1964

May 4, 6, 7

Aug. 17

BETWEEN:

JOSEPH A. VILLENEUVE .....APPELLANT;

AND

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

Revenue—Income Tax—Income Tax Act, R.S.C. 1952, c. 148—Profit on sale and expropriation of real estate—Income or capital gain—Onus on taxpayer to disprove basis of assessment—Evidence given by taxpayer at trial of purpose of acquisition of property not conclusive of his true purpose at time of acquisition.

In 1952 and 1953 the appellant purchased two farms about one-half mile apart in the Township of Cornwall on the outskirts of the City of Cornwall, the first being of one hundred acres and the second of eighty-five acres. At no time did he make any attempt to farm either property nor had either property been worked intensively by its previous owner. The houses on both properties were rented by the appellant, who also arranged to have the tenants on the one hundred acre property operate it as a farm, the appellant supplying stock and equipment. In 1955 the Hydro Electric Power Commission of Ontario expropriated a part of each of the properties for relocation of railway lines resulting from the St. Lawrence Seaway development.

The Ontario Hydro also purchased thirty-two acres of the one hundred acre property between the proposed new railway line and an existing line. The appellant sold the eighty-one acres remaining of the eighty-five acre property after the expropriation to land speculators, realizing a substantial profit on that sale, as well as on the sale to the Ontario Hydro of part of the one hundred acre property. The respondent assessed the profit on the sales as income of the appellant.

The evidence established that the appellant had been engaged in speculative real estate transactions immediately before acquiring the two farm properties and went into a speculative real estate business in a comprehensive way very shortly afterwards.

Held: That the onus of disproving the respondent's assumption, when assessing, that the acquisition of the two farms had for its purpose or one of its possible purposes, their subsequent disposition at a profit, was on the appellant.

2. That the appellant's evidence at the trial that his purpose was to farm the properties, although given in all sincerity, still may not reflect the true purpose at the time of acquisition, and must be considered along with the objective facts

3 That the appellant has not established on a balance of probability that he had acquired the two properties for the purpose of farming them to the exclusion of any purpose of disposition at a profit.

4 That the appeal is dismissed.

APPEAL from a decision of the Tax Appeal Board.

The appeal was heard by the Honourable Mr. Justice Cattanach at Cornwall.

Paul Rouleau and *Jean Forget* for appellant.

N. A. Chalmers and *R. L. Radley* for respondent.

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

CATTANACH J. now (August 17, 1964) delivered the following judgment:

This is an appeal from a judgment of the Tax Appeal Board[1] dismissing appeals by the appellant from assessments of income tax for the taxation years 1956, 1957 and 1958.

There is no dispute as to the amounts of the assessments but the question for determination is the familiar one as to whether profits realized on the expropriation and sale of two parcels of real estate were 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 (*supra*) the appellant sets out his case as follows:

(a) In the year 1952, the Appellant purchased from one Marie Anne Daigle certain farm lands, then lying in the Township of Cornwall,

[1] (1963) 31 Tax A.B.C. 157.

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County of Stormont. In the year 1953 the Appellant purchased neighboring farm lands from one Albert Cadieux. Both purchases were made by the Appellant for the purposes of dairy farming.

(b) Following the initiation of the St. Lawrence Seaway and Power Development, parts of the aforesaid farms were expropriated by Provincial agencies for Railway and Highway Relocations.

(c) Following the aforesaid expropriations, the Appellant, in the year 1956, sold the Cadieux farm. Subsequent to the year 1956, the Appellant was paid compensation by the Ontario Hydro Electric Power Commission, relative to the said expropriations.

(d) As a result of the Highway and Railway Relocations as aforesaid, the lands in question became unsuitable for farming.

(e) The Appellant submits that the said purchases and sales were not a venture in the nature of trade.

The respondent's Reply insofar as it is relevant, reads as follows:

1. He admits that the Appellant purchased certain lands in the year 1952, hereinafter referred to as the "Daigle Property" and purchased certain lands in the year 1953, hereinafter referred to as the "Cadieux Property", both parcels of land being in the Township of Cornwall, County of Stormont in the Province of Ontario, but does not admit any further allegations of fact contained in Part A of the Notice of Appeal.

2. In assessing the Appellant for his 1956, 1957 and 1958 taxation years he made the following assumptions as to fact:

(a) that in 1952 the Appellant purchased the Daigle Property with the view to trading in, dealing in or otherwise turning to account;

(b) that in 1953 the Appellant purchased the Cadieux Property with the view to trading in, dealing in or otherwise turning to account;

(c) that a portion of the said lands were expropriated by the Hydro Electric Power Commission of Ontario, (hereinafter referred to as the "Commission") and the Appellant realized a profit of $29,447.00 in his 1958 taxation year;

(d) that in 1956 the Appellant sold the Cadieux Property realizing a profit thereon of $30,500.00;

(e) that the profit arising from the expropriation by the Commission and the profit arising from the sale of the Cadieux Property constituted part of the Appellant's income for the relevant years since they were profits from a business or adventures in the nature of trade.

The narrow issue is, therefore, whether the appellant purchased the Daigle property in 1952, and the Cadieux property in 1953, "with the view to trading in, dealing in or otherwise turning to account" such properties. If he did, resulting profits were taxable. If, however, as the appellant alleges, both purchases were made "for the purposes of dairy farming" and as a result of railway and highway relocations, the lands became unsuitable for farming, profits from the disposition of the lands would not be taxable.

The onus of showing that the assumptions so made by the respondent were unfounded, fell on the appellant.

The appellant, by his evidence, gave a complete history of his business career prior to the purchases in question.

The appellant, at the time of the trial, was aged fifty-three. A member of a large family, he was born and raised on a farm in the United County area of Ontario. At the age of twenty he left the family farm for employment as an office-boy in a Montreal industrial firm, but after two years in such employment he returned to the farm which he again left at the age of twenty-four, this time for the City of Cornwall, Ontario, where he became a life insurance agent, which occupation he partially abandoned after approximately ten years, to open and operate a refreshment stand in 1939 at the outer limits of the city in a comparatively sparsely populated area, but in close proximity to a military training establishment. The refreshment stand prospered to the extent that in 1941 the appellant totally abandoned his life insurance activities to devote his entire time to the operation of the refreshment stand.

In 1940 the appellant bought a vacant lot across the street from his refreshment stand upon which he constructed a more substantial building in which to conduct an expanded lunch counter and confectionery business. He subsequently added a second storey which he occupied as living quarters.

In 1945 he converted the lunch counter business to that of a retail grocery, the military training centre having been closed, to cater to a skeleton staff in the military establishment and to families in the immediate area.

From 1939 to 1945 the appellant realized from his grocery business an average annual net income of $6,000 which, during the years 1945 to 1948, decreased to $4,000 and from 1948 to 1955 gradually decreased to $1,100.

In 1946 the appellant bought an adjacent lot, which by previous arrangement with the owner he had used for a garden, presumably for business expansion because of a rumour that the military training centre was to be converted to a low rental project which did not materialize.

In 1947 he sold this lot at a modest profit and subject to the restriction that two buildings accommodating four families should be built thereon.

In 1950, in partnership with one Dejardines, the appellant bought further lands in the immediate locality of his grocery store.

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Various reasons were given by the appellant for this purchase. At that time the creation of a new church parish was contemplated with the construction of a church for the area. A parish priest and a separate school inspector approached the appellant, as a responsible and interested member of the community and latterly an alderman for the area, with the suggestion that it would be expedient to acquire land upon which to build a bilingual separate school in connection with the new church. Further a portion of the land was used as an apiary to the annoyance of the neighbourhood. As it was not taken off their hands for a school, the appellant and his partner subdivided the land into building lots. Difficulties in providing access resulted, according to the appellant, in the partners acquiring additional property for the subdivision. The partners worked out a distribution of the lots by which the appellant received nine which were all sold by him in and about 1952 at a total net profit between $5,500 and $6,000.

The profits realized from the subdivision are not in issue here, but the transactions are relied on by the respondent as indicating a course of conduct that had already been embarked upon by the appellant in 1950 to 1952. On the other hand, it was argued on behalf of the appellant that this was an isolated transaction into which the appellant had been obligated to enter. During the trial I intimated that, if I had to determine the taxability of the profits realized from this subdivision, I would find, without hesitation, that this was an adventure or concern in the nature of trade.

The appellant also dealt at some length with the circumstances surrounding the acquisition of the Daigle and the Cadieux properties.

In 1952, it became obvious to the appellant that his grocery business was becoming increasingly less profitable so that he considered more lucrative endeavours. The appellant stated that, because of his farming background and the fact that three of his brothers, who had continued to farm, were most successful and prosperous he, too, wished to farm.

In August, 1952, the appellant bought the 100 acre property known as the Daigle farm for $11,150. He assumed an existing mortgage of $2,500, placed a mortgage on his grocery property for $8,000 and paid the balance of $650 in

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cash. He also paid $900 in cash for a small quantity of livestock and antiquated farm machinery. He sold the livestock forthwith. Because the farm machinery was obsolete he was unable to dispose of it and did not use it himself. It was apparent that this farm property had not been worked intensively by the vendor.

Despite his expressed desire to become actively engaged in farming, the appellant did not move onto the premises, the reason advanced therefor being that he was unable to dispose of his grocery business as a going concern and had to liquidate his stock gradually, which operation was not completed until March, 1955.

In November, 1953, the appellant purchased the property known as the Cadieux farm consisting of 85 acres, more or less, about one-half mile from the Daigle farm for $11,500 of which amount $5,000 was paid in cash and he gave back a mortgage on the property for the balance of $6,500. This farm was not worked intensively either since Cadieux, the vendor's husband, had another full time occupation.

Both farms were in the Township of Cornwall at the time of their purchase by the appellant, the Daigle farm being a mile from the city limits. On January 1, 1957 this rural area was annexed bringing the farms within the city limits.

Part of the cash involved in the purchase prices came from the profit realized by the appellant from the sale of lots in the subdivision as well as other resources available to him such as the proceeds of the disposition of the grocery business.

The Daigle farm had a substantial brick house of sixteen rooms which the appellant rented to a succession of Dutch immigrants yielding a monthly rental income between $100 and $115. In addition, the appellant made an arrangement with the tenants to operate the farm, the appellant supplying stock and equipment. Any income from such arrangement was very modest.

There was also a house on the Cadieux farm which the appellant leased at a monthly rental of $90.

The Hydro-Electric Power Commission of Ontario expropriated approximately 2 acres of the Daigle farm, the preliminary plan of the expropriated area being registered on November 10, 1955. In December 1955 a part of the Cadieux farm was also expropriated by the Commission. Such expropriations were the result of the St. Lawrence

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Seaway development by reason of which the Canadian National Railway was obliged to relocate its main east-west line. The Daigle farm was already intersected by a Canadian Pacific Railway line further to the north, which was infrequently used. The new Canadian National line bisected the farm, leaving the farm buildings on a small area to the south of the new railroad and an area of some 32 acres between the old Canadian Pacific line and the new Canadian National line. According to the appellant these circumstances rendered farming impractical on this particular acreage. The Hydro, as the public body primarily responsible for the project, arranged to purchase the 2 acres of land required for the construction of the railroad and in addition the area of some 32 acres between the new railroad line and the former one for a consideration of $33,122, thereby giving the appellant a net gain of $29,447 and leaving him in possession of some 67 acres of the farm, a portion to the north of the Canadian Pacific line and a further portion to the south of the new line.

On the Cadieux property, four acres at the southern extremity had been expropriated for railway purposes. The appellant, forthwith, sold the Cadieux farm, subject to the expropriation of four acres, to Messrs. Shear and Leiberman, acknowledged land speculators, for $42,000, $10,000 of which was paid in cash and a mortgage for the balance of $32,000, a net gain of $30,500.

The appellant says that the reason he did not use these farms for farming when he had completed the liquidation of his grocery business in March, 1955 was that, at that time, it was evident that expropriation was imminent.

In July, 1955, the appellant became a real estate broker, in partnership with a fellow alderman, because, as the appellant put it, he saw an opportunity to benefit from the real estate boom occasioned by the Seaway development as others were doing. It is conceded that from this time forward he was engaged in the business of dealing in real estate.

As indicated above, the question in this case is whether the purpose for which the appellant acquired the two farms in 1952 and 1953 was to operate them himself as a farmer. If that was his exclusive purpose at the time of acquisition,

profits from expropriation of part of one of them and from the sale of the other after the farming project had been abandoned would not be profits from a business or an adventure in the nature of trade. If that was not his exclusive purpose at that time there can, in the circumstances, be no doubt that the acquisition of these two farms had for its purpose, or one of its possible purposes, subsequent disposition at a profit and resulting profits are, therefore, taxable. The onus of disproving the respondent's assumption, when assessing, that the latter was the case, was on the appellant and in my view he has failed to discharge that onus.

The question of fact as to what was the appellant's purpose in acquiring these properties is one that must be decided after considering all the evidence. The appellant's evidence at the trial that his purpose was to farm these properties is only part of the evidence. Such evidence may be given in all sincerity and still may not reflect the true purpose at the time of acquisition. Statements now as to intention at the time of acquisition must be considered along with the objective facts. The appellant never did commence farming operations, nor did he give any evidence of having taken the preparatory steps that would have been necessary before he could have commenced farming these properties in a serious way. On the other hand, the appellant was engaged in speculative real estate transactions immediately before the acquisitions in question and went into a speculative real estate business in a comprehensive way very shortly afterwards. Giving careful attention to all the evidence, I am not satisfied that there is a balance of probability that the appellant acquired the two properties for the purpose of farming them to the exclusion of any purpose of disposition at a profit. Accordingly it cannot be said that the assumptions of the Minister in assessing the appellant as he did were not warranted.

The appeal is, therefore, dismissed with costs.

Judgment accordingly.