, was to continue for five years, but the evidence indicates that very little was done and that no income was derived from the trees at any time. For some two years Piggott did a small amount of pruning and spraying but only one account of some $15 for such work was produced, although there may have been other small accounts. Nothing further was done in developing the orchard, due, it is said, to the shortage of labour in wartime.

The respondent also states that while he actively promoted the sale of lots and buildings on the Booth property by advertising and the like, he did nothing to push the sales in Simcoe Heights; in all cases he says the purchasers came to him. He could not say, however, what efforts his associate Ryerse had made to further the sales.

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He added, also, that one of his reasons for selling the Simcoe Heights lots was that taxes had increased following the annexation to the town of Simcoe.

When considering the important question as to the intention of the respondent at the time of the purchase, it is important to bear in mind that what he was seeking originally was a small lot on which to construct his own home. He acquired the 29 acres merely because the former owner would not sell one building lot. There is no evidence that the respondent had any knowledge of farming or fruit-raising. The most significant evidence, however, is that relating to the survey of the property and the preparation and registration of the plan, some of the details of which I have set out above. I reject entirely the respondent's suggestion that he was "pressured" by his friend, the witness Gray, to lay out the whole property in lots and register a plan and that he finally agreed to do so because of the financial needs of Gray. That evidence is not supported by that of Gray himself. The respondent says that all he really needed was an outline sketch of the small lot on which his home was to be built and as required by the proposed mortgagee thereof. Had that been so, such a plan could have been prepared at very little expense and there is no evidence to show that for such a limited purpose it was necessary to secure the various consents and certificates shown on Exhibit 1 or to register any plan.

The fact is that he expended about $3,600 in all in that connection (only $800 of which went to Gray) and in addition he laid out a further sum of about $2,500 in the succeeding years in grading the roads, clearing the land and the like. The only reasonable inference from the established facts is that even prior to the time of purchase he had in mind selling lots as the opportunity arose. The plan as registered was necessary for one purpose only, namely, to facilitate sales of lots. His residence was built on a lot facing on the public highway and there was therefore no need of laying out roads or dedicating them as public highways if his intention was merely to hold and operate the orchard for his own use. Such dedication would have been most disadvantageous to the working of the orchard.

There is no difficulty, therefore, in reaching the conclusion that the respondent fully intended at the time he purchased Simcoe Heights to dispose of the lots as soon as conditions were favourable for him to do so. No doubt his plans were held up due to war conditions, building restrictions and the like. His first sales were made in 1945 and 1946 and apparently were of vacant lots.

The evidence is not very clear as to whether all the 72½ lots referred to in the pleadings had been improved by the addition of buildings prior to sale, or whether some were sold as lots. It is probably the case that some lots and some lots with buildings were sold, but I was not asked to find that there was any distinction between such sales so far as income tax is concerned. Further, the evidence is not clear as to whether all the 72½ lots referred to were originally part of the orchard (Exhibit 1) or whether some were lots received by the respondent at the time of his exchange of properties with the town of Simcoe in 1947. I infer from the evidence as a whole that the lots now in question included those received at the time of the exchange and that all of the property shown in Exhibits 1 and 3 were known as "Simcoe Heights".

It is admitted by the respondent that none of the profits received from the sales of these lands were included in his income tax returns. He considered the sales of *lands* to be merely the realization of a capital asset. Now the respondent's own evidence is that for all the years in question he considered himself to have been carrying on a business separate and apart from that of his coal business. He stated that he first acquired income from the contracting business in 1947 and that business continued throughout.

As for the lots acquired by exchange from the town of Simcoe in 1947, he says they were suitable for building purposes, that he bought and used them for that purpose only and sold them as soon as buildings were constructed. As to these lots, it is clear that they were not acquired as an investment but for the purpose of sale at a profit at the earliest possible moment. In my view, no distinction can be drawn between the profits realized on the sale of the buildings thereon (and which he did report as taxable income) and that realized on the sale of the lands on

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which the buildings were erected. Both were profits from carrying on the business of a building contractor. They are therefore profits from a business both under the *Income War Tax Act* and *The Income Tax Act*.

There remains only the question regarding the profits from the sales of the land which originally formed part of the orchard. In support of his submission that the respondent was merely realizing a capital asset and that the profits so realized were not profits from a business, counsel for the respondent referred me to the decision of Hyndman D. J. in *McGuire v. M. N. R.* (1). That case, however, is clearly distinguishable on the facts. There the taxpayer in 1940 purchased a farm as a residence and with the intention of operating it as a farm. After operating it as such for some years, he found that it was not a paying proposition; then he had an opportunity of selling a small lot but found that under *The Planning Act* he could not convey the title until he had prepared and registered a plan of subdivision. In compliance with that requirement he laid out and registered a plan of some 52 lots. In the years 1949 to 1952 he sold 20 lots. Hyndman D. J. allowed the taxpayer's appeal from assessment to tax on the profits so realized. He was of the opinion that at the time of purchase, McGuire had no intention of reselling any of the land, but intended merely to operate it as a farm; that the registering of a plan some seven or eight years after the purchase was done solely because of the requirements of *The Planning Act,* and that in so selling his own property McGuire was not engaged in a business but was merely realizing unused portions of his own property. In the present case, however, the respondent arranged for the preparation of the subdivision plan prior to completing his purchase and had it completed and registered at a very considerable cost immediately after the purchase was made, indicating very clearly, as I have stated above, his intention of disposing of the lots as soon as there was a demand for them.

Moreover, as I have pointed out above, the respondent was admittedly carrying on the business of a building contractor in each of the years in question. In 1947 he

(1) [1956] Ex. C.R. 264.

acquired by exchange further land suitable for building. In all the years, he and his associate built houses for sale and entered into building contracts with purchasers, purchased materials, employed labour, placed mortgages, and did everything one would expect building contractors to do. Such operations fall clearly within the term "business", both in the *Income War Tax Act* and *The Income Tax Act*. In my opinion, the sales of the 72½ lots now in question cannot be segregated from the sale of the buildings. They formed a necessary part of the building operation as a whole and were part of the respondent's inventory used in carrying on that business. Reference may be made to the well-known case of *Hudson's Bay Company v. Stevens* (1), in which the Court had to determine whether the Hudson's Bay Company carried on a trade in buying and selling land by which they made a profit. Farwell L. J., at p. 437, pointed out the distinction between dealing with one's property as owner and dealing with it as a trader, in these words:

> It is clear, therefore, that a man who sells his land, or pictures, or jewels, is not chargeable with income tax on the purchase-money or on the difference between the amount that he gave and the amount that he received for them. But if instead of dealing with his property as owner he embarks on a trade in which he uses that property for the purposes of his trade, then he becomes liable to pay, not on the excess of sale prices over purchase prices, but on the annual profits or gains arising from such trade, in ascertaining which those prices will no doubt come into consideration.

In the present case, the respondent in the sales in question was using his property for the purposes of his trade or business and in my opinion the profits therefrom are properly to be taken into account in computing his taxable income.

In both the Reply to the Notice of Appeal and in the cross-appeal, the respondent challenged the method used by the Minister in computing the profits for each year. At the hearing, however, these claims were abandoned and it was agreed that the profits as such were properly determined.

(1) (1903-11) 5 T.C. 424.

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Accordingly, for the reasons which I have given, the Minister's appeal will be allowed, the cross-appeal of the respondent will be dismissed and all the assessments in appeal will be affirmed. The respondent will pay the costs of the appeal and of the cross-appeal after taxation.

Judgment accordingly.