BETWEEN:

Ottawa 1967

May 29-30

THE MINISTER OF NATIONAL REVENUE .... APPELLANT;

AND

MILUSKA CADA .... RESPONDENT.

AND

BETWEEN:

ROGER NANTEL SÉGUIN .... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Income tax—Purchase of property by two persons as tenants in common—Subsequent sale of property—Whether sale of partnership interest.

In May 1961 Séguin and one Palef acquired for $80,000 a property in Ottawa, each an undivided half interest, in contemplation of erecting a building thereon. Soon afterwards Séguin sold half his interest in the property to Cada at a profit of $7,500 and in October the whole property was sold for $140,000. In this court the only question was whether, with respect to the transaction between Séguin and Cada, Séguin had sold and Cada had purchased an interest in a property or an interest in a partnership, it being conceded that in the former case the gain of $7,500 which Séguin made on the transaction must be included in computing his income and deducted in computing Cada's income for 1961.

Held, there was no evidence that Séguin and Palef had formed a partnership to operate a business with respect to a building to be erected on the property, and accordingly Séguin had not sold Cada an interest in a partnership but in the property.

Quaere as to what the result would have been if in fact it had been a sale of an interest in a partnership?

INCOME TAX APPEALS.

Cyrille H. Goulet for appellant Séguin.

B. Shinder for respondent Cada.

L. R. Olsson for the Minister of National Revenue.

JACKETT P. (orally):—These two appeals were heard together on the same evidence; and I propose to give one set of reasons for my disposition of the appeals.

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The appeal in *Minister of National Revenue v. Cada* is an appeal by the Minister against a decision of the Tax Appeal Board allowing an appeal by the taxpayer from her assessment under Part I of the *Income Tax Act* for the 1961 taxation year. The appeal in *Séguin v. Minister of National Revenue* is an appeal by the taxpayer directly to this Court against his assessment under Part I of the *Income Tax Act* for the 1961 taxation year.

In so far as they are significant for the purposes of these appeals, the facts established by the evidence adduced in this Court are, for the most part, substantially those set out in the reasons given by the Tax Appeal Board in the *Cada* appeal, and I do not propose to re-state the facts at length in these reasons.

For the purpose of giving the reasons for my conclusions, it is sufficient to summarize the highlights of those facts as follows:

1. In May 1961 Séguin and one Palef bought a property in Ottawa for $80,000 on the basis that each should own an undivided one-half interest therein.

2. At the time of such purchase, Séguin and Palef contemplated erecting a building on the property. (One of the main issues in the appeal, if not the main issue, is whether, either at that time, or very shortly afterwards, a partnership was formed to carry on a business related to such property such as, for example, the business of operating a building to be erected on it.)

3. Shortly after Séguin and Palef bought the property, Séguin sold one-half of his interest to one Sirotek for $7,500, plus $250, being one-half of the amount already paid by Séguin on account of the property, and an assumption by Sirotek of one-half of Séguin's outstanding liability in respect of the purchase. (Sirotek says that he bought a one-quarter interest in the property while Séguin says he sold a one-quarter interest in the alleged partnership.)

4. Subsequently, the parties to the purchase paid, on closing of the purchase transaction, $4,862.61 for each one-quarter interest. The balance of the purchase price was covered by a mortgage.

5. In early October 1961, before plans, which were under discussion, were adopted for building on the property, the property was sold for $140,000.

6. At about the time of the re-sale, Sirotek advised Séguin that he had purchased the quarter interest as agent for his sister, the taxpayer Cada.

7. As a result of the sale of the property, Cada received as her share of the net proceeds of the sale of the property a sum of $17,934.92.

The sum of $7,500 paid by Sirotek to Séguin on the occasion of the purchase of half of Séguin's interest is the amount that is in dispute in both appeals.

In the *Cada* appeal, the Tax Appeal Board has held that Cada is taxable on the profit from her purchase of a quarter interest and the sale of the property. No appeal has been taken from that decision. The Board has further held that, in computing her profit, Cada is entitled to deduct from the amount of $17,934.92 received by her as her share of the net proceeds of the sale of the property, not only the sum of $250 (being the part of the down payment under the original purchase agreement attributable to her share in the purchase) and the sum of $4,862.61 (being what she had to pay on closing), but also $7,500, being the amount that she paid to Séguin for one-half his interest over and above the amounts that he had paid or would have had to pay for that half of his interest. The only point of the Minister's appeal in the *Cada* case is the attack on the correctness of the Board's decision that Cada was entitled so to deduct that sum of $7,500 in computing her taxable profit.

The only basis for such attack on the Board's decision is that what Cada bought was a one-quarter interest in a partnership and not a one-quarter interest in the property. There is not a scrap of evidence before me that Cada acquired anything that might be called an interest in a partnership. The evidence is clear that the only authority that she gave to her brother was to acquire an interest in the property on her behalf and that that is the only bargain that he, in fact, entered into on her behalf. Not only do Sirotek and Cada say this, but Séguin rejects any suggestion that he ever accepted Cada as a partner. Either

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she bought an interest in the property, in which event the Board's decision is correct, or she acquired nothing, in which event there is no basis for taxing her on anything in so far as this transaction is concerned.

The appeal in the *Cada* matter is dismissed with costs.

In the *Séguin* appeal, the question is whether Séguin is bound to take into his income, under Part I of the *Income Tax Act*, for the 1961 taxation year, the $7,500 he received from Sirotek over and above the cost to him of the interest that he sold at that time. If he was merely selling a quarter interest in the property, then, clearly, he is taxable on this amount of $7,500. It is conceded that the profit made by the group on the sale in October 1961 was properly taxed as a profit from a business within the extended meaning of that word to be found in section 139(1)(*e*) of the *Income Tax Act*. If that is so, a profit from a sale by Séguin of a part of his interest in the property must also be taken into income. There is no question as to the $7,500 being profit. Séguin says, however, that he did not sell, either to Sirotek or Cada, an interest in the property, but that he sold to Sirotek a half of his interest in the alleged partnership.

A "partnership" is defined by section 2 of the *Partnership Act*[1] to be "the relation that subsists between persons carrying on a business in common with a view of profit", and I take Séguin's contention to mean that, on his view of the matter, the property had become dedicated to a partnership of which the members were himself and Palef and that, by the transaction in question, Sirotek was admitted as a partner on a quarter interest basis and paid to Séguin $7,750 for a quarter interest in the partnership assets.

I express no opinion as to what the result would be if, in fact, there had been a sale by Séguin to Sirotek of a quarter interest in a partnership in the sense that I have outlined, because the evidence, as I appreciate it, does not establish that any such partnership had in fact arisen. If there had been such a partnership, I might have had to consider whether, having regard to other facts established before me to which I have not referred, the approach

[1] R.S.O. 1960, chapter 288.

adopted by the Supreme Court of Canada in *General Construction Co. Ltd. v. Minister of National Revenue*[2], has any application to the facts of this case.

I accept completely the evidence given by Séguin and Palef, which appeared to me to be given quite openly and frankly. I have no doubt that, if they had proceeded with their plans and erected a building and, after its completion, had operated it as an apartment building or an office building, at some point of time, they would have become associated in the operation of a business in such a way that there would have been a partnership. As, however, there was no explicit partnership agreement, either written or verbal, and as their operations in relation to this property never, in fact, reached the stage of carrying on a business in common, there is no evidence upon which I can find as a fact that there was a relationship between Séguin and Palef immediately before the sale to Sirotek that would fall within the statutory definition of "partnership". I listened carefully to the evidence of Séguin and Palef and, while there is no doubt that they had bound themselves, as it were "by a handshake", to embark on a project in relation to the property in question, I cannot find that the nature of the project had become sufficiently crystallized for that agreement to be a legally binding agreement or that events had progressed to the point that, according to what they had agreed with each other, properly understood, the time had arrived when there was an existing relationship of persons carrying on a business in common. If there was no partnership, there could not have been a disposition of an interest in a partnership and the transaction between Séguin and Sirotek, whether he was acting as principal or agent, must have been a sale of an undivided interest in the property. It follows, as I have already indicated, that the resulting profit to Séguin must be included in his income for the 1961 taxation year.

The *Séguin* appeal is dismissed with costs.

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2 [1959] S.C.R. 729.