
BETWEEN:

ROBERT JAMES RANDOLPH RUSSELL ..... APPELLANT;

AND

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

AND BETWEEN:

CLIFFORD W. TANNER ..... APPELLANT;

AND

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

1963
Apr. 9, 10
May 15

Revenue—Income tax—Income Tax Act R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e)—Real estate transaction—Capital gain or income—Share-

1963

ROBERT JAMES RANDOLPH RUSSELL *et al.* *v.* MINISTER OF NATIONAL REVENUE

holders of trucking company—Purchase of suburban land as site for trucking terminal and sale of surplus land at a profit—"Salvage" operation leading to capital gain or scheme for profit making and income—Appeals dismissed.

Appellants were the two shareholders of a trucking company in which appellant Tanner had been employed as Manager. In order to expand parking and terminal facilities appellants purchased a sixteen and one-half acre tract in the name of Mrs. Tanner for $20,000 in 1950. The tract contained more land than needed by the corporation and the surplus was sold off in a number of transactions over a period of years, after a survey had been made. One sale consisting of 11.2 acres was to the corporation which resold it. Appellants made a profit of $116,000 on these sales. They were assessed for income tax on such profits and an appeal therefrom to the Tax Appeal Board was dismissed. They appealed to this Court. The appeal is concerned with the taxation years 1955, 1956, 1957 and 1958 and the appeals of both appellants were heard together.

Held: That the property was acquired with the intention of disposing of it and was acquired for the purpose of trade since appellants by participating in the transactions as they did were engaged in a business within the meaning of the Act.

2. That the whole course of action of the appellants was indicative of dealing in real estate and they had embarked on an adventure or concern in the nature of trade and that the profits from the sales in question are income within the meaning of the Act.

3. That appellants had intended to sell the property after acquiring it to the company as required and of disposing of the balance, and the land was therefore the subject of trade and was so purchased.

4. That the appeals be dismissed.

APPEALS under the *Income Tax Act.*

The appeals were heard before the Honourable Mr. Justice Cattanach at Toronto.

Colin S. Berg for appellants.

Thomas Z. Boles and *E. E. Campbell* for respondent.

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

CATTANACH J. now (May 15, 1963) delivered the following judgment:

These are appeals from judgments of the Tax Appeal Board[1] dismissing appeals by the appellants from assessments of income tax for the taxation years 1955, 1956, 1957 and 1958. As the same problem is involved in both cases, the appeals, eight in number, being the four assess-

[1] 29 Tax A.B.C. 246, 254.

ments for the taxation years mentioned with respect to each appellant, were heard together. The question for determination is whether profits realized on the sales of portions of a parcel of certain real estate in the taxation years 1955 and 1956 were income for purposes of the *Income Tax Act*, or a capital gain. While the assessments for the taxation years 1957 and 1958 are also in issue, they are so in issue incidental to the assessments for the taxation years 1955 and 1956 by reason of section 85B which permits the appellants to carry unearned portions of mortgage interest arising from the real estate sales in 1955 and 1956 into the years 1957 and 1958.

The appellant, Robert James Randolph Russell, Esq., Q.C. is a member of the legal profession who practices his profession from two offices in the suburbs of the City of Toronto. The appellant, Clifford W. Tanner, also of Toronto, has spent his entire working lifetime in the motor transport business. Neither of the appellants had engaged in any speculative venture in real estate prior to the events to be related, although the legal firm of which Mr. Russell is the senior member, owns the two premises it occupies and Mr. Russell personally owns two office buildings from which he derives rental income and the general law practice in which he is engaged is comprised of about 40 percent conveyancing work.

Mr. Tanner first engaged in a transportation business operated by his family. This business was sold to Toronto-Peterborough Transport Company Limited (hereinafter referred to as the Company) in 1930 and Mr. Tanner continued in the employ of the Company as manager. All of the issued shares in the capital stock of the Company, being 400 in number, were owned by Mr. Roy Andrews, with the exception of qualifying shares. Mr. Andrews died in 1946 and the business was continued under the ownership of his widow with Mr. Tanner as manager until 1948 when Mrs. Andrews expressed the wish to be out of the business.

Accordingly, in that year Mr. Tanner and Mr. Russell entered into an agreement to purchase the outstanding shares of the Company in the proportion of 45 and 55 percent respectively.

1963

ROBERT JAMES RANDOLPH RUSSELL *et al.* *v.* MINISTER OF NATIONAL REVENUE

Cattanach J.

To finance this purchase Mr. Russell paid $50,000 of which $15,000 were his own funds and the balance of $35,000 was borrowed by him. Mr. Tanner was able to raise $15,000. At the outset Mr. Tanner purchased 94 shares, but by subsequent borrowing and an application of profits derived from the transactions which are the subject matter of the present appeals, he was able to purchase 86 more shares and so fulfilled his agreement with Mr. Russell to the effect that the shares would be purchased in the proportion of 55 and 45 percent between them.

At the time of the acquisition of the shares by the appellants, the Company carried on its business from leased premises on De Grassi Street in the eastern section of Toronto which were inadequate for the efficient operation of the Company's activities. There were insufficient parking and terminal facilities for the Company's equipment. Increased demands for service from the Company's customers could not be met from that location. In addition, the Municipality was in the course of expropriating properties to extend the street so that what facilities as were available to the Company would be further diminished. It was manifestly imperative that new and larger premises be obtained forthwith.

Therefore, the appellants, in concert and on their individual initiative, began an extensive and diligent search for property suitable for the Company's needs, which search extended over a period of approximately ten months from the latter part of 1949 to the early part of 1950 without satisfactory result. Mr. Russell took no part in the management of the transportation business which he was content to leave to the experience and proven ability of Mr. Tanner, nor did he hold any elected office in the Company. Nevertheless, Mr. Russell was vitally interested in the eventual success of the Company as a major shareholder, for which reason it is obvious that he gave unstintingly of his efforts to ensure that success. He was aware of the size and type of property which was required by the Company.

Eventually, Mr. Russell found a property in North York Township bounded by O'Connor Drive and Victoria Park on the east and west and on the north by Sunrise Avenue, comprising approximately 16.5 acres. The property afforded ready access to major highways not subject to half-load

restrictions at any time. A ravine ran through the southern portion of the property. The land was undeveloped and devoid of services. It was used for farming purposes. There was a house and barn on the land. The surrounding lands were similar.

The appellants agreed that this property was eminently suited to the Company's requirements and at that time it was estimated that an area of 5 acres was needed by the Company.

The land was owned by the Harris Estate and a sign advertising it for sale was erected thereon inviting inquiries of the National Trust Company which was acting on behalf of the estate.

Accordingly, Mr. Russell telephoned the real estate department of the trust company and advised that the Company would submit an offer. He was informed that the land was not for sale and that to make an offer was futile because it would be rejected. Despite this advice an offer was made by the Company to the National Trust Company in an amount of $15,000 for the entire property. The offer was promptly rejected.

Some four months later, on April 25, 1950, Mr. Russell wrote the trust company inquiring whether the estate would be interested in selling approximately 5 acres and the price expected therefor. A reply, dated April 27, 1950, was received advising that the estate was not interested in dividing the land.

Later, Mr. Russell was passing the property and saw a new sign by a different trust company advertising the land for sale. He therefore telephoned the new advertiser and was exasperated on being informed the land was not for sale. Having been so rebuffed in his attempts to purchase the property, Mr. Russell spoke with a member of the Harris family who was an executor of the estate and was informed by him that an offer of $20,000 for the property would be accepted.

Accordingly, after consultation with Mr. Tanner, Mr. Russell drafted an offer for the property dated May 11, 1950 conditional upon the conduct of a transport and warehousing business being permitted by the municipal authority. The offer was made by the Company and signed by Mr. Tanner as President. The offer was accepted.

1963

ROBERT JAMES RANDOLPH RUSSELL *et al.* *v.* MINISTER OF NATIONAL REVENUE

Cattanach J.

No attempt was made to negotiate the purchase of a lesser portion of the property commensurate with the Company's estimated requirements from the executors of the estate, but such omission was undoubtedly prompted by the previous rebuffs experienced by Mr. Russell from the two trust companies and by the necessity of an expeditious relocation of the Company's business.

Mr. Russell then ascertained that the Township of North York would approve the conduct of the Company's business from the property.

Mr. Tanner was of the opinion that $20,000 was an excessive price, but it was agreed by the appellants that the surplus to the Company's needs could be sold.

Although the offer had been made in the name of the Company, a direction was issued to the vendor to cause the deed to be made to Mrs. Maude Tanner, the wife of the appellant Clifford W. Tanner, as trustee for both appellants herein.

The reasons advanced for the adoption of this procedure were that the Company did not have funds available for the purchase of the land and to not impair the accommodation advanced to the Company by its bank. Mr. Russell advanced $10,000 to the Company and a further $10,000 was borrowed on the security of a mortgage on part of the land to close the sale. Subsequently, in 1951 Mr. Russell advanced the Company $25,000 in amounts of $5,000 on five dates between March and July of that year and further amounts of $12,500 and $20,000 in March and August of 1956, on the security of promissory notes from the Company which were endorsed by him to the Company's bank which then continued its accommodation to the Company. The advances made by Mr. Russell were for the construction of terminal facilities by the Company.

In response to questions, Mr. Russell gave the following answers as to why the deed to the land was made in Mrs. Tanner's name as trustee for the appellants and why the land was not placed in the Company's name forthwith:

> Well, that may have been one of the reasons why it was not in my name as trustee or Mr. Tanner's name as trustee. As it worked out we could deal with the property, as we did deal with it, to advantage.
>
> It was to save our investment . . . If the Company had gone into bad times we would at least have had the land.

In the fall of 1950 or the beginning of 1951, the Company abandoned its premises on De Grassi Street and used the premises acquired.

Between the years 1951 and 1956 the appellants disposed of a major part of the land so purchased in eight different sales realizing a profit of $116,500.

The sales were as follows:

	Year	*Purchaser*	*Sale Price*
(1)	1951	Trinidad Leaseholds	$12,500
(2)	1952	W. A. Cain	7,500
(3)	1953	Sun Oil Co Ltd.	22,500
(4)	1954	Trinidad Leaseholds	10,000
(5)	1955	Byers Motors Ltd.	20,000
(6)	1955	B. & H. Realty Ltd.	15,000
(7)	1955	Toronto-Peterborough Transport	26,376
(8)	1956	W. A. Milne	21,000

The amounts of the assessments for income tax are not in dispute between the parties and the present appeals relate to sales in the years 1955 to 1956 so that items 5 to 8 constitute the material transactions, although reference is made to items (1) to (4) to illustrate the appellants' complete course of conduct.

In 1952, 5.6 acres were to be sold to the Company for a total consideration of $13,000. The original sale price negotiated between the appellants and the Company was $10,000 for the land and $10,000 for the buildings. However, the Department of National Revenue considered the transaction not to have been at arm's length and consequently was at a value greater than the value of the property. The price was accordingly reduced to $13,000 as representative of the fair value, to which all parties agreed. However, this sale was never consummated.

In the meantime, under the expert management of Mr. Tanner, and due to the remarkable development of the area in which the Company was located, it enjoyed a phenomenal success. Initially the Company possessed some seventy vehicles and in 1955 had increased its equipment to over three hundred vehicles. Therefore, the ultimate sale to the appellants in 1955 was 11.2 acres for a consideration of $26,376 which was worked out by the appellants on the same basis as the tentative sale to the Company in 1952 for $13,000. The southerly portion of the property deeded to the Company through which a ravine

1963

ROBERT JAMES RANDOLPH RUSSELL *et al.* *v.* MINISTER OF NATIONAL REVENUE

Cattanach J.

runs was being filled from excavations for construction in the immediate area of which there were many.

The sales in 1951 and 1954 to Trinidad Leaseholds were for the purpose of erecting a gasoline station. The purchaser had negotiated an arrangement for the sale of gasoline and oil to the Company at a mutually satisfactory price. For a short time the filling station was operated by the appellants through an employee, but the project was unsuccessful because adequate supervision was not possible.

The land sold to W. A. Cain by the appellants for $7,500 in 1952 was later purchased by the Company for $47,000. The acquisition of this property at an enhanced price was explained by the circumstances that Cain had erected a substantial building which was eminently suitable for the Company's use as a garage, repair shop and office accommodation.

An offer to purchase additional property was refused by the appellants because at that time the needs of the Company were not ascertained. The land which was the subject of this offer was included in the 11.2 acres later transferred to the Company. The Company subsequently sold the land to B. & H. Realty Ltd. for $15,000 so that in effect the land retained by the Company was acquired for $11,376.

At the time of the purchase of the land by the appellants from the Harris Estate, a plan of survey was done, the cost of which was shared equally by the vendor and purchasers. Mr. Russell explained that this survey was made to determine the precise limits of the property being purchased by the appellants and to permit a correct description being drawn. There were four further plans of survey made on April 28, 1953, October 2, 1953, August 20, 1955 and February 14, 1956.

The area in which the property was situated was zoned for industrial and commercial development and had been designated by the Township of North York as an area of subdivision control wherein no parcel of land could be divided for sale or sale in part or agreed to be sold in part save where the land was shown in a duly registered plan of subdivision.

Mr. Russell insisted that a plan of survey preceded each individual sale to comply with the municipal control by law.

1963

ROBERT JAMES RANDOLPH RUSSELL *et al.* *v.* MINISTER OF NATIONAL REVENUE

Cattanach J.

I conclude that the survey on April 28, 1953 related to the Cain sale, the survey on August 20, 1955 to the sales to Byers Motors, Ltd. and B. & H. Realty Ltd. and the survey on February 14, 1956 to the sale to Milne. However, I am unable to relate the survey of October 2, 1953 to any immediately subsequent sale.

The title on the plan of October 2, 1953 originally read "Proposed Subdivision", but on Mr. Russell's instruction those words were struck out and replaced by the words "Plan showing" because, he stated, it was a plan to show what lands the appellants had available. In 1953 the adjacent lands were being rapidly developed which circumstance was indicated upon the plan as well as additional information to the effect that lots were shown for commercial use, no municipal water or services were available, but good wells were on the property and the soil was suitable for septic tanks.

This plan of subdivision was not registered, which accounts for subsequent sales being preceded by still further plans.

The sales to Cain, Byers Motors, Ltd., B. & H. Realty Ltd. and Milne, were all negotiated by a real estate agent who was a member of the same service club as the appellants and to whom the appellants paid a commission, although the lots were not listed for sale with the agent nor were they advertised for sale.

Prior to the commencement of these proceedings, Mr. Russell wrote a letter, approved by Mr. Tanner, to the Department of National Revenue, which was introduced in evidence as Exhibit R1, the penultimate paragraph of which reads as follows:

> From the information we were able to get from your Department, and taking all the circumstances into consideration, it appears that there was no other course to be taken, and the writer respectfully submits that any moneys received by Mr. Tanner and the writer should be considered capital gain. It was only because of the phenomenal growth of the area subsequent to the purchase of the property that enhanced its value, and due to the heavy and increased taxation, it could have been that we would have lost considerable money. This was definitely a risk capital venture, and it was not even known at that time whether or not the Company would be permitted to operate in that location. Mr Harris, through his Solicitor, wrote on June 21st 1950 sending a copy of a letter he had received objecting to a Transport Company becoming established adjacent to a proposed residential sub-division. This, of course, was after the Offer to Purchase had been made, and accepted Enclosed is a copy of Mr. Harris' Solicitors' letter, and a copy of the Planning Board's letter re the objection.

1963

ROBERT JAMES RANDOLPH RUSSELL *et al.* *v.* MINISTER OF NATIONAL REVENUE

Cattanach J.

By s. 3 of the *Income Tax Act* the income of a taxpayer for the purposes of Part I of the Act is declared to be his income from all sources inside and outside Canada and to include income for the year from *inter alia* all business. By s. 4 income from a business is declared to be, subject to the other provisions of Part I, the profit therefrom for the year and by s. 139(1)(*e*) business is defined as including a profession, calling, trade, manufacture or undertaking of any kind whatsoever and as including an adventure or concern in the nature of trade but not an office or employment.

On the facts above recited the issue to be resolved is whether the land was bought by the appellants to serve the Company's interest and the possibility of sale of the surplus at a future time was in the nature of a salvage operation and not a scheme of profit making, or whether the appellants' whole course of action was indicative of dealing in real estate, not only with respect to the land surplus to the Company's need, but also with respect to the land eventually sold to the Company.

The test for resolving such an issue is that stated in *Californian Copper Syndicate v. Harris*[1] as follows:

> 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. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realization, the gain they make is liable to be assessed for Income Tax.
>
> What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

The test so outlined is not always susceptible of easy application for there is no single criterion by which the

[1] (1904) 5 T.C. 159 at 165.

issue may be resolved, and cases, such as the present one, frequently arise in which the circumstances and facts point to either conclusion.

In my view the appellants acquired the property with the intention of disposing of it which they did in fact, in eight separate sales including the sale to the Company, at substantial profit. In the Notice of Objection to the assessments the appellants state, "We intended that the Company would purchase only the required land and we would dispose of the balance when occasion arose."

The deed to the property was made in the name of Mrs. Tanner as trustee for the appellants and while the appellants owned all the issued shares of the Company, nevertheless, the Company is an entity separate and apart from its shareholders. It was the acknowledged intention of the appellants to sell the land required by the Company to it and to dispose of the surplus. In my view, therefore, the land acquired by the appellants was the subject of trade and was so purchased for that purpose.

The sales were negotiated through the intervention of a real estate agent known personally to both appellants, and while the lands were not advertised for sale by usual means, nevertheless, this particular real estate agent knew that the appellants had land available and were willing to sell it.

The sales of the land began within a comparatively short period after its acquisition by the appellants and consistently continued for a period of six years thereafter.

The land reserved for use of the Company was the interior portion with a right of way to the street. While such land was equally suitable for the Company's purpose, nevertheless, it did have the effect of leaving the surplus abutting paved streets and accordingly more attractive for sale to prospective purchasers.

Despite Mr. Russell's protestations to the contrary, I conclude that the plan dated October 2, 1953 was, in fact, what it purported to be, that is a plan of subdivision even though no lots were actually staked. Mr. Russell admitted that he may have asked the surveyor to sketch out the land remaining. This plan of subdivision was not registered which accounts for the subsequent sales being preceded.

1963

ROBERT JAMES RANDOLPH RUSSELL *et al.* *v.* MINISTER OF NATIONAL REVENUE

Cattanach J.

by still further plans to comply with the municipal requirements.

Had the sales been dedicated to the benefit of the Company such would negative the conduct of a business in real estate. The two sales to Trinidad Leaseholds may well have been advantageous to the Company in order to have a supplier of gasoline and oil readily accessible, but I cannot conceive of the appellants' foreseeing the resale of the Cain property to the Company with a structure thereon so adaptable to use by the Company.

The sales to Byers Motors Ltd., B. & H. Realty Ltd. and to Milne were not dictated by any relationship of suppliers to the Company, but rather such sales were completely independent of such consideration.

The letter of February 29, 1960 written to the Department of National Revenue by Mr. Russell and approved by Mr. Tanner emphasises the speculative nature of the undertaking.

The cumulative effect of the foregoing factors leads me to the conclusion that the appellants by participating in the transactions as they did, were engaged in business within the meaning of the *Income Tax Act* in that they embarked upon an adventure or concern in the nature of trade and that the profits from the sales in question were income within the meaning of the Statute.

The appeals are therefore dismissed with costs.

Judgment accordingly.