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Nov. 26
Nov. 29

BETWEEN:

JOHN CRAGG ..... APPELLANT;

AND

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

Revenue—Income Tax—Income Tax Act, S.C. 1948, c. 52, Div. J., s. 91(4) —Whether profit from purchase and sale of property is capital gain or taxable business profit a question of fact—Taxpayer not subject to tax on income not received during year.

Between May 1, 1943 and January 31, 1946, the appellant purchased ten properties in Toronto and sold nine of them and the question was whether his profit on these transactions was a capital gain upon the realization or exchange of an investment or a profit or gain from a trade, business or calling.

Held: That whether a profit on the purchase and sale of properties is a capital gain upon the realization or exchange of an investment or a profit or gain from a trade, business or calling is a question of fact to be answered in the light of all the surrounding circumstances and little, if any, help is to be derived from the actual decisions in other cases. *California Copper Syndicate* v. *Harris* (1904) 5 T.C. 159 followed.

2. That the Court must be careful before it decides that a series of profits, each one of which would by itself have been a capital gain, has become profit or gain from a business. Such a decision cannot depend solely on the number of transactions in the series, or the period of time in which they occurred, or the amount of profit made, or the kind of property involved. Nor can it rest on statements of intention on the part of the taxpayer. The question in each case is what is the proper deduction to be drawn from the taxpayer's whole course of conduct viewed in the light of all the circumstances. The conclusion in each case must be one of fact.

3. That, on the facts, the appellant was carrying out a scheme of profit making, that his purchases and sales of property were operations of business and that his profits therefrom were subject to tax.

4. That a taxpayer cannot be taxed in respect of income that he has not received during the taxation year. *Capital Trust Corporation Limited et al* v. *Minister of National Revenue* (1937) S.C.R. 192 applied.

APPEAL from a decision of the Income Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Thorson President of the Court, at Toronto.

J. D. McNish K.C. and *S. G. Tinker* for appellant.

G. B. Bagwell K.C. and *T. Z. Boles* for respondent.

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

THE PRESIDENT now (November 29, 1951) delivered the following judgment:

This is an appeal from the decision of the Income Tax Appeal Board (1) dismissing the appellant's appeal from his income tax assessment for the year 1946 whereby the sum of $7,537.66 was added as taxable income to the amount reported by him.

This amount was said to be the appellant's net profit in 1946 from the purchase and sale by him of three properties in the city of Toronto, namely, 100 Albertus Avenue purchased on July 31 1945, for $11,962.34 and sold on November 26, 1946, for $8,750 a loss of $3,212.34, 2339-41 Yonge Street purchased on January 15, 1946, for $133,000 and sold on May 15, 1946, for $141,000, a profit of $8,000 and 94 Tyndall Avenue purchased on January 31, 1946, for $34,500 and sold on April 30, 1946, for $37,250, a profit of $2,750.

It was contended for the appellant that this amount was a capital gain upon the realization or exchange of an investment and for the Minister that it was the annual net profit or gain from a trade, business or calling carried on by the appellant.

The test to be applied in determining an issue such as this has been considered by the courts in several cases. In *California Copper Syndicate* v. *Harris* (2) the Lord Justice Clerk (Macdonald) put it 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 . . .
>
> 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?

(1) (1950) 3 Tax. A.B.C. 203. (2) (1904) 5 T.C. 159 at 165.

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This statement of principle has been approved by Lord Dunedin, speaking for the Judicial Committee of the Privy Council, in *Commissioner of Taxes* v. *Melbourne Trust, Limited* (1); by Lord Buckmaster in the House of Lords in *Ducker* v. *Rees Roturbo Development Syndicate* and *Inland Revenue Commissioners* v. *Rees Roturbo Development Syndicate* (2); by Duff J., as he then was, speaking for the Supreme Court of Canada, in *Anderson Logging Co.* v. *The King* (3), which judgment was affirmed by the Judicial Committee of the Privy Council (4), and, more recently, by this Court and Kerwin J. in the Supreme Court of Canada in *Atlantic Sugar Refineries Limited* v. *Minister of National Revenue* (5). The question on which side of the line an item of profit or gain falls is thus one of fact to be answered in the light of all the surrounding circumstances. Consequently, little, if any, help is to be derived from the actual decisions in other cases based, as they must be, upon the facts of the case in which they were given.

The facts appear from the evidence of the appellant who was the only witness called. They are not in themselves in dispute, the only question being the deduction that should be drawn from them. The appellant was a full time employee in the accounting department of the North American Life Assurance Company with office hours from 8.30 a.m. to 4.45 p.m. There is no reference in his evidence to any purchase or sale of properties prior to 1943 but from May 1, 1943, to January 31, 1946, he purchased ten properties and sold nine of them, the particulars of his purchases and sales being set out in Exhibit 1. His first purchase was on May 1, 1943, of 504 Sherbourne Street, a large rooming house of 23 rooms, for $11,500. This, he said, was a revenue producing property. He had acquired some money that he desired to invest and gave as his reason for purchasing the property that he realized that his income as a clerk was going to be limited and he wanted to increase it. On November 1, 1943, he purchased two other properties, one, 29-31 Winchester Street, a small apartment house of 10 suites, for $20,000 and the other, 337-41 Sherbourne Street, a small apartment house of 18 suites, for $25,000. These

(1) (1914) A.C. 1001 at 1010.
(2) (1928) A.C. 132 at 140.
(3) (1925) S.C.R. 45 at 48.
(4) (1926) A.C. 140.
(5) (1948) Ex. C.R. 622; (1949) S.C.R. 706.

were both revenue producing and his reason for purchasing them was the same as in the case of the first one, namely, to increase his income. Then on January 2, 1944, he purchased 610-18 Mt. Pleasant Road. This was a different kind of property from the first three. It had three stores and a billiard room on the ground floor and 4 apartments over the stores. It was also revenue producing. In 1944 the appellant sold all these properties at a substantial profit, 504 Sherbourne Street on March 1, 1944, at a profit of $13,500, 29-31 Winchester Street on April 1, 1944, at a profit of $2,000, 610-18 Mt. Pleasant Road on May 1, 1944, at a profit of $6,500 and 337-41 Sherbourne Street on October 31, 1944, at a profit of $4,000, a total profit of $26,-000. The appellant gave a reason for each of these sales. He said that he was anxious to obtain more desirable properties than the rooming house and the two apartment houses. These were older properties in the heart of the downtown district and needed renovation and it was difficult for him to supervise this in view of his full time occupation. There was a similar reason for selling the 610-18 Mt. Pleasant Road property. He did not have time to attend to this investment and, in addition, the fact that there was a billiard room on the premises caused trouble. I now come to three properties of a different nature. On May 1, 1944, the same day as he sold the Mt. Pleasant Road property, he bought Buckingham Manor at Oshawa, a reasonably modern apartment house of 28 to 30 suites, for $48,500. He had a resident caretaker there who collected the rents but he sold this property on April 30, 1945, at a profit of $4,500, giving as his reason for so doing the fact that Oshawa was 35 miles away and gas rationing made supervision difficult. On January 1, 1945, he bought 34-36 Rosecliff for $149,300. This was a fire proof, very modern building with 52 suites and a 28 car garage. The appellant still owns this property, which is fully rented, and has refused an offer of $300,000 for it. Then on July 31, 1945, he purchased Wilton Court, a 100-room hotel. This was revenue producing. It was managed for him by persons on the staff of the hotel. He sold this property on December 5, 1945, at a profit of $23,000, making a total profit in 1945 of $27,500. He gave as his reason for this sale that there was a second mortgage on the Rosecliff property which he

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had to meet and that he used part of the proceeds of the Wilton Court sale to pay it. As part of the sale price for Wilton Court the appellant had to take in 100 Albertus Avenue at $11,962.34. He did not like this investment. Indeed, he never acquired it as such. It was really a trade in which he had to take in order to make his advantageous sale of Wilton Court. He sold this property on November 26, 1946 at $3,212.34 less than the amount at which he had taken it in trade. This was the only sale on which he did not make a profit. Then we come to the other two properties already mentioned, 2339-41 Yonge Street, an apartment house with 40 suites and 2 stores, which the appellant bought on January 15, 1946, and sold on May 15, 1946, at a profit of $8,000 and 94 Tyndall Avenue which he purchased on January 31, 1946, and sold on April 30, 1946, at a profit of $2,750. Altogether his profits on the 9 properties sold between March 1, 1944 and April 30, 1946, was $61,037.66.

The appellant emphasized that he had never advertised any of his properties or listed them for sale and that he had not sought out buyers but that the real estate agents had brought offers to him which he had accepted. He also stated that he often felt an urge to leave his insurance company employment and look after his investments but that he decided in 1946 that he would stay with the company and after that he purchased no other properties, except a small residence which he did not buy for investment. The only property he still retains is 34-36 Rosecliff. He left the employ of the insurance company in 1949 and is now engaged in real estate development and promotion.

While the appellant said that his sole reason for purchasing the properties was to produce revenue and increase his income he admitted on cross-examination that he had stated before the Income Tax Appeal Board that he knew the condition of the real estate market in 1943 and 1944, that it seemed to him that there would be a good market and an increase in value and that this fact influenced him in his decision to purchase. When he was asked why he did not retain the properties if his sole purpose was investment he said that when he was approached to sell he did so, it being his desire sooner or later to own a modern revenue producer which he obtained when he purchased 34-36

Rosecliff. When he was asked why he then purchased Wilton Court he said that at the time he was thinking about resigning his position with his insurance company and that if he had done so he would have retained Wilton Court. This was also given as his reason for purchasing 2339-41 Yonge Street and 94 Tyndall Avenue. This uncertainty followed a period of service in the forces.

There is one other fact to which reference must be made. On May 26, 1947, the appellant made an application under section 5 of the Excess Profits Tax Act, 1940, for a reference to the Board of Referees to have his standard profits determined at $25,000. In this application he described the nature of his business as that of real estate and stated that it had commenced in July 1943. There was a solemn declaration by him that the facts in his application were true. The appellant also filed returns under the Excess Profits Tax Act for the years 1944 and 1945, showing under the head of business income a profit on the sale of properties of $26,000 for 1944 and $27,500 for 1945. His standard profits were fixed by the Board of Referees at $25,000 subject to a deduction for salary allowance. The appellant gave as an explanation for his application that it had been made at the request of the Income Tax Department, but the fact of the application and its contents remains.

Counsel for the appellant stressed the fact that he had not listed or advertised any of his properties or attempted to sell them, that he had testified that his purpose in purchasing the properties was to increase his income and that his evidence was uncontradicted and that he had given a sound reason for the sale of each property. He agreed that the onus was on the appellant to show that he had not been carrying on an operation of business and submitted that the appellant had discharged this onus. His argument then was that in purchasing the three properties the appellant was merely investing his money and that in selling them he was merely realizing his investment and that his profit on each sale was a capital gain and not subject to tax.

There is, I think, no doubt that each of the profits made by the appellant could, by itself, have been properly considered a capital gain and the Court must be careful before it decides that a series of profits, each one of which would by itself have been a capital gain, has become profit or gain

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from a business. Such a decision cannot depend solely on the number of transactions in the series, or the period of time in which they occurred, or the amount of profit made, or the kind of property involved. Nor can it rest on statements of intention on the part of the taxpayer. The question in each case is what is the proper deduction to be drawn from the taxpayer's whole course of conduct viewed in the light of all the circumstances. The conclusion in each case must be one of fact.

I am unable to accept counsel's submission that all that the appellant did was to invest his money and then realize his investment. That does not seem to me to be a realistic view of his course of conduct. I am not impressed with his statement that he did not list or advertise his properties or seek to sell them. He did not have to do so for the offers came to him and he accepted them. The number of transactions and the rapidity of turnover of the properties are also important factors. I am also of the view that it may fairly be inferred from his conduct, rather than from his statements, that in 1943 he embarked upon a program of purchasing properties because he thought that they would increase in value and selling them with the objective of finally acquiring a modern revenue producing property. On the facts, I have no difficulty in finding that the appellant was carrying out a scheme of profit making, that his purchases and sales of property were operations of business and that his profits therefrom were subject to tax. Moreover, I am unable to see how he can now assert that his profits were not business profits in view of his statutory declaration that he was in the real estate business. He cannot escape from this declaration by his attempted explanation.

In view of this finding the appeal herein on the ground put forward by the appellant must fail. But the assessment against which the appeal was taken cannot stand in its present amount. It appeared as the result of questions put by the Court that the alleged profits of $8,000 from the sale of 2339-41 Yonge Street and $2,000 from the sale of 94 Tyndall Avenue were represented by mortgages in favour of the appellant payable by instalments. The mortgage back to him on the sale of 2339-41 Yonge Street was a second mortgage for $10,560, which included his so-called

profit of $8,000. This was payable at the rate of $100 per month inclusive of interest, the first payment falling due in June, 1946. The mortgage on 94 Tyndall Avenue was also a second mortgage for $4,695, of which $2,750 was profit, payable quarterly at the rate of $250 and interest at 5 per cent per annum, the first payment being due on July 31, 1946. It was, therefore, clear that the profit alleged to have been received in 1946 on the sale of these properties was not in fact wholly received in 1946. I think it must follow from the decision of the Supreme Court of Canada in *Capital Trust Corporation Limited et al* v. *Minister of National Revenue* (1) that since a taxpayer is taxable in respect of the income received by him during a taxation year, regardless of the year in which it may have been earned, he cannot be taxed in respect of income that he has not received during such year. Consequently the appellant was taxable in 1946 only for such profits, if any, as he received in 1946, the remaining profit being taxable in subsequent years.

Under the circumstances, I granted leave to the appellant to amend his statement of claim to allege that the profits of $8,000 and $2,750 were not received by the appellant in 1946 and not taxable in that year. In so doing I acted under section 90(2) of the Income Tax Act, Statutes of Canada 1948, chap. 52, as amended, included in Division J of that Act, which governs this appeal.

Section 91(4) of the Income Tax Act provides for the manner in which the Court may dispose of an appeal from the Income Tax Appeal Board as follows:

91. (4) The Court may dispose of the appeal by

(*a*) dismissing it;

(*b*) vacating the assessment;

(*c*) varying the assessment; or

(*d*) referring the assessment back to the Minister for reconsideration and reassessment.

It is interesting to note that there is no specific provision for disposing of the appeal by allowing it. The alternative to dismissing the appeal is to deal with the assessment in

(1) (1937) S.C.R. 192.

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one of the ways specified in paragraphs (*b*), (*c*) and (*d*) of section 91(4). In order to give effect to the findings of the Court that the appellant is subject to tax on the ground that his profits were net profits from a business but not subject to tax on profits not received by him in 1946 the Court must dispose of the appeal by referring the 1946 assessment back to the Minister for reconsideration and reassessment.

On the matter of costs I see no reason why the appellant, having failed on the grounds of appeal put forward by him, should be excused from liability for costs. If he had originally raised the matter which I gave him leave to raise by amendment the Minister might well have given effect to it and amended the assessment accordingly. After careful consideration of the matter I have concluded that the respondent is entitled to costs.

Judgment accordingly.