MINERALS LIMITED ..... APPELLANT;

AND

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

1956
Sept. 19
1957
Feb. 4

Revenue—Income tax—Capital gain—Company incorporated to acquire freehold mineral rights with power to deal in petroleum and natural gas leases—Profit from sale of leases—Capital gain or profit from business—The Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 3, 4, 127.

The appellant company in the course of its main operation (the acquiring of freehold mineral rights) and for the purpose of promoting the operation, acquired a number of petroleum and natural gas leases. In the 1951 taxation year it sold the leases in a single transaction and thereby realized a profit. The Minister assessed the profit as income assessable to tax under ss. 3 and 4 of *The Income Tax Act,* S. of C. 1948, c. 52, as the profit of a business carried on by the appellant. The appellant appealed to the Income Tax Appeal Board which affirmed the assessment. The appellant appealed from the Board's decision contending that the sum assessed was a capital profit realised from the sale of an investment.

Held: That the acquiring of the leases was not an ordinary investment of the appellant's funds but an activity engaged in as part of its profit-making operations. Trading and dealing in mineral leases was one of the classes of profit-making activities authorized by the appellant's Memorandum of Association. The business carried on by the company included an operation of taking petroleum and natural gas leases to advance the main operation but at the same time with a view to making a profit by selling or otherwise dealing in them and the profit ultimately realized by their sale was not a capital profit but a gain made in an operation of business in carrying out a scheme for profit-making. It was accordingly income and properly assessable.

APPEAL from a decision of the Income Tax Appeal Board.

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

R. A. MacKimmie, Q.C. and *J. R. Smith* for appellant.

J. L. McDougall, Q.C., and *A. L. DeWolf* for respondent.

THURLOW J.:—This is an appeal from the judgment of the Income Tax Appeal Board (1), dismissing the appellant's appeal from its income tax assessment for the year 1951, whereby income tax was assessed upon a sum of $140,084.89 in addition to the amount reported by the appellant as its income for that year. The sum in question was a profit realized by the appellant in 1951 upon a sale of petroleum and natural gas leases held by it.

(1) (1955) 55 D.T.C. 492; 13 Tax A.B.C. 365.

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The appellant contends that this sum was a capital profit realized on the sale of an investment, while the respondent contends that it was income assessable to tax under ss. 3 and 4 of *The Income Tax Act*, S. of C. 1948, c. 52, as the profit of a business carried on by the appellant in the year in question.

These sections are 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.

Section 127(1) also provides:

127. (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;

The issue is one of fact. In *Californian Copper Syndicate v. Harris* (1) the test for determining it is expressed thus:

It is quite a well settled principle in dealing with questions of assessment 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?

In the main, the facts are not in dispute, and the real problem lies in determining the proper inferences to be drawn from them and in applying the test to them. To appreciate the problem it is necessary to keep in mind the

(1) (1904) 5 T.C. 159 at 165, 166.

difference between freehold mineral rights in land on the one hand and leases to prospect for and remove minerals from the land on the other.

In the year 1949, there were in the province of Saskatchewan many farmers and other persons who owned the minerals, including oil and natural gas, which might be found in their lands. Many of these owners, particularly those in the vicinity of the City of Regina, had granted leases of their petroleum and natural gas rights to oil companies or other individuals, but there were some owners who had not done so. The leases were of a standard form, giving the lessee the right for ten years to prospect for and take oil and natural gas from the land and providing for payment to the owner of an annual rental of ten cents per acre until prospecting operations were undertaken on the property, and for royalty payments amounting to one-eighth of the value of any oil or gas that might be produced.

On December 1, 1949, a company named Farmers Mutual Petroleums Ltd. was incorporated under *The Companies Act* of the province of Saskatchewan, the purpose of which was to acquire freehold mineral rights from as many owners as possible and, by thus creating a "pool" of mineral rights, to enable the several owners to share in the royalties from minerals that might be produced from any of the properties transferred to it. The company was organized and promoted by William Harrison Riddle, a man of experience as a promoter in some branches of the oil business. By an agreement dated December 13, 1949, the company appointed Mr. Riddle, who is described as an "oil operator", to be its promoter and organizer for five years, with the exclusive right to solicit membership in the company on the basis of its prospectus. The prospectus provided that membership in the company should be based on an exchange of freehold mineral rights for stock in the company, the company issuing one ordinary share without nominal or par value for each acre of mineral rights transferred to the company and further undertaking to reserve and hold an undivided one-fifth interest in all mineral rights transferred to it in trust for the member transferring the same.

By the agreement above mentioned, Mr. Riddle agreed to pay the costs and expenses of incorporating and organizing the company and the entire cost of obtaining subscriptions

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and acquiring the mineral rights, to act as the organizer and promoter of the company for five years, to employ and pay all necessary agents and employees and generally to pay all the operating expenses of the company for the five-year term. In return for his services and to reimburse him for money expended, the company agreed to hold in trust for him one-fifth of all the mineral rights acquired by it.

Pursuant to this agreement Mr. Riddle, and later the appellant company, which on June 1, 1950 assumed his obligations and acquired his rights thereunder, secured transfers from the owners to Farmers Mutual Petroleums Ltd. of the mineral rights in some 750,000 acres of land. The latter company then held an undivided three-fifths of these mineral rights in its own right, an undivided one-fifth of them in trust for the owner who had transferred them and an undivided one-fifth of them in trust for the appellant company.

When acquiring the mineral rights, Mr. Riddle and the appellant in each case also obtained for Farmers Mutual Petroleums Ltd. an assignment of the owner-lessor's rights under the petroleum and natural gas lease. The company thus became entitled to the rents and royalties payable under the leases and held these rights, as well, for itself, the former owner and the appellant company in the same proportions. Through this arrangement any owner who had transferred his mineral rights to the company became entitled to share as a member of the company in three-fifths of the royalty from any minerals that might be produced from lands the minerals of which were thus vested in the company. If the land from which minerals were produced happened to be his own, that owner would be entitled in addition to one-fifth of the royalty from the minerals so produced, and in every case the appellant company would be entitled to one-fifth of the royalty. As the rentals from rights under lease served to provide a revenue to Farmers Mutual Petroleums Ltd. from which to pay taxes on its rights, and as there was no practical chance of prospecting being carried out on properties not under lease to an oil company, it was necessary in order that the scheme should be equitable to all the members that all the mineral rights taken should be in a position to provide the same rental revenue to the company and have a like chance as well of

having oil or gas produced from them. It, therefore, was made a requirement of Farmers Mutual Petroleums Ltd. that the mineral rights should be under lease before the company would accept the transfer. This presented no difficulty at the outset of the operation, as the mineral rights in the lands in the neighbourhood of Avonhurst near Regina, where the canvass was commenced, were all under lease, but as the agents' work took them further afield they encountered cases where there was no lease in existence. Mr. Riddle had been engaged in acquiring leases for himself and other parties some time prior to the commencement of this operation, and when the operation was begun he was under the impression that there was not a lease to be had, believing that all the mineral rights were under lease to one oil company or another. When, in the course of soliciting owners on behalf of Farmers Mutual Petroleums Ltd. for transfers to that company of their mineral rights, he or his agents found that the rights were not under lease, he himself proceeded to take a lease, at first in his own name, and after June 1, 1950 in the name of the appellant company. The leases obtained by Mr. Riddle in his own name prior to June 1, 1950 were transferred to the appellant at that time and these, together with the leases taken by the appellant after June 1, 1950, covered a total of 81,000 acres of mineral rights. On or about May 5, 1951 the appellant company in a single transaction sold to Amigo Petroleums Ltd. all of these leases (with the exception of a few which were rejected because the title was unsatisfactory) at the rate of $2 per acre and thereby realized the profit of $140,084.89 which is the subject of this appeal.

The position taken by the appellant is that the whole purpose of the appellant company was to carry out Mr. Riddle's contract of December 13, 1949 with Farmers Mutual Petroleums Ltd. and by so doing to acquire for itself a one-fifth share of the mineral rights, rents and royalties transferred by the owners to Farmers Mutual Petroleums Ltd., that when in the course of carrying out this purpose the appellant encountered an owner whose mineral rights were not under lease it would have preferred that the owner grant a lease to some oil company, but that to require the owner to negotiate a lease on his own involved delays and the probable loss of the opportunity to get the transfer

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of mineral rights through the owner changing his mind in the meantime, and that, in these circumstances, the appellant took the lease not as a business venture in itself but simply as an accommodation to the mineral owner and as a practical expedient to clear the way for the owner to transfer his mineral rights to Farmers Mutual Petroleums Ltd. From this position it is argued that the moneys expended in acquiring the leases were an investment of capital outside the scope of appellant's business and not made for the purpose of making a profit and that the sale of the leases, made as it was in a single transaction involving all the leases held by the appellant, was simply a realization of the investment.

A number of cases were cited in support of this submission, but all of them turn on their own facts, and they are helpful only as illustrations of the application to particular situations of the test already mentioned. The true nature of the transaction giving rise to the profit is to be determined on the facts of each particular case. In the case at bar this involves consideration of the objects for which the appellant company was organized and what its business and undertakings were.

The appellant company was incorporated under *The Companies Act* of the Province of Saskatchewan on May 30, 1950 with a nominal capital of $20,000, and throughout the material period Mr. Riddle was in complete control of it. Paragraph 3 of its memorandum of association is as follows:

> 3. *The objects for which the Company is established are the* prospecting for, locating, *acquiring, managing,* developing, working *and selling, mineral claims* and mining properties, and the winning, getting, treating, refining and marketing of minerals therefrom, *and the exercise of such powers as are incidental to or conducive to the attaining of the above objects, that is to say:*
>
> (*a*) To search for, recover and win from the earth natural gas, petroleum, salt, metals, minerals, and mineral substances of all kinds, and to that end to explore, prospect, mine, quarry, bore, sink wells, construct works or otherwise proceed as may be necessary to produce, manufacture, purchase, acquire, refine, smelt, store, distribute, sell, dispose of and deal in petroleum, natural gas, oil, salt, chemicals, metals, minerals, and mineral substances of all kinds, and all products of any of the same, *to trade in, deal in and contract with reference to lands* and products thereof, *or interests in land,* mines, quarries, wells, *leases,* privileges, licences, concessions, *and rights of all kinds, covering, relating to or containing or believed to cover, relate to or contain, petroleum, natural gas, or oil,* salt, chemicals, metals, minerals *or mineral substances of any kind.*

(*b*) To carry on the business of a manufacturer and refiner of natural gas, oils, grease, petroleum and all products thereof, *to deal in,* import and export, prospect for, open development on, work, improve, maintain and manage, *acquire by purchase, lease or otherwise and sell, lease or otherwise dispose of,* natural gas, petroleum, *oil lands,* oil, grease, chemicals *or rights or interests therein,* and to purchase, buy, sell and deal in natural gas, crude petroleum oil and other oils, grease and other products thereof; to sink oil wells, natural gas wells, to erect, acquire, buy, purchase, lease or otherwise maintain and operate all refineries or plants, to work the same; to store, tank, warehouse, refine, crude petroleum oil or other oils, grease and chemicals; to construct and operate pipelines for transportation of natural gas and oil; to construct and maintain gas and oil works on the property of the Company, to do all acts, matters and things as are incidental or necessary to the due settlement of the above objects or any of them, to carry on the business of bonded warehouses, customs brokers, and storage warehouses.

(*c*) To manufacture, import, export, buy, sell, and deal in goods, wares and merchandise of all kinds, and without limiting the generality of the foregoing to manufacture, compound, refine and purchase and sell chemicals, dye stuffs, cements, minerals, superphosphates, soap, fertilizers, paints, varnishes, pigments, polishes, stains, oils, acids, alcohols, coal, coke, coal tar products and derivatives, peat, peat products, rubber, rubber goods and products, medicines, pharmaceutical supplies, chemical and medicinal preparations, articles and compounds, separately or in combination and under all conditions and at all stages of preparation, and manufacture of all plastics and plastic materials, supplies and manufactured articles of every kind whatsoever and related products and by-products.

(*d*) To buy, sell and deal in, plant, machinery, implements, equipment, conveniences, provisions and other things capable of being used in connection with operations respecting petroleum or natural gas, or other minerals, and natural products, required by the Company and its workmen, and others employed by the Company, including its patrons and customers.

I have italicized certain expressions which I think contemplate activities of the kind carried on by the appellant, at least insofar as the mineral leases in question are concerned. Removed from the remaining expressions, the italicized portions read thus:

The objects for which the Company is established are the acquiring, managing, and selling mineral claims and the exercise of such powers as are incidental to or conducive to the attaining of the above objects; that is to say:

(*a*) to trade in, deal in, and contract with reference to lands or interests in land, leases, and rights of all kinds covering, relating to, or containing or believed to cover, relate to, or contain petroleum, natural gas, or oil, or mineral substances of any kind;

(*b*) to deal in, acquire by purchase, lease, or otherwise, and sell, lease or otherwise dispose of oil lands or rights or interests therein.

Prima facie activities of the company falling within these objects are the business of the company or a part of it, and the profits from such activities are income liable to tax.

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Anderson Logging Co. v. The King (1); *Gairdner Securities Limited v. Minister of National Revenue* (2).

The burden of displacing this presumption and of proving that the profit did not arise in the course of carrying out the profit-making operations of the company is on the appellant.

It was not suggested, and I do not think it could be successfully argued, that this company was anything other than a company organized for the purpose of engaging in operations with a view to making a profit.

On June 1, 1950, the day following its incorporation, the company purchased from Mr. Riddle, described in the agreement as the vendor, for $10,000, payable on or before December 1, 1950, the following:

> Firstly—the business of the Vendor and the goodwill thereof as promoter and organizer of Farmers Mutual Petroleums Ltd., as now carried on by the Vendor at the said City of Regina.
>
> Secondly—all furniture, fixtures, equipment, and office machines to which the Vendor is entitled in connection with the said business as set forth in Schedule "B" hereof, and signed by the Parties for identification.
>
> Thirdly—all stocks of stationery, forms and office supplies of the said business.
>
> Fourthly—the full benefit of all pending contracts and engagements to which the Vendor is entitled in connection with the said business.
>
> Fifthly—all the right, title and interest of the Vendor in and to the said Agreement made between the Vendor and the said Farmers Mutual Petroleums Ltd., dated the 13th day of December, A.D. 1949, or in any way connected therewith or arising therefrom, including all mineral rights and interests in mineral rights and land heretofore or hereafter acquired by the Vendor pursuant to the said Agreement, which said Agreement has been assigned by the Vendor to the Purchaser, a copy of which said Assignment is hereunto annexed as Schedule "C" to this Agreement.
>
> Sixthly—the residue of the term of the Lease now unexpired on the premises in which the said business is now carried on, and the Vendor hereby assigns to the Purchaser the residue of the said term.
>
> Seventhly—all other property to which the Vendor is entitled in connection with the said business.

The appellant accordingly acquired and had a business or undertaking to carry on practically from the time of its incorporation. It was a business or venture in which, by expending certain moneys and performing certain services, the appellant was to become entitled to certain rights, and I think it was accurately described as a business. After

(1) [1925] S.C.R. 45.

(2) [1952] Ex. C.R. 448; [1954] C.T.C. 24; 54 D.T.C. 1015.

acquiring this business, the appellant company became the employer of the agents who were soliciting transfers of mineral rights to Farmers Mutual Petroleums Ltd., it carried out Mr. Riddle's contract with that company, and, as above mentioned, it also took leases on mineral rights in the course of these operations and ultimately sold them. It does not appear to have engaged in any other operations or activities throughout the period from the time of its incorporation to the time of making the sale of the leases.

What then is the nature of the activities by which the appellant acquired and sold the leases? Were these activities a part of the profit-making operations of the company, or were they an ordinary investment and subsequent realization of capital?

The evidence does not show how many of the 750,000 acres of mineral rights acquired for Farmers Mutual Petroleums Ltd. were obtained before or how many were obtained after the appellant assumed the undertaking, nor does it show how many of the 81,000 acres on which the appellant ultimately held leases were taken on lease after it commenced operations. It does appear, however, that the 81,000 acres were comprised in some 303 leases. A list of these leases is attached as a schedule to the formal offer of sale made by the appellant to Amigo Petroleums Ltd. (ex. 7), and this list gives, in the case of each lease, a date which is called the anniversary date of the lease. The dates so given range over a period of slightly more than a year, the earliest date being January 13, 1950 and the latest January 20, 1951. There are eight leases for which the anniversary date given is later than December 13, 1950, six of them in December, 1950 and two in January, 1951. In the case of each of these eight leases, if what is given in the schedule as the anniversary date is not the actual date of the lease, the date of the lease itself could conceivably be one year earlier and still follow the making of the agreement of December 13, 1949 between Mr. Riddle and Farmers Mutual Petroleums Ltd. But as to the remaining 297 leases, it is impossible, consistently with the evidence as to when and how they were acquired, that the date of any of them could be earlier by a year than the date given as the anniversary date on this exhibit, as in such case the lease would antedate the making of the agreement between

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Mr. Riddle and Farmers Mutual Petroleums Ltd. In my opinion, it follows that, in the case of each of these 297 leases, the date given in the schedule as the anniversary date is, in fact, the date of the lease itself. Of these 297 leases, four are dated in January, 1950, one in April, 1950, and ten in the last few days of May, 1950, making a total of fifteen leases taken prior to the time when the appellant company took over the operation. From this, I conclude that, in the course of its operations between June 1, 1950 and January 20, 1951, a period of less than seven months, the appellant negotiated and entered into some 282 separate leases of petroleum and natural gas rights. Apparently for convenience in carrying out this part of its activities, the appellant had obtained a supply of printed lease forms. The terms of these leases follow those of the form used by Mr. Riddle himself but have the appellant's name printed in them in several places, as well as the address of its solicitors as the place at which notices may be given to it.

The funds required to finance the activities of the appellant were provided by advances made to it by two oil companies who advanced a total of $147,500. There is no evidence as to what portion, if any, of the $10,000 consideration money payable by the appellant to Mr. Riddle under the contract dated June 1, 1950, already referred to, was to represent the value, if any, of the leases which he then transferred to the company, but of the advances received by the appellant $26,349.11 was charged in its accounts as expended in acquiring the leases which it obtained. The agents were paid a commission on the transfers of mineral rights which they obtained, but the evidence does not show whether or not any commission was paid to them for obtaining the leases.

There is no evidence as to whether or not the question of taking these leases was ever considered at any meeting of the directors of the appellant company, nor was any evidence offered of any directors' minute relating to them or to the intention or purpose of the company in taking them. Evidence was, however, given by Mr. Riddle on commission in the United States. He stated that his purpose in promoting Farmers Mutual Petroleums Ltd. was to acquire for himself a one-fifth interest in the mineral rights, that in

carrying out this purpose he did not take the leases with the purpose of selling them but rather as an accommodation to the owners, and that the purpose for which the appellant company was formed was "to give perpetuity to the operations" that he personally had with Farmers Mutual Petroleums Ltd.

Speaking of his intention as to the leases, he said in examination in chief:

Q. What did you intend to do with the leases you took to accommodate these farmers and get them in this Farmers Mutual?

A. Well, we didn't know, *I tried to get McQueen and Mewburn to take those leases and they didn't want the leases.*

Q. This was prior to incorporation?

A. No, I don't remember just when; *we talked about those leases several times, what we would do with them. We could not make up our mind but we knew we had to pay if we kept them long enough.*

In cross-examination, he said:

Q. So that you had annually an obligation if you wanted to retain that lease, you had the obligation to pay that annual rental under the lease, is that right?

A. Yes.

Q. Now, then, I am correct in this, this was done as a systematic method of by-passing delays in connection with negotiation, or the giving by the farmer of the petroleum and natural gas lease to some major oil company?

A. *No, I didn't say it was our intention to give it to the major oil companies, we had no intention of doing that,* in fact, it was just a stepchild and I didn't know what I was going to do, frankly.

Messrs. McQueen and Mewburn were associated with and in control of the oil companies which advanced the funds to finance the operations of the appellant company, and Mr. Riddle had previously been engaged in obtaining petroleum and natural gas leases on his own and their behalf. It also appears from Mr. Riddle's evidence that another oil company showed some interest in obtaining the leases in question and in obtaining other petroleum and natural gas leases as well and that Amigo Petroleums Ltd., who ultimately bought the leases, before doing so offered as much as five dollars per acre for some of them.

The following also appears in Mr. Riddle's cross-examination:

Q. And after talking back and forth you eventually arrived at a sale agreement with Amigo whereby they took your leases, lock, stock and barrel, at $2 an acre regardless of the area?

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A. Yes, I tried my best to get rid of him and so I said, "If you take all of them at $2, all right," and I had no idea he would take them.

Q. You thought it was a pretty good price?

A. Yes, I made a wild statement and I had no idea that he would buy those leases. Of course, I thought I was crazy and Neil McQueen thought I was, too.

Q. Mr. McQueen thought you were selling too cheap?

A. No, but he didn't want to sell the leases. He don't sell leases, does he?

Q. I don't know Mr. McQueen, except I met him once and I thought he was a very nice man.

A. No, they buy leases all the time, they never sell them.

Q. He would have preferred to keep them, retain them?

A. Just for the gamble, yes.

Q. Now, a considerable amount of money was advanced to Minerals Limited by Mr. McQueen's companies to pay the cost of acquiring these minerals from Farmers Mutual?

A. Yes.

In the foregoing quotations, the witness is obviously referring to his intention not so much at the time when the leases were taken as at later stages. He did, however, say at one point in his evidence:

Q. Well, now, was membership in the Farmers Mutual open to any person who held mineral rights?

A. No, the Farmers Mutual, you could take the by-laws or the prospectus, I have forgotten now—it has been a long time ago, *but at its inception* we intended to and we did take minerals from farmers who had leased to major oil companies or another company *or even individuals for that matter because we figured the individuals would transfer their leases to major companies,* in fact, we weren't so much interested in that, we were interested in the one-eighth retained by the farmer or the landholder on mineral rights.

I think the proper inference from this and the other evidence is that there was a market for petroleum and natural gas leases, the major oil companies being willing to take them, and that the leases taken by Mr. Riddle and later by the appellant company were taken with a view to selling or otherwise dealing in them with a view to making a profit.

It may be that, by taking the leases, the appellant cleared the way for transfers of the mineral rights in these properties to Farmers Mutual Petroleums Ltd., which resulted in the appellant becoming entitled to an undivided one-fifth share of the minerals themselves, but I do not think that obtaining the one-fifth interest was the sole motive or that clearing the way for the transfer was the sole purpose of Mr. Riddle or the appellant in taking the leases. The

appellant was not required by its contract with Farmers Mutual Petroleums Ltd. to take any leases. It nevertheless did so and expended $26,349.11 of borrowed moneys in acquiring some 282 or more of them. Mr. Riddle was a man of experience in acquiring and selling leases and, when taking them, must have known the courses that would be open with respect to them. Obviously, neither Mr. Riddle nor the appellant company had any intention of prospecting for oil or gas on the properties. The leases could be held for ten years, but at an annual cost of $8,100. At the end of that period they would terminate if minerals were not being produced from the properties. Or, they could be allowed to lapse at the end of the first or any subsequent year, but this course involved the loss of the money expended in acquiring them and any additional annual rentals that might have been paid. It would also have disturbed the workings of the scheme of Farmers Mutual Petroleums Ltd., as upon the leases lapsing there would be no revenue from them with which to pay the mineral taxes. I think it is improbable that Mr. Riddle or the appellant, when taking the leases, intended to follow either of these courses. They were, of course, possible courses for him or the appellant to follow, and there was no necessity at the time to decide definitely whether to follow either of them or not, but they were expensive and undesirable courses. I do not think the leases would have been taken at all if Mr. Riddle had been of the opinion that either of these courses would have to be followed. The only other practical course was to turn the leases to account by selling or otherwise dealing in them, and in my opinion that was the intention and purpose of Mr. Riddle and the appellant in taking them. That is what was done with them in the end. I think that it is what was intended when they were taken.

I find that the acquiring of the leases was not an ordinary investment of the company's funds but was an activity of the appellant company, engaged in as part of its profit-making operations and with a view to making a profit by selling or otherwise dealing in them when a favourable opportunity to do so arose. The appellant company was one formed for the purpose of making a profit. Its profits were to be made by carrying out operations of the kind mentioned in its memorandum of association. One of the

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classes of activities there mentioned was that of trading and dealing in mineral leases. On the day following its incorporation, the company took over a business which included a subordinate but closely related operation of taking mineral leases to advance the main operation, but at the same time with a view to making a profit by selling or otherwise dealing in them. The company carried on that business with the same object in view, it acquired many more leases, and ultimately, by selling them, made the profit in question. In my opinion, this profit is not a capital profit, made on realizing an investment, but a gain made in an operation of business in carrying out a scheme for profit-making. It was accordingly income and was properly assessed.

The appeal will be dismissed with costs.

Judgment accordingly.