BETWEEN:

SAM SORBARA ....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

1963 Nov. 25, 28-29 Dec. 2, 3

1964 Aug. 28

Revenue—Income Tax—Income Tax Act, R.S.C. 1952, c. 148, s. 85E—Expropriation and sale of lands owned by partnership—Objective in partnership acquiring lands—Partnership not limited to dealing in lands subsequently expropriated and sold—Partnership business not terminated by expropriation and sale—Negotiation of compensation for expropriation an integral part of partnership business—Compensation for expropriated land forming part of assets of a business must be included in profits of business—Whether collection of compensation for lands expropriated and sold took place in course of partnership business.

In 1952 Malton Subdivisions Limited, in which the appellant was a shareholder, purchased 150 acres of land adjoining Malton Airport, near Toronto, Ontario and caused a subdivision plan thereof to be registered. In 1953 a partnership known as Bel-Air Builders, in which the appellant was a partner, acquired an agreement with Malton Subdivisions Limited under which it was entitled to purchase the lots shown on the subdivision plan. On February 12, 1954 a substantial portion of the 150-acre subdivision was expropriated by the Government of Canada but, on March 30, 1954 a large part of the expropriated land was abandoned by the Government and reverted to its former owners. By an agreement dated July 8, 1958 between Her Majesty in right of Canada, Malton Subdivisions Limited and the partners of Bel-Air Builders, Her Majesty agreed to pay $725,000 for a release of all claims arising out of the expropriation and for a conveyance of substantially all the unexpropriated lands in the subdivision. Of this amount $100,000 had been paid in 1954, $610,000 was paid in the latter part of 1955 and the balance was paid in 1958.

The appellant appealed from the re-assessment of his income for 1956 by which his share of the profit from the disposal of the subdivision lands by Bel-Air Builders was included in his taxable income, claiming, *inter alia,* that Bel-Air Builders ceased to carry on business from the

1964

SORBARA
v.
MINISTER OF NATIONAL REVENUE

time of the expropriation on February 12, 1954 and that the sale giving rise to the profit was governed by s. 85E of the *Income Tax Act,* which required the sale to be deemed to have taken place in the last taxation year in which the appellant carried on business through Bel-Air Builders, which was 1954, and that, accordingly, the assessment under appeal must be vacated because it purports to assess the gain on the said sale in the 1956 taxation year of the appellant. He claimed in the alternative that the gain resulting from the said sale was a non-taxable capital gain.

Held: That the objective of the partnership, Bel-Air Builders, in acquiring the rights to buy the subdivision lots was the usual one of making a profit in such a way as might appear from time to time to be most advantageous.

2. That under whatever agreement associated the partners of Bel-Air Builders together when they acquired the subdivision from Malton Subdivisions Limited, there is no doubt that they would have felt quite free to deal with any lands that they could acquire in any way that was calculated to produce a profit, and that being the scope of the partnership business, there is no basis for a finding that the business had ceased at the time of the expropriation or at any time before all the property had been disposed of and the proceeds therefrom had been collected and distributed.
3. That the business of acquiring land for disposition at a profit includes all operations essential to the successful completion of the project, including not only sale or other disposition but collection of the proceeds of disposition.
4. That negotiations leading to settlement of compensation for expropriation of part of the inventory of a business are an integral part of the carrying on of the business.
5. That compensation for land that was part of the assets of such a business and that has been expropriated must be included in computing the profits from the business.
6. That the collection of compensation for the lands expropriated and the sale of the other lands took place in the course of the partnership business.
7. 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 Toronto.

P. N. Thorsteinsson for appellant.

N. A. Chalmers for respondent.

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

CATTANACH J. now (August 28, 1964) delivered the following judgment:

This is an appeal under the *Income Tax Act,* 1952 R.S.C., c. 148, from a decision of the Tax Appeal Board[1] dismissing

[1] (1961) 26 Tax A.B.C. 28.

an appeal from a re-assessment of the appellant for the 1956 taxation year. The only question in issue is whether the appellant's portion of a profit made by a partnership of which he was a member was properly included in computing his income for the year.

During the early part of 1952, the appellant and some "associates" acquired 150 acres of land adjoining Malton Airport at $600 per acre, or a total of $90,000. That property became vested in a company, Malton Subdivisions Limited, and, by the latter part of November, 1952, a subdivision plan, known as Plan 454 for the Township of Toronto, had been registered in respect of that land and the appellant and one, N. L. Lorenzetti, had become the owners of all the shares in the company. In order to obtain the necessary approvals of the respective authorities for registration of the subdivision plan, Malton Subdivisions Limited had entered into an agreement with the Township of Toronto whereby it had assumed onerous obligations concerning the installation or erection of water mains, sewers, roads, ditches and a sewage disposal plant. This agreement envisaged that, in order to assist in the financing of the work necessary to carry out these obligations, the company "would sell or mortgage" lots "on which houses are erected or partially erected" prior to the completion of all services but would not allow "use or habitation of any building on any lot until services are completed as herein provided".

The original plan was, apparently, that Malton Subdivisions Limited would sell the lots shown on the subdivision plan and make some additional profit by building some houses as a company project, presumably for resale. At some stage, the appellant associated himself with a number of other persons in a partnership that did business under various names such as "Bel-Air Builders Company", "Bel-Air Builders" and "Bel-Air Builders Co.". This partnership, in which the appellant (who is an admitted speculative trader in lands) was evidently the dominant personality, acquired an agreement with Malton Subdivisions Limited, dated August 4, 1953, that had been entered into with the appellant and some associates as trustees for a proposed company, entitling it to acquire the various lots shown on Plan 454 at a stipulated schedule of prices over a period of ten years.

On February 12, 1954, a substantial portion of the 150 acres covered by Plan 454 was taken by the Government of Canada under the *Expropriation Act*, 1952, R.S.C., c. 106. A large part of the property so taken was abandoned by the Government on March 30, 1954, and thus reverted to the person or persons who owned it at the time of the expropriation.

By an agreement dated July 8, 1955, between Her Majesty in right of Canada, Malton Subdivisions Limited and the partners constituting "Bel-Air Builders", Her Majesty agreed to pay $725,000 for a release of all claims arising out of the expropriation and for a conveyance of substantially all the unexpropriated lands in Plan 454. Of this amount, $610,000 was paid in the latter part of 1955, $100,000 had been paid as an advance payment in 1954 and the balance was paid in 1958. The major portion was therefor received in the partnership's financial year ending March 30, 1956. (The appellant's share in any profit made by the partnership from its business in that year is required to be included in the appellant's income for the 1956 taxation year.)

Attached to the appellant's income tax return for the 1956 taxation year were financial statements of the "Bel-Air Building Company" partnership showing that the appellant's share of "Net Gain on Disposal of Investment Properties for the Year Ended April 30, 1956" was $30,893.68. No part of this was included in the income shown by his return.

By Notice of Re-Assessment dated May 9, 1958, the appellant was re-assessed for the 1956 taxation year and the explanation of the difference between the income as declared by the appellant's income tax return and the income as fixed by the re-assessment, contained in the attached form T7W-C, showed that the Minister treated as income $30,893.68, being "Bel-Air Builders Co.—Capital gain claimed deemed taxable income".

On June 30, 1958, the appellant filed a Notice of Objection by which he took the position, in effect, that the portion of the Bel-Air Builders' profit applicable to the portions of the subdivision intended for commercial and apartment sites—namely $185,362.07 out of a total profit of $198,837.25—is "capital" because the intention was "to

retain for rental purposes the commercial and apartment sites as a long-term investment".

The Minister having confirmed the re-assessment, the appellant appealed to the Tax Appeal Board and, by its Notice of Appeal, again took the position that "Participation . . . in the proposed development, in particular in the property acquired for commercial and apartment sites, was in the nature of an investment and any gain realized was capital in nature". The Tax Appeal Board, after reviewing the facts as established by the evidence before it, dismissed the appeal and stated its conclusions in a paragraph which reads:

Taking stock of what actually happened and the result, I think that it was another case of a buyer of real estate having made money out of it one way, instead of another, but with the result that was hoped for originally, viz., a goodly profit, however it might arise. Here, the appellant increased his receipts for 1956 by nearly $31,000, and it was in his chosen business as a real estate broker that he did so. In my view of the evidence put forward, his activities constituted a highly speculative albeit very enterprising, adventure in the nature of trade rather than an investment project. The speculative nature of the venture was borne out by several witnesses, who even referred to the proposed community site as being like the Gobi desert, it seemed so remote and rough. Hence, it appears to me that the said gain became labelled as taxable income, and I must so find.

Had the issue in this Court been the same as the issue in the Tax Appeal Board, I would have been content to adopt the Board's disposition of the matter. In the main outline, the story as revealed by the evidence in this Court is the same as the story as set out in the Board's judgment although there are differences in detail. However, in this Court, the appeal was presented in a different way.

The appeal to this Court was put forward originally by a Notice of Appeal dated May 19, 1961. By that Notice of Appeal, the substance of the complaint against the assessment was the same as the complaint in the Tax Appeal Board, if, indeed, the words employed were not precisely the same. The original Notice of Appeal was, however, amended on November 12, 1963, and again on November 25, 1963. The significant changes may be summarized as follows:

(a) Paragraph 9 of the Statement of Facts was recast to allege, for the first time, that "From the time of the expropriation by the Crown on February 12, 1954, Bel-Air Builders Company ceased to carry on business".

1964
SORBARA
v.
MINISTER OF NATIONAL REVENUE
Cattanach J.

(b) Section B of the Notice of Appeal was revised to drop, *inter alia,* the propositions
   (i) that participation in the project was an investment and any gain realized was capital in nature,
   (ii) that the gain was the result of an accidental and unforeseen cancellation of the project and not income from a business, and
   (iii) that the investment in the property was not an adventure or concern in the nature of trade,

and to substitute two grounds only for the appeal, namely:

1. The sale that gave rise to the gain that has been assessed as income was governed by the provisions of section 85E of the *Income Tax Act,* . . . the mandatory provisions of which required the sale to be deemed to have taken place in the last taxation year in which the appellant carried on business through the partnership of Bel-Air Builders Company, which was 1954, and accordingly the assessment hereby appealed from must be vacated because it purports to assess the gain on the said sale in the 1956 taxation year of the appellant.
2. In the alternative if the said sale was not subject to the provisions of section 85E with the result as aforesaid, the gain resulting therefrom was not income to the appellant but was a capital gain not taxable under any of the provisions of the *Income Tax Act.*

Subsection (1) of section 85E of the *Income Tax Act,* which is referred to in the first of the two new grounds of appeal, reads as follows:

85E. (1) Where, upon or after disposing of or ceasing to carry on a business or a part of a business, a taxpayer has sold all or any part of the property that was included in the inventory of the business, the property so sold shall, for the purposes of this Part, be deemed to have been sold by him

(*a*) during the last taxation year in which he carried on the business or the part of the business, and

(*b*) in the course of carrying on the business.

At the opening of the trial in this Court, counsel for the appellant made it clear that the appellant was *not* contending, in this Court

(a) that any part of the amount in issue is "proceeds from the realization of an investment, in the ordinary sense", or

(b) that the appellant is not "a trader in land".

Later, during the course of the trial, counsel said, speaking of the appellant: "I have admitted this man is a trader. . .". The position put forward on behalf of the appellant, as I understand it, is that

(a) the partnership's business ceased at the time of the expropriation in 1954;

(b) that neither the expropriation of part of the partnership's lands nor the sale of the remainder was, in fact, a transaction in the course of the partnership's business, but, on the contrary, each of them either fell into the classification of slump transactions (i.e., transactions whereby a business was terminated) or liquidation sales (i.e., transactions disposing of assets of a business after termination of the business); and

(c) that, while section 85E operates to require that the sale in 1956 be deemed to be in the course of carrying on of the partnership's business, it requires that it be deemed to have taken place in the 1954 taxation year, the last taxation year in which the partnership's business was carried on, and so does not support taxation of the profit therefrom as part of the appellant's 1956 income.

It will be seen, therefore, that the appellant's case is based entirely on the submission that the partnership business came to an end at the time of the expropriation or, alternatively, was brought to an end at the latest by the sale of the remainder of its interest in the land covered by Plan 454 in 1956. If the partnership business was still subsisting and that sale was in the course of the partnership business, the appellant's propositions lack the necessary factual foundation.

Leading counsel for the appellant stated his basic factual submissions as follows:

> Number 1. The business of Bel-Air Builders, the partnership of which the appellant was a member, consisted of the development of a specific subdivision project in Malton with all that that usually entails.
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> Number 2. Upon expropriation of all but about 16 of the 150 acres involved by the Department of Transport in February, 1954, the business of Bel-Air Builders ceased.

1964
SORBARA
v.
MINISTER OF
NATIONAL
REVENUE
Cattanach J.

The first proposition is supported by the following portion of the appellant's testimony:

> Q. . . . and Mr. Sorbara, what was the business of Bel-Air Builders?
> A. The business of Bel-Air Builders was to develop Aria Bella Village; to build houses, and to build the commercial shopping centre.
> Q. Did Bel-Air Builders ever carry on any other business activities, other than the development of Aria Bella Village?
> A. None.

It is also supported by the following portion of the appellant's testimony:

> A. Bel-Air Builders came to be formed, for the purpose of continuing the development of Ava-Bella Village; to build houses for sale, and to build commercial buildings for rent, which were essential to the completed project.

On the other hand, in the Reply to the Notice of Appeal, there is a statement, that has not been challenged, that, in assessing the appellant, the respondent acted *inter alia* on the assumption that the appellant and his associates acquired the agreement with Malton Subdivisions Limited for the purchase of lots on Plan 454 "with a view to reselling them or otherwise turning them to account at a profit". The onus of disproving the fact so assumed lay on the appellant.

In considering whether the appellant has discharged that onus, I must consider that part of the appellant's evidence quoted above having regard to

(a) such other evidence as there may be as to what the business of the partnership was, and

(b) the weight that may reasonably be attributed to the appellant's evidence given in 1963 by which he attempts to define the precise limits of one of the multitude of businesses with which he was associated some nine or ten years earlier, assessed in the light of my conclusions as to the reliance that may be placed on his recollection of earlier events in circumstances touching his own interests.

With reference to the latter point, I may say that I am of the view that very little weight may be attributed to the appellant's account of earlier events even when given on oath. Not only does he not appear to have appreciated that he had a personal responsibility to be sure of the accuracy of statements sworn by him, but a reading of his evidence as a whole confirms my view, formed during the course of the trial, that his evidence cannot be relied upon.

1964

SORBARA
v.
MINISTER OF
NATIONAL
REVENUE

Cattanach J.

Without taking the time to review the other evidence as to what the business of the partnership was, I can express my conclusion that, apart altogether from the onus of disproving the Minister's assumption referred to earlier, the evidence taken as a whole shows that the partnership's objective in acquiring the right to buy lots on Plan 454 was the usual one of making a profit in such a way as might appear from time to time to be most advantageous. Certainly, the partnership had in mind many possibilities, including buying lots and reselling them, buying lots building on them and selling, and buying lots building on them and renting. I do not accept the appellant's evidence that the partnership's business in 1954 was restricted by definition to development of Aria Bella Village. In my view, this statement is nothing more than a convenient way of describing the business after the event when its activities had in fact been so restricted during the first few months of its existence. I have no doubt that the partners, under whatever agreement associated them together when they acquired this subdivision (clearly the "Declaration of Partnership" by which they declared that they were in business "as Builders" is not such agreement) would have felt quite free to turn to adjoining lands as a supplement to, or a substitute for, lands on Plan 454, had any such lands presented themselves as being a potential source of profit, and would have felt quite free under such agreement to deal with any lands that they could so acquire in any way that, in their judgment, was calculated to produce a profit.

That being my finding as to the scope of the partnership business, I find no basis in the evidence, apart from the appellant's bare statement, for a finding that the business had ceased at the time of the expropriation or, indeed that it had ceased before all the property had been disposed of and the proceeds of disposition had been collected and distributed. In my view, the business of acquiring land for disposition at a profit includes all operations essential to the successful completion of the project, including not only sale or other disposition, but collection of the proceeds of disposition. See *International Harvester Company of Canada, Limited v. Provincial Tax Commission*[1], per Lord Morton of Henryton at pp. 51-52. It follows that negotiations leading to settlement of compensation for expropriation of part of

[1] [1949] A.C. 36.

1964

SORBARA
v.
MINISTER OF
NATIONAL
REVENUE

Cattanach J.

the inventory of a business is an integral part of the carrying on of the business.

There is, of course, no question that compensation for land that was part of the assets of such a business and that has been expropriated must be included in computing the profits from the business. See *Kennedy v. The Minister of National Revenue*[1], (an appeal to the Supreme Court of Canada from this decision was dismissed without reasons[2].) A question might have been raised as to whether the compensation should have been included in computing the profit from the business for the year in which the land was expropriated. See *Commissioners of Inland Revenue v. Newcastle Breweries, Limited*[3]. However, no such question was raised at any stage of the proceedings, and, if it had been, it might well have given rise to issues of fact as to the method that is appropriate in this case to determine the profits from the business. I note that the accounting witness called by the appellant seemed to be of the view that the partnership profit should be computed in accordance with what is known as the "cash" basis.

As appears from what I have already said, I am of opinion that the collection of compensation for the lands expropriated, and the sale of the other lands, took place in the course of the partnership business. The appeal is, therefore, dismissed with costs.

Judgment accordingly.