Halifax 1968 Mar. 20-21 Ottawa Mar. 30

BETWEEN:

VAUGHAN CONSTRUCTION COMPANY LIMITED ..... APPELLANT;

AND

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

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THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

VAUGHAN CONSTRUCTION COMPANY LIMITED ..... RESPONDENT.

Income tax—Disposition of land by company—Expropriation of land—Whether profit of business—Award of partial compensation for expropriation—Income of what year—Amount receivable—Income Tax Act, s. 85B(1)(b).

In 1953 appellant company, which had previously carried on a construction business and sold fill, acquired 12.3 acres of undeveloped land in Halifax for $67,900. In 1954 after rejecting an offer of $130,750 appellant exchanged the 12.3 acres for 2.9 acres in a commercial area of Halifax plus $33,000 and as a condition of the transaction covenanted to convey the property to the city on request for $87,520 if it failed to erect an office building thereon which would be subject to city taxes. In August 1955 while appellant was engaged in demolishing some old buildings on the property the Province expropriated the land. In June 1957 an arbitrator fixed compensation for the 2.9 acres at $280,000 plus interest and ordered the Province to pay appellant on account $87,520 plus certain interest, and the Province did so forthwith. In 1961 the Supreme Court of Canada on appeal allocated the compensation $96,240 to Halifax and the remainder to appellant.

Held, (1) The profit made on the exchange of the 12.3 acres in 1954 and on the expropriation of the 2 9 acres in August 1955 was in each case a business profit and chargeable to income tax. On the evidence appellant acquired both properties as speculations with a view to profiting on their disposition. *Taylor v. M.N.R.* [1956-60] Ex.C.R. 3 and *Irrigation Industries Ltd v. M.N.R.* [1962] S.C.R. 346, applied.

(2) The $87,520 plus interest paid appellant in June 1957 on the arbitrator's award was attributable to appellant's 1957 taxation year. While compensation for expropriated property is not to be taken into account by a taxpayer who computes income on the accrual basis until the amount is fixed by arbitration or agreement appellant became immediately entitled to the amount awarded by the arbitrator in June 1957 and such amount was therefore to be taken into account as an amount receivable in that year. *M N.R. v. Benaby Realties Ltd.* [1968] S.C.R. 12; [1967] C.T.C. 418, applied and distinguished.

INCOME TAX APPEALS.

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H. B. Rhude and *D. R. Chipman* for Vaughan Construction Company Limited.

I. M. MacKeigan, Q.C. and *M. J. Bonner* for Minister of National Revenue.

THURLOW J.:—These appeals are from judgments[1] of the Tax Appeal Board which dismissed the taxpayer's appeal from a re-assessment of income tax for the year 1954 and allowed its appeal from a re-assessment of tax for the year 1957. In each case there is an issue as to whether profit realized in a particular transaction was profit from a business as defined in the *Income Tax Act* and therefore taxable as income under its provisions. With respect to the 1957 re-assessment there is also an issue as to whether, if taxable at all as income, the profit in question was taxable as income of that year.

The appeals were heard together on common evidence which consisted of (1) oral testimony by Mr. Harry Gordon an accountant who since 1956 has prepared the appellant company's financial statements, Dr. A. Murray MacKay, the Chairman of the Board of Directors of the Maritime Telegraph and Telephone Company Limited, Mr. Angus P. Gladwin, a claims agent in the employ of the Province of Nova Scotia and Mr. Kenneth S. Mahon, a trust officer in the employ of the Canada Permanent Trust Company, (2) a number of documents which were admitted by consent and (3) portions of the examination for discovery, conducted on behalf of the Minister, of Bernard J. Vaughan who at all material times was the President and Managing Director of the appellant company and the owner of its issued capital stock. Mr. Vaughan, however, was not called as a witness at the trial.

The appellant company was incorporated under the *Companies Act* of Nova Scotia in 1943 with broadly expressed objects and powers including those of acquiring the plant and machinery of Bernard J. Vaughan doing business as a general contractor and of carrying on various businesses including dealing in real property. Thereafter for three or four years it carried on a construction business

[1] (1965) 39 Tax ABC 380.

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in which it constructed dwelling houses in what was referred to as the Vaughan subdivision in the northern part of the City of Halifax. This business came to an end by 1948 and from that time until the events which occurred in 1953 and subsequently the company's business activities seem to have consisted in selling fill which it obtained from a block of properties in an industrial zone on Kempt Road in the City of Halifax which Bernard J. Vaughan had in the meantime acquired.

In his personal capacity Vaughan was a trader in real estate. He acquired, subdivided and sold the property referred to as the Vaughan subdivision and he acquired, consolidated and sold in pieces the industrial land on Kempt Road already mentioned. He was also engaged in a venture in acquiring properties on what was referred to as the airport highway, which did not turn out satisfactorily, and he owned a company known as Airway Broadcasting Company which acquired property in what is known as Geizer's Hill in the County of Halifax a portion of which was later sold at an enhanced price to the Public Service Commission of Halifax following a threat of expropriation by that body.

In 1950 Vaughan, a Mr. Doyle and a Mr. Cousins became engaged in a transaction in which Messrs. Doyle and Cousins provided the financing for and purchased a 12.3 acre property on Howe Avenue in the northern part of the City of Halifax. This was undeveloped land a portion of which was rocky and some of which was swamp. The plan was to make profit by the sale of the property and Vaughan was to advise and assist in disposing of it. He was to be entitled to a half interest in the property and to half of the proceeds therefrom after Messrs. Doyle and Cousins had recovered their initial investment.

In 1951 and 1952 the appellant company supplied fill for this property for the account of Doyle and Cousins to the value of $27,900 but none of the property had been sold when Mr. Cousins died and his executors and Doyle proposed putting the property up for sale. Vaughan thereupon arranged to borrow $40,000 and purchased the property for the appellant company for that amount plus the indebtedness for the fill. The transaction was completed in September 1953 but the offer to purchase had been made

some months earlier and not later than May 12, 1953, when a deposit of $4,000 was paid to the Canada Permanent Trust Company which held the title as trustee and represented Mr. Doyle and the executors of Mr. Cousins' estate.

Some years earlier the Maritime Telegraph and Telephone Company had acquired from the City of Halifax for $87,520 a 2.9 acre property in downtown Halifax on the corner of Spring Garden Road and Queen Street known as the Bellevue property which it had intended to use in part as a site for a head office building and in part as a service area. As part of the purchase transaction the company had obligated itself to construct a first class office building on the land and if it failed to do so to reconvey the land to the city upon request for $87,520. The company, however, ultimately came to the conclusion that this property was not suitable for its purposes and in 1953 began looking for another more suitable property in the course of which by a letter dated June 10, 1953, which followed verbal discussions with Mr. Vaughan, it offered him 25¢ per square foot for the Howe Street property. This offer, which would have amounted to some $130,750 for the property, was declined not, ostensibly, because it was not high enough but because Vaughan was unwilling to sell. He suggested another property in which he was not interested and an offer was made by the Maritime Telegraph and Telephone Company for it which was also declined by the owner. In the following year discussions again took place between representatives of the Maritime Telegraph and Telephone Company and Mr. Vaughan with a view to that company acquiring the Howe Street property in the course of which Mr. Vaughan suggested that while he did not want to sell he would trade that property for the Bellevue property providing the conditions were satisfactory. Eventually, following arrangements with the city, a transaction was completed in which the appellant company transferred the Howe Street property to the Maritime Telegraph and Telephone Company in exchange for the Bellevue property and $33,000 and as part of the transaction the appellant company covenanted with the City of Halifax to construct a first class office building on the Bellevue property as soon as practicable, to reconvey the property to the city on request for $87,520 if it failed to proceed with construction of the building and that the building when constructed

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would be subject to taxation under the provisions of the Halifax City Charter. From the point of view of the city this was important since there was an infirmary to the southward of the property and property of the province to the eastward and if either became owner of the property it might be exempted from city taxation. From the point of view of the appellant company it represented a restriction upon its rights in the property.

In the meantime while in possession of the Howe Street property the appellant company had received a sum of some $8,900 from the city on the purchase of a sewer easement across it.

In assessing the appellant company for 1954 the Minister added to its declared income the $8,900 so received, the $33,000 received from the Maritime Telegraph and Telephone Company and the value of the Bellevue property at $87,520 which amounts, after deducting the cost of the Howe Street property, left a profit upon which tax was assessed. It is the liability of the appellant company for tax on this profit that is in issue in the 1954 appeal.

After obtaining title to the Bellevue property the appellant began demolition of a number of old buildings thereon and had discussions with a number of persons interested in acquiring the property or portions of it but the demolitions had not yet been completed when in August 1955 the Province of Nova Scotia expropriated the property. Vaughan had been informed as early as February 1955 of the province's interest in acquiring the property and discussions had taken place respecting a price in the month preceding the expropriation but no agreement had been reached. By an order dated June 4, 1957 made by His Honour Judge Pottier, Judge of the County Court for District Number One (as he then was), acting as an arbitrator, the compensation payable in respect of the property was fixed at $280,000 plus 5% thereof for compulsory taking and it was further ordered that, pending further decision or order as to the balance of the said compensation payable, the province should pay to the appellant company $87,520 "on account of the said compensation together with five per centum (5%) thereof by way of allowance for compulsory taking, making a total of ninety-one thousand eight hundred and ninety six dollars ($91,896)" together with interest thereon at 5% per annum

from the 19th of June, 1956 until payment. By the same order leave was reserved to any of the parties to apply from time to time with regard to the balance remaining of the said compensation. In a decision filed prior to the making of the order the learned Judge had expressed the opinion that there could be no question regarding the rights of the appellant company to the sum of $87,520 of the $280,000 compensation which he had previously assessed, and he had intimated that he would grant an order for payment of $87,520 to the appellant company together with proportionate interest and allowance for compulsory taking.

No appeal was taken from this order either by the City of Halifax or by the Province of Nova Scotia, which had been ordered to make the payment, and the province in fact paid the appellant company the sum so ordered on June 13, 1957. The Minister included the amount so received in computing the appellant's income for tax purposes for the year 1957 and it is the correctness of his so doing that is in issue in the 1957 appeal.

It should be added that in 1959 a further order with respect to the remainder of the compensation money was made and was the subject of appeals by both the City of Halifax and the Vaughan Construction Company Limited to the Supreme Court of Nova Scotia *in banco* and later by the City of Halifax to the Supreme Court of Canada where it was ultimately determined that the City of Halifax was entitled to $96,240 of the $280,000 award of compensation and the appellant company to $183,760 thereof in each case with interest thereof at 5% per annum from June 18, 1956, to the date of payment. The formal judgment of the Supreme Court of Canada contained no reference to the 5% allowance for compulsory taking referred to in the order of June 4, 1957 and in the order from which the appeal to the Supreme Court was taken but the reasons for judgment[2] which are referred to in the reply and to which my attention was invited in the course of argument by counsel for the Minister clearly show that the 5% for compulsory taking was disallowed by the Supreme Court of Canada.

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[2] *Vide Regal Heights Limited v. Minister of National Revenue* [1960] S.C.R. 902 at 907.

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In the view I take the profit realized by the appellant company from its acquisition and disposal of the Howe Street property was plainly profit from a venture in the nature of trade and thus from a business as defined in the *Income Tax Act*. Apart from the fact that the first offer made by the Maritime Telegraph and Telephone Company was turned down, which is explained only by the statement made by Mr. Vaughan on discovery that he was exploring several possibilities for development of the property either for residential or industrial purposes, nothing in the evidence even suggests that the appellant acquired the property otherwise than as a speculation in undeveloped real estate. Mr. Vaughan when first acquiring an interest in it by entering into the transaction with Messrs. Doyle and Cousins did so in the course of a scheme for making profit by disposing of it and there is nothing to indicate that this purpose for it ever changed or that the intention of his company was in any way different from his own. The company did nothing with the property in the time it held it save to arrange a price for the easement acquired by the city and to dispose of it in the transaction with the Maritime Telegraph and Telephone Company and while there is evidence that Mr. Vaughan enquired of an insurance company if financing could be obtained for the construction of apartment buildings on it and was told that it would not, such evidence falls far short of establishing that the appellant company had plans for constructing such buildings. Even less does it establish that the appellant company planned to construct such buildings to be held as investments. Moreover in the hands of such a company the property itself consisting as it did of some 12.3 acres of undeveloped and unproductive land zoned for industrial purposes has the character and appearance of inventory rather than of a fixed or capital asset.

Finally the property was dealt with by the appellant company in the same way that a speculative dealer in land might be expected to deal with it; acquiring it, holding it for a comparatively short time, during which it served no purpose in the appellant company's hands, until an interested party came along and then making it the subject of a profitable trade for a substantial sum in cash and another valuable and readily saleable piece of property.

Both of the positive guides enunciated by the former President of this Court in *Taylor v. Minister of National Revenue*[3], which were cited with approval by the Supreme Court of Canada in *Irrigation Industries Limited v. Minister of National Revenue*[4], thus indicate that the transaction from which the profit here in question arose was an adventure in the nature of trade in addition to which the intention of Mr. Vaughan in acquiring an interest in the property and of his company in acquiring the property itself serve to confirm this conclusion.

The appeal in respect of the 1954 re-assessment accordingly fails.

I reach a similar conclusion with respect to the nature of the profit realized from the Bellevue property, though in this case since the property was expropriated there was no disposal transaction from which any conclusion can be drawn. That the property, like the one for which it was exchanged, was of an inventory nature in the appellant company's hands is, however, in my view, plain. Though different in character from the Howe Street property it too was a comparatively large area, large enough to accommodate a number of substantial commercial structures, and it was located in a commercial area in which there was a great demand for land. Moreover, apart from the fact that the company covenanted with the city to erect a first class office building on a part of the property which would be subject to municipal taxation, which is equivocal on the question to be determined, nothing in the evidence indicates that the company had any plans whatever to build on the property. Rather the contrary is indicated. In the period of nine months during which the appellant company held the title it neither developed plans for such a building, nor settled on specific ideas as to how to develop the property, nor did it employ anyone to formulate such ideas or to draw plans. It had no financial resources of its own with which to build a first class office building; yet it neither arranged for financing nor made efforts to secure tenants for such a building. There is even less evidence of any intention to hold the property, whether with or without a building thereon, as an investment. On discovery Mr.

[3] [1956-60] Ex. C R 3

[4] [1962] S C.R. 346

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Vaughan said the plan for the property was simply to remove the old buildings and to explore the "possibility" of building an "A type" building, build it and leave the rest undeveloped for another day, and that the determination of what would happen to the rest of the property would come later. He also said that in talking with the manager of a trust company about the property he mentioned that a particular party was interested in the whole of the property but that if the trust company would offer $6 per square foot for the portion the trust company wanted he would endeavour to have that held out of the transaction. It was submitted that the particular party referred to was the province and that this occurred after Mr. Vaughan became aware that the property would be expropriated but even if this was the fact (though I do not think it is established) it appears to me to show the situation to be one of an experienced dealer carrying on a business of trading in land. These facts, in my view, indicate that the property was acquired simply as a speculation with a view to turning it to account for profit in any way that might present itself, including sale and, in fact, apart from the demolition of the old buildings the only activity of the appellant company with respect to the property in the time it held the title appears to have consisted in talking with various prospective purchasers of the whole or part of it. In my view therefor the profit realized by the appellant from the Bellevue property was also profit from a business within the meaning of section 139(1)(*e*) of the *Income Tax Act*.

I turn now to the contention that in any event profit from the Bellevue property was not realized in the appellant company's 1957 taxation year. In the appellant company's reply this point was based on the contention that the year in which the profit must be taken to have been realized was the year in which the expropriation occurred, that is to say, 1955, but in argument the point was based on the contention that the compensation to be paid to the appellant company, whose financial statements were compiled on an accrual basis, was not ascertained in the 1957 year since the company's entitlement to compensation for the property was not finally determined until 1961 when the judgment of the Supreme Court of Canada was rendered. The contention was based on the judgment of that

Court in *Minister of National Revenue v. Benaby Realties Limited*[5] which was rendered after the filing of the appellant company's reply.

In the *Benaby* case Judson J., speaking for the Court said at page 419:

> The taxpayer conducted its business on the accrual basis under Section 85B(1)(*b*), which reads:
>
> 85B.(1) in computing the income of a taxpayer for a taxation year,
>
> (*b*) every amount receivable in respect of property sold or services rendered in the course of the business in the year shall be included notwithstanding that the amount is not receivable until a subsequent year unless the method adopted by the taxpayer for computing income from the business and accepted for the purposes of this Part does not require him to include any amount receivable in computing his income for a taxation year unless it has been received in the year.
>
> The Crown's argument is that the general rule under the *Income Tax Act* is that taxes are payable on income actually received by the taxpayer during the taxation period; that there is an exception in the case of trade receipts under Section 85B(1)(*b*), which include not only actual receipts but amounts which have become receivable in the year; that the taxpayer's profit from this expropriation did not form part of its income for the year 1954 because it was not received in that year and because it did not become an amount receivable in that year.
>
> In my opinion, the Minister's submission is sound. It is true that at the moment of expropriation the taxpayer acquired a right to receive compensation in place of the land but in the absence of a binding agreement between the parties or of a judgment fixing the compensation, the owner had no more than a right to claim compensation and there is nothing which can be taken into account as an amount receivable due to the expropriation.

He said further at page 421:

> My opinion is that the Canadian *Income Tax Act* requires that profits be taken into account or assessed in the year in which the amount is ascertained.
>
> *Try v. Johnson*, [1948] 1 All E.R. 532, is much closer to the point in issue here. The claim was for compensation under legislation which imposed restriction on "Ribbon Development". When the case reached the Court of Appeal, the amount of compensation was admitted to be a trade receipt. The argument in that Court was directed to the appropriate year of assessment. The judgment was that the right of the frontager to compensation under the *Ribbon Development Act* contained so many elements of uncertainty both as to the right itself and the quantum that it could not be regarded as a trade receipt for the purpose of ascertaining the appropriate year of assessment until the amount was fixed either by an arbitration award or by agreement.

[5] [1968] S.C.R. 12; [1967] C.T.C. 418 at 419.

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Under the Canadian *Expropriation Act*, there is no doubt or uncertainty as to the right to compensation, but I do adopt the principle that there could be no amount receivable under Section 85B(1)(*b*) until the amount was fixed either by arbitration or agreement.

The right to compensation under the *Expropriation Act* of the Province of Nova Scotia is I think the same and as the financial statement of the appellant company and its income tax returns for 1956 and subsequent years, and possibly for earlier years as well, were prepared on an accrual basis the principle adopted by the Supreme Court appears to me to apply. However, after the making of the order of the arbitrator in June 1957 and the making of the payment directed thereby by the party directed to make it, who did not appeal therefrom, I do not think it could any longer be said that the appellant company had "a mere right to compensation" or that there was nothing which could "be taken into account as an amount receivable due to the expropriation". What up to that time had been a mere right to compensation the amount of which was entirely unascertained appears to me to have been converted by the order of the arbitrator into an ascertained amount of compensation, to which the appellant company became immediately entitled, plus a right to a further unascertained amount of compensation. On the principle adopted in the *Benaby* case the payment on account, to which the appellant company then became entitled, and which was paid to it, in my view, therefore, became an amount which could "be taken into account as an amount receivable due to the expropriation" and was properly included in the computation of the appellant company's income for its 1957 taxation year.

The Minister's appeal accordingly succeeds.

The appeal in respect of the re-assessment for the year 1954 will be dismissed. The appeal in respect of the 1957 re-assessment will be allowed and the re-assessment will be restored. The Minister is entitled to the costs of both appeals.