1965

Apr. 5-7

Apr. 20

BETWEEN:

HARRY SHEFTEL ..... APPELLANT;

AND

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

AND BETWEEN:

BENJAMIN SHEFTEL ..... APPELLANT;

AND

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

AND BETWEEN:

LEOPOLD SHEFTEL ..... APPELLANT;

AND

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

Revenue—Income—Income tax—Purchase and subsequent sale of real property at a profit—Taxability of profit from sale of real property—Exclusive purpose of taxpayer at time of purchase of real property—Business or adventure in the nature of trade—Onus of disproving assumptions made by Minister when assessing—Subsequent disposition at a profit the purpose or one of possible purposes of acquisition of land—Income Tax Act, R.S.C. 1952, c. 148.

These appeals are from the decision of the Tax Appeal Board dismissing appeals from the assessment of the appellants for the 1959 taxation year.

The appellants are brothers who have resided and carried on business in the City of Calgary, Alberta for most, if not all, of their adult lives. They almost invariably engaged in their various business activities as partners. Many of their business enterprises included the purchase of real estate, its development and rental or subsequent sale. Among these enterprises was the development and operation of a chain of neighbourhood grocery and general stores in Calgary and the operation of a feed lot near the Calgary stockyards.

In April 1959 the appellants purchased a 10 acre parcel of land south of but in close proximity to the limits of the City of Calgary, their alleged intention being to develop the tract as a feed lot, the existing one being too small. Two months after the purchase the land, together with other lands south of the city, was expropriated and made part of the City of Calgary. When the appellants applied for a permit

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to develop the 10 acre parcel as a feed lot the authorities of the City of Calgary refused to grant such permission.

In 1959 the appellants sold the 10 acre parcel to Kelwood Corporation Limited for development as a residential subdivision. It is the assessment by the respondent of income tax on the profit realized on the sale to Kelwood Corporation Limited that the appellants have appealed from.

The evidence established that the appellants made no inquiries of any kind regarding the use to which the lands in question could be put before purchasing them, nor did they avail themselves of the appeal procedure outlined to them when their request to the City of Calgary for permission to develop the land as a feed lot was rejected.

Held: That if it were the appellants' exclusive purpose at the time of the acquisition of the land to construct and operate a feed lot thereon, the profit from the sale after that project had been necessarily abandoned, would not be a profit from a business or an adventure in the nature of trade. If that was not their exclusive purpose at that time there can, in the circumstances, be no doubt that the acquisition of this land had for its purpose or one of its possible purposes subsequent disposition at a profit and the resulting profit is, therefore, taxable.

2. That it is inconceivable that the appellants, being business men of astuteness and acumen, should have undertaken the purchase of the property in question with no other object in mind except its use as a feed lot without making any preliminary inquiries whatsoever as to whether they would be permitted to use the land for that purpose.

3. That the onus of disproving the Minister's assumption, when assessing, that the acquistion of the land had for its purpose or one of its possible purposes subsequent disposition at a profit, was on the appellants and they have failed to discharge that onus.

4. That the appeals are dismissed.

APPEALS from a decision of the Tax Appeal Board.

The appeals were heard by the Honourable Mr. Justice Cattanach at Calgary.

S. J. Helman, Q.C. and *R. Kambeitz* for appellants.

W. A. Howard, Q.C., T. E. Jackson and *G. R. Forsyth* for respondent.

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

CATTANACH J. now (April 20, 1965) delivered the following judgment:

These are appeals from decisions of the Tax Appeal Board[1] dated June 14, 1963 whereby the Board dismissed the appeals of the three appellants therein from the assessments of the Minister for the 1959 taxation year.

[1] (1963) 32 Tax A.B.C. 259, 266.

The appellants are brothers who are partners in their many activities each of whom manages his own special line of business. The appellant, Harry Sheftel, was engaged in the cattle purchasing and marketing business, whereas the other brothers, Leopold and Benjamin, were primarily responsible for the operation of a chain of neighbourhood grocery and general stores. When competition from the large grocery supermarkets become severe this business was gradually curtailed and eventually abandoned. However, the brothers, being enterprising, venturesome and experienced business men, turned their undoubted talents to other fields. They acquired land in the City of Calgary upon which they built and operated neighbourhood shopping centres, the land and buildings upon which the stores were previously operated were turned to account either by renting or selling existing buildings or the construction of buildings on vacant lands for rental purposes. All of these activities covered a span of years and were participated in by all three brothers, although one or the other of the brothers may have been dominant in a particular transaction depending upon their respective specialities.

The transaction which gives rise to the instant appeals was instigated by the appellant, Harry Sheftel. In connection with their cattle operation the appellants had acquired a 3½ acre parcel of land from the City of Calgary in 1949 in close proximity to the existing and extensive stock yards and used it as a feed lot. After using the property as a feed lot from 1949 to 1954 (which use is still being continued), the appellants on the recommendation of Harry Sheftel, decided that the original feed lot was too small for their expanded business, that a packing plant should be erected on that site and a larger feed lot should be purchased.

In purported furtherance of this purpose the appellants purchased a 10 acre tract of land on April 1, 1957 described as follows:

> The most Southerly Six Hundred and Sixty (660) feet of the most Northerly Nine Hundred and Ninety (990) feet of the West Half of Legal Subdivision Five (5) of Section Twenty Eight (28), Township Twenty Three (23), Range One (1), West of the Fifth Meridian in the Province of Alberta containing Ten (10) Acres, more or less.

The land, at the time of purchase, was within the municipality of Rockyview but very close to the then existing southerly boundaries of the City of Calgary. The registered

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owner of the land was Neil D. Campbell who pastured horses on the adjacent 10 acres. He had sold the land in question to Ruth A. Henderson under an agreement for sale dated July 12, 1956. The appellants acquired the interest of Ruth A. Henderson by an assignment dated April 1, 1957 at a total cost to them of $25,200.

At the time of purchase the appellants did not retain an independent solicitor to act on their behalf in the requisite conveyancing, but were content to accept and rely on the services of Ruth A. Henderson's solicitors. The agreement provided for a purchase price of $21,000 payable $6,000 on execution, and $5,000 payable on July 5 in each of the years 1957, 1958 and 1959. When the interest under the agreement was assigned to the appellants on April 1, 1957 the balance outstanding was $15,000.

It was further provided in the original agreement that in the event of development being commenced by the purchaser at any time prior to July 5, 1959 the entire outstanding balance of the purchase price would become due and payable thereon. There was no adjustment for taxes and the vendor was entitled to remain in possession and be responsible for taxes until development of the property being begun by the purchasers at which time an adjustment for taxes would be made and the balance of the purchase price would become payable if development was begun prior to July 5, 1959, but in the event no development was commenced prior to July 5, 1959 the provisions for payment as above mentioned would prevail.

The assignment to the appellants on April 1, 1957 made the conditions in the Agreement for Sale applicable to them.

The appellants made no enquiries at the time of purchase as to any zoning regulations applicable, the taxes payable, nor the services available. Harry Sheftel did testify, however, that this land was within ready access by truck over passable roads to the original feed lot upon the site of which it was proposed to build a packing plant and that from the general appearance of the area it was devoted solely to agricultural uses and accordingly he foresaw no impediment to the construction of a feed lot. However evidence was adduced by the Minister that on April 1, 1957 there were a number of medium priced houses along 66th Avenue and south on 14th Street not too far distant from the subject

property. A subdivision known as Meadowlarks was well under way a half mile distant from the property and there were two substantial homes on 100 acre tracts of land some quarter of a mile distant.

The appellants did not indicate to Ruth A. Henderson or Neil D. Campbell the use to which the land was proposed to be put because, as he testified, he assumed that neither of them were concerned.

The appellants Harry and Leopold Sheftel testified (Benjamin did not testify) that they had no knowledge of proposals or rumours of annexation of the area by the City of Calgary despite the fact that public hearings were held during August 1956 and March 1957 respecting annexation of which prior notice had been given by insertions in local newspapers under the legal notices columns.

The land was, in fact, brought into the City of Calgary by order of the Board of Public Utility Commissioners for the Province of Alberta dated June 4, 1957 with retroactive effect to December 30, 1956.

The appellants decided shortly after the purchase of the land to provide a house for a man to care for the cattle as well as a garage. In order to do so it was necessary to obtain the consent of Neil D. Campbell, the vendor and still registered owner. An agreement was, therefore, completed between Campbell and the appellants dated April 24, 1957 whereby consent to construct a house and garage was obtained provided they indemnified him for any resultant increase in taxes and the agreement also provided that the appellants should obtain the permission of the relevant municipal authorities before commencing construction of the dwelling house and garage. It follows that the appellants on April 24, 1957 contemplated the possibility that permission of the municipal authorities was required to construct a house and garage.

Initial enquiries were made with respect to the building of a packing plant on the original feed lot site. Blue prints were prepared for the packing plant. Correspondence was conducted with the Federal Department of Agriculture in Ottawa in 1954 and with the Calgary Health Department in 1955, all prior to the purchase of the land here in question on April 1, 1957.

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In April 1958 the appellants must have learned that the land which they proposed to use as a feed lot had been incorporated within Calgary city limits because on that date the Montreal Trust Company, which almost invariably acted on behalf of the appellants in transactions of this nature, wrote the City of Calgary to advise that the construction and operation of a feed lot on the land in question was in contemplation and requested permission to so construct a feed lot.

On April 25, 1958 the City replied enclosing a copy of the decision of the Technical Planning Board stating that the request to operate a feed lot on the premises was considered and refused because the property had been classified on the interim zoning guide as "Agricultural future residential" which did not permit the development of feed lots and that feed lots were only permitted in heavy industrial areas under special conditions.

The appeal procedure from such refusal was explained but no appeal was launched because, as Harry Sheftel testified, he considered an appeal to be futile having been so informed by a civic official who also indicated to Harry Sheftel that he would vigorously oppose such an appeal.

Despite this rebuff the project of constructing a packing plant was not abandoned because there was tendered in evidence a letter dated March 27, 1961 from the Stockyard Branch of the Bank of Montreal offering financial assistance with respect thereto subject to adequate security being given. There was also correspondence in August 1960 with a manufacturer of meat packing machinery and equipment in Chicago, Illinois—followed by a personal visit of the appellant, Harry Sheftel, to the manufacturer in Chicago for a personal conference and a visit to plants there. The appellants expended the sum of $12,000 in furtherance of this project.

On April 14, 1959 the appellants sold the interest in the 10 acre parcel they had acquired on April 1, 1957 to Kelwood Corporation Limited for the purpose of subdivision and building. Kelwood was particularly interested in this area and had been busily engaged in purchasing land and options in the area. This Company was also anxious that the area should become annexed to the City of Calgary to facilitate the provision of necessary services for the

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construction of housing subdivisions. The land was sold for $47,500 thereby giving rise to a profit of $22,300 divided equally among the three appellants amounting to $7,433.33 each. These amounts were added by the Minister to the reported income of the respective appellants for the 1959 taxation year.

Since the identical issue arises in all three appeals it was agreed that the evidence adduced in one appeal should be applicable to the other two.

There is no dispute as to the amounts of the assessments but the question for determination is the familiar one as to whether the profit on the sale of a parcel of real estate was income for the purposes of the *Income Tax Act*, R.S.C. 1952, c. 148.

By the Notice of Appeal from the Tax Appeal Board the appellants set out their case as follows:

(*a*) The intention of the appellant and his brothers was the acquisition of property for the purpose of development as a feed lot and as a result the creation of income from carrying on the business of operating a feed lot.

(*b*) The fact that the appellant and his brothers were unable to use the land for the purpose for which it had been acquired arose from circumstances over which they had no control.

(*c*) Neither the appellant nor his brothers made any effort to sell the parcel of land and they did not list the property for sale with any licensed Real Estate Agent.

(*d*) The increment in value of the parcel of ten acres of land was not the result of any act by the appellant or his brothers but was caused solely by the sudden development of the City of Calgary southward, resulting in an increase in value over which the appellant and his brothers had no control.

The Minister's reply, so far as it is relevant, reads as follows:

8. In making the re-assessment, notice of which was given on the 21st day of March, 1961, the Respondent acted upon the following assumptions:

(*a*) that the Appellant, in concert with Benjamin Sheftel and Leopold Sheftel, acquired the land referred to in paragraph 5 of the Notice of Appeal (hereinafter referred to as the "said lands") with a view to trading in, dealing with, or otherwise turning it to account at a profit;

(*b*) that the Kelwood Corporation Limited purchased the said lands from the persons referred to in sub-paragraph (*a*) hereof on the 14th day of April, 1959, for the sum of $47,500.00;

(*c*) that the profit realized by the aforementioned persons from the purchase and subsequent resale of the said lands was $22,300.00;

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(*d*) that the Appellant's share of the profit from the purchase and subsequent resale of the said lands was $7,433.34;

(*e*) that the Appellant's share of the profit arising from the sale of the said lands during the Appellant's 1959 taxation year constituted part of his income for that year since it was profit from a business or adventure in the nature of trade.

The narrow issue is, therefore, whether the appellants purchased this property on April 1, 1957 "with the view to trading in, dealing with, or otherwise turning it to account at a profit". If they did, the resultant profit is taxable. If, however, as the appellants allege, the purchase of the property was made "for the purpose of development as a feed lot" and they "were unable to use the land from circumstances over which they had no control" then the profit from the land would not be taxable.

The onus of showing that the assumptions so made by the Minister were unfounded falls on the appellants.

If it were the appellants' exclusive purpose at the time of the acquisition of the land to construct and operate a feed lot thereon, the profit from the sale after that project had been necessarily abandoned, would not be a profit from a business or an adventure in the nature of trade. If that was not their exclusive purpose at that time there can, in the circumstances, be no doubt that the acquisition of this land had for its purpose or one of its possible purposes, subsequent disposition at a profit and the resulting profit is, therefore, taxable.

The onus of disproving the Minister's assumption, when assessing, that the latter was the case, was on the appellants and in my view they have failed to discharge that onus.

The question of fact as to what was the appellants' purpose in acquiring this property is one that must be decided after considering all the evidence. The appellants' statement at the trial that their intention was to construct and operate a feed lot on this particular property is only a part of the evidence. While such evidence may have been given in all sincerity it still may not reflect the true purpose at the time of acquisition. Present statements as to intention at the time of acquisition must be considered along with the objective facts.

To me it is inconceivable that the appellants, being business men of astuteness and acumen, should have undertaken the purchase of the property in question with no other

object in mind except its use as a feed lot without making any preliminary enquiries whatsoever as to whether they would be permitted to use the land for that purpose. They made no enquiries prior to purchase from any municipal authority as to zoning regulations, taxes to be paid when they eventually acquired title or the availability or likelihood of the availability of services.

The appellants, over a span of years, had participated in the purchase and sale of land, both within and without the City of Calgary, and had conducted on such lands various enterprises. From this it follows logically that they must have been aware of the necessity of obtaining permission to devote land to certain uses and of complying with existing use and building restrictions which may have been imposed thereon.

Both Harry and Leopold Sheftel testified that from their examination of the location of the land they anticipated no difficulty in obtaining permission to operate a feed lot on it at the time of purchase. To me such a statement is so naïve as to confound its credibility. There were a number of residential houses of variable quality in the area. The very nature of a feed lot, of which the appellants were familiar, would of necessity inspire opposition to one's presence by these residents. Furthermore, the appellants had been resident in the City of Calgary for their entire adult and business life. They had observed and participated in the City's phenomenal growth and expansion. Therefore, they could not have been oblivious to the likelihood of the southerly development of the City which occurred shortly after the purchase of the land. In point of fact the land was brought into the limits of the City of Calgary by order dated June 4, 1957, just two months after its purchase by the appellants on April 1, 1957, the order having retroactive effect to December 30, 1956.

The appellants professed total ignorance of the annexation proceedings which had been going on since August 1956 and of any residential development in the area.

Because of their limited educational advantages the appellants also professed an unfamiliarity with proceedings for annexation and their attendant preliminary steps and matters of like nature. However, they almost invariably engaged the services of the Montreal Trust Company for

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assistance in their many business transactions, but in the present instance they did not seek the advice of the Trust Company officers but accepted the services of the vendor's solicitor without obtaining independent advice, nor did they instigate the most elementary precautionary enquiries to ascertain if the land could have been used as a feed lot.

As evidence of their intention to use this particular land as a feed lot, the appellants point to the steps they took towards the ultimate construction of a meat packing plant on the 3½ acre plot of land on which the original feed lot was conducted and it was submitted that the plans were so interwoven that one could not be completed without the other. However, in my opinion such does not necessarily follow. The appellants had also purchased a 20 acre plot in the Blackfoot Trail, which was used to grow feed and was purchased at a much lesser cost per acre than the land here in question. Both such parcels of land were equi-distant from the original feed lot site and enjoyed many similar advantages in common for use as a feed lot. Therefore there would have been no insurmountable obstacle to transferring the proposed feed lot operation to the 20 acre parcel in the Blackfoot Trail if the packing plant project were to be completed. Incidentally the construction of the packing plant had not as yet been undertaken at the time of trial. The first step taken by the appellants to begin the feed lot project, which could possibly be construed as preparatory thereto, was the writing of a letter dated April 3, 1958 by the Montreal Trust Company, on instructions of the appellants, to request permission to construct and operate the feed lot in the lands in question, that is one year after the purchase of the land. The reply was a definite refusal but resort was not had to the appeal procedure outlined in the reply.

It is quite true the appellants did not advertise the land for sale, nor did they list it with a real estate agency. They did not have to. The Kelwood Corporation Limited had been busily engaged in acquiring options on land in the area, advocating annexation of the area by the City and generally promoting the residential development of the area, all of which facts, could have been ascertained by any interested person by the instigation of casual enquiries and resort to the records of the Land Titles Office.

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There was no evidence, therefore, that the appellants had any assurance when they purchased this land, that they would be permitted to operate a feed lot on it. They were hopeful of putting the land to this use. That hope was not realized and they then sold it at a profit.

After having given careful consideration to all the evidence, I am not satisfied that there is a balance of probability that the appellants acquired this land for the purpose of operating a feed lot to the exclusion of any disposition of it at a profit. Accordingly it cannot be said that the assumptions of the Minister, in assessing the appellants as he did, were not warranted.

The appeals are, therefore, dismissed with costs.