1958
Jan. 27
Feb. 3

BETWEEN:

GLEN J. DAY .... APPELLANT;

AND

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

Revenue—Income tax—Land purchased for sale as building lots and later sold en bloc at a profit—Capital gain or taxable income—"Business"—The Income Tax Act 1948, S. of C. 1948, ss. 3, 4, 127(1), 139(1)(e)—Appeal dismissed.

Appellant in 1950 purchased a block of land near Toronto for the purpose of subdividing it and selling it all in building lots. He engaged surveyors who prepared a suitable plan of the subdivision and though some stakes were placed on the property the lots were not actually staked out. Because of unforeseen expenses and other difficulties, in May, 1951, he abandoned his original plan and rented the land for the crop season of that year. In 1951 he was employed for a short time with a company in Toronto and after a period of unemployment he purchased in the fall of 1952 a company which he still operates. In November 1951, he sold the land for an increased price over that at which he purchased it. A certain amount of the purchase price was paid on the closing of the deal and the balance in instalments. He was assessed for income tax for the profits on the sale of the land for each year the instalments were received, and from such assessment appealed to this Court.

Held: That appellant had no intention of retaining the property as an investment but did intend to sell it if and when a suitable price could be obtained and having entered into the business of a subdivider in exactly the same way as one engaged in that business would do and having been frustrated in completing his arrangements for disposing of it in one way, namely in lots, he did sell it another way, namely *en bloc,* and the profits realized on such sale constitute income and consequently are properly assessed for income tax.

APPEAL under the Income Tax Act.

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

J. D. McNish, Q.C. for appellant.

J. D. C. Boland for respondent.

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

CAMERON J. now (February 3, 1958) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board dated March 6, 1957, dismissing the appellant's appeal from re-assessments, all dated February 9,

1956, and made upon him for the taxation years 1952, 1953 and 1954. In each of these years the appellant received certain moneys, the proceeds of a sale of a large block of land, but being of the opinion that these amounts were not to be taken into account in computing his taxable income, omitted them from his tax returns. In the re-assessments, however, the Minister of National Revenue added to the declared income the profits which had been received therefrom during the several years.

The single question for determination, therefore, is whether the profits realized on the sale fall within the provisions of ss. 3 and 4 of *The Income Tax Act,* and more particularly whether they are within the provisions of s. 127, s-s. (1)(*e*) thereof. (The latter section, having been re-numbered appears as s. 139, s-s. (1)(*e*) of the Act in force for the years 1953 and 1954.)

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.

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 facts in the case are not seriously in dispute. It is admitted that if the profits realized constitute taxable income in the hands of the appellant, the amounts added to the declared income are correct and the re-assessments must stand.

The appellant is a young man who graduated from the University of Toronto in 1947 in Commerce and Finance. Immediately upon graduation he joined the Day Sign Company of Toronto, a family concern, fully expecting that he would soon have a financial interest in that business. His hopes, however, were not realized, and due to that fact,

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and for personal and financial reasons, he gave notice at the end of 1950 that he would leave that company on March 31, 1951, which he did.

In the meantime in June, 1950, he had occasion to visit a relative in the Scarboro district east of the city of Toronto, and noting the rapid development of that area, conceived the idea of purchasing a block of land, turning it into a subdivision and then selling it all in building lots. In June, 1950, he purchased a block of 129 acres lying between the Kingston Road and Lake Ontario for $105,000, of which amount $5,000 was paid in cash as a deposit and the balance in cash on closing the purchase early in July of the same year. Exhibit 1 is the agreement of purchase and sale. Exhibit 2 shows the limits of the property in red ink. The evidence does not indicate how much of the purchase price was paid out of his own resources, but it was admitted by his counsel during the argument that a substantial amount was borrowed from a bank. Indeed, in the deductions allowed the appellant, there is an expense item of over $4,000 for bank interest.

Prior to the signing of the agreement to purchase, Mr. Day had had numerous discussions with one Beverley Eppes, an experienced real estate agent in the area and who was agent for the vendor in that sale. Estimates had been made as to the prospect of realizing a profit on the transaction, the number of lots to be made available, and other matters. It was estimated that the total cost of complying with the requirements of the township of Scarboro as to the installation of roads and services would be $50,000, an amount which Day says he could have arranged for. He says frankly that being then dissatisfied with his employment at Day Sign Company he intended to go into the business of buying property, subdividing it and selling it, as he felt confident he would do at a substantial profit.

Following the purchase, he engaged surveyors to prepare a plan of subdivision, and after amendment a suitable plan was approved. While some stakes were placed on the property, the lots themselves were not actually staked out on the land. One item of expense allowed was for $1,500 for surveyors.

Before the subdivision could be proceeded with he had to secure the approval of his plans by both the township of Scarboro and the province of Ontario Planning Board. He immediately ran into difficulties with the township authorities, who insisted on requirements which he had not anticipated or provided for. They required wider roads, some of which had to be paved instead of gravel; larger water mains; provisions for an access road; the reservation of certain acreage for a school; and of 5 per cent of the area for parks. There seemed to be a good deal of uncertainty as to just what they did require, and various meetings were held. Day finally estimated that the total expense of meeting these requirements would be $150,000, an amount greatly in excess of his original estimate. He was completely "fed up", particularly as he estimated that with this outlay his total costs would be so great that he could not sell his lots at competitive prices, and would make no profit. In addition, he had made no arrangements and had no means to provide for the extra outlay. By the end of April, 1951, he had reached the conclusion that the plan could not be proceeded with and must be abandoned.

Nothing further was done at that time as to further development or sale of the property. Under the terms of his original purchase the tenant, Campbell, was entitled to remain on the property for 1950 and remove his crop. In May, 1951, when he had abandoned his original plan, Day arranged to rent the farm for the crop season of 1951 to Campbell for $400.

He then looked for other employment, and from June, 1951, to April, 1952, was with the Silknit Company of Toronto. He was looking for a chance to enter a business on his own account, and after a few months of unemployment and a few months with the Highland Dairy Company he purchased, in the fall of 1952, the Bender Caskets Company of Newmarket, which he still operates.

After abandoning his original plan to subdivide the property, he gave some consideration to what should be done with it, but reached no conclusion. He discussed the matter with the witness J. F. Neil, a graduate of the Ontario Agricultural College, who was of the opinion that the land was suitable for potato growing and that under

normal conditions of weather and market a return might be expected. It is apparent, however, from this witness, that if such a plan were put into operation, it would need experienced management—and the appellant had had none —and a substantial capital outlay for machinery, equipment and barns. Whether such a plan would have been successful seems very doubtful in view of the large capital cost of the land and equipment. No decision was reached as to what should be done. The property was not advertised for sale and was not listed with any brokers.

In November, 1951, Mr. Day received an offer to purchase the property en bloc for $205,000. This was the first offer he had received for the property as a whole, although other offers had been made for lots or groups of lots before he had abandoned his original plan. He accepted this offer the following day. By its terms he received $2,500 as a deposit, $17,500 on closing in January, 1952, when he was given a mortgage for $185,000, to be paid in instalments of $9,000 quarterly, and the balance at the end of five years. Provisions were made for additional payments to secure the discharge of lots sold. The plans which had been prepared were taken over by the purchaser, and, with modifications, the subdivision was carried out. A commission in excess of $10,000 was paid by Day to the broker who brought the offer to him.

Mr. McNish, counsel for the appellant, frankly concedes —and I think rightly so—that if Day's plan to purchase, subdivide, improve and sell the property in building lots had been carried out as originally planned, the profits realized in that event would have been taxable income in his hands, as falling within the provisions of ss. 3 and 4 of the Act, or at least within the extended meaning of "business" as defined in s-s. (1)(*e*) of s. 127, as being an adventure in the nature of trade, notwithstanding that the appellant neither before nor since this purchase and sale had been engaged in the business of buying and selling real property, except that on one occasion he bought and later sold his own residence.

It is submitted, however, that in May, 1951, his original intention to buy, develop and sell the land was frustrated, and that he then fully abandoned that intention of speculating in real estate. It is said that thereupon the

property became a capital asset, and, as stated in the Notice of Appeal, that at the time of its sale some six months later, the profit secured was merely that realized upon the sale of an investment. The fact that he took other employment, that he proceeded no further with his plan of subdivision, and that he made no attempt in the meantime to sell or list his property for sale is said to be a clear indication of a change of intention.

Now, while he did abandon his original plan of realizing a profit by subdividing the property into building lots and selling them—at least for the time being—I am quite unable to find on the evidence that he at any time abandoned his plan to make a profit by selling the property in some way. It was not suggested that he came to the conclusion that he would operate the property as a farm, and the discussions with Neil were only in regard to what could be done with the property. He was not a farmer, and did nothing to indicate that he ever intended to put Neil's suggestion into effect. The renting of the property to Campbell was for the crop season only, and was entirely in the nature of a stopgap, as indicated by its short duration and the fact that the rental represented less than half of the annual taxes.

There may be cases in which property purchased for trading and speculative purposes might, in certain circumstances, become an investment, the profit from which at a later sale would not be taxable income, but such is not the case here.

In *Gairdner Securities, Ltd. v. M. N. R.*[1], Rand J., in the Supreme Court of Canada, said:

> Investments in the sense urged look primarily to the maintenance of an annual return in dividends or interest.

It is abundantly clear that Day never abandoned his original intention to sell the property, which he had purchased speculatively, at a profit. Mr. McNish said in argument that the only alternative to farming the property was to sell it. Day was anxious to start up in business on his own account, and for that purpose, as well as to pay off his liability to the bank, would have to sell the land. His desire to sell it is clearly evidenced by the immediate acceptance of the first offer made to him.

[1] [1954] C.T.C. 24 at 27.

Many cases were cited by counsel for both parties, but I find it necessary to refer to one only which I think is closest to the problem here—that of *McIntosh v. M.N.R.*[1]. The facts in that case are, in many respects, similar to those in this case; the same argument was raised and rejected, that there had been a change of intention of such a nature that the property originally purchased for purposes of erecting and selling houses, became in the circumstances, an investment.

In that case McIntosh, a retired merchant, without experience in buying and selling real estate, entered into an agreement with one Laidlaw, an experienced builder, to purchase certain acreage, erect houses thereon, and sell them with a view to profit. McIntosh was to purchase 55 lots and Laidlaw the remaining 110, but they were to be associated in the building scheme. Differences arose between the parties, and following litigation, 55 of the lots were transferred to McIntosh. Having no experience in building houses, he decided to sell the vacant lots. In 1952 he sold 20 lots at a substantial profit.

At p. 129, Hyndman D.J. said:

> The question for decision is, therefore, whether said profit was capital accretion, or, income subject to tax.
>
> It can be said at once that this was an isolated transaction, not in any way related to the respondent's usual or ordinary business.
>
> It is equally true that when he entered into the arrangement with Laidlaw his intention was to make gain or profit. Also, after acquiring the 55 lots from Laidlaw, he had no intention of using them himself or developing them for revenue purposes.
>
> From his notice of appeal to the Income Tax Appeal Board, dated the 27th of September, 1954, I quote the following:
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> > "The appellant's venture in purchasing the said lots was a speculation."
>
> It was very strongly argued by Mr. Laird, Q.C., counsel for respondent, that the arrangement with Laidlaw having fallen through, an entirely new situation arose affecting or displacing his original intention.
>
> I have given this argument my best consideration, but I cannot escape the conclusion that the original idea, namely, to make gain or profit, continued. It was, as above stated, still a venture or speculation, and not an investment in the ordinary sense.
>
> Having acquired the said property there was no intention in his mind to retain it as an investment, but to dispose of the lots, if and when suitable prices could be obtained.

[1] [1956] Ex. C.R. 127.

He allowed the appeal of the Minister, and restored the assessment which had been set aside by the Income Tax Appeal Board. The taxpayer appealed to the Supreme Court of Canada, in its judgment, delivered a few days ago —but not yet reported—the Chief Justice of Canada, speaking for the Court, said:

> A consideration of the entire record makes it clear that that arrangement was an adventure or concern in the nature of trade within the meaning of the term "business" as defined in the Act, but the argument is that, because of differences which arose between him and his relative, what he did subsequently was merely an endeavour to realize upon an investment. I agree with Mr. Justice Hyndman that that is not the true conclusion from all the circumstances; nor do I think that it is answered by the reasons of the Income Tax Appeal Board that, in order to escape taxation, the appellant should either have refrained from selling the lots for more than they had cost him, or else should have given them away.

Later he said:

> In the present case I agree with Mr. Justice Hyndman's findings with reference to the appellant that:
>
> > "Having acquired the said property there was no intention in his mind to retain it as an investment, but to dispose of the lots, if and when suitable prices could be obtained."
>
> The appeal should be dismissed with costs.

In fairness to counsel for the appellant, I should state that the judgment of the Supreme Court of Canada was not delivered until after the hearing of the present appeal.

I am unable to distinguish that case from the one now before me. Here Day had no intention of retaining the property as an investment, but did intend to sell it if and when a suitable price could be obtained. Having entered into the business of a subdivider in exactly the same way as one engaged in that business would do, and having been frustrated in completing his arrangements for disposing of it in one way—namely, in lots—he did sell it in another way—namely, en bloc.

Accordingly, for these reasons, the appeal will be dismissed, and the re-assessments made upon the appellant for each of the years 1952, 1953 and 1954 will be affirmed. The respondent is entitled to his costs after taxation.

Judgment accordingly.