1966
*Dec. 1, 2
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G. W. GOLDEN CONSTRUCTION LIMITED ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Real estate transactions—Construction company—Sale of land allegedly acquired for investment purposes—Secondary intention—Admissibility of evidence of subsequent transaction—Capital gain or income—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).

The appellant company was engaged in the business of purchasing land for the purpose of building houses thereon for sale, but also with a view to constructing apartment blocks for renting. In 1953, it had assembled a number of lots on which it built a number of houses which were later sold. However, some of these lots were required by the city of Edmonton for a school and in 1955, the appellant company received 3 other parcels of land in exchange. The company's declared intention was to erect apartments for renting on these new lots it received from the city. In 1958, the appellant subdivided one of these parcels into 3 lots, one of which it sold for a cash payment and another lot. The latter was immediately sold. The Minister assessed the profit realized from the 2 sales as part of the appellant's income. The appellant argued that these sales should be regarded as an unsolicited realization of an investment. The appellant also objected to the presentation of evidence by the Minister that it had sold the balance of the property in 1959 to a shopping centre company. The Exchequer Court upheld the Minister's assessment. The company appealed to this Court.

Held: The appeal should be dismissed.

The evidence concerning the sale in 1959 of the balance of the property which the appellant had received from the city was admissible. That evidence was relevant to show a course of conduct on the part of the appellant. Notwithstanding the fact that the appellant company may originally have intended to build apartments on this land, the evidence disclosed that it had the secondary intention of selling the lands at a profit if it were unable to carry out its primary objective. The property received from the city should be regarded as having been acquired by the appellant as part of the inventory of its business and as having been so held by it when the profit in question was realized. Consequently, the profit was a profit from the appellant's business within the meaning of ss. 3 and 4 of the *Income Tax Act*.

Revenu—Impôt sur le revenu—Transactions immobilières—Compagnie de construction—Vente de terrain censé avoir été acquis pour des fins de

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*PRESENT: Taschereau C.J. and Fauteux, Martland, Ritchie and Spence JJ.

placement—Intention secondaire—Admissibilité d'une preuve de transaction subséquente—Gain en capital ou revenu—Loi de l'Impôt sur le Revenu, S.R.C. 1952, c. 148, arts. 3, 4, 139(1)(e).

La compagnie appelante s'occupait d'acheter des terrains dans le but d'y construire des maisons qu'elle vendait, mais aussi dans le but d'y construire des maisons de rapport. En 1953, la compagnie avait réuni un grand nombre de lots sur lesquels elle a bâti plusieurs maisons qu'elle a subséquemment vendues. Cependant, quelques-uns de ces lots ont été requis par la cité d'Edmonton pour y construire une école, et en 1955, la compagnie a reçu de la cité, en échange, 3 parcelles de terrain. L'intention de la compagnie à ce moment-là était d'ériger des maisons de rapport sur ces nouveaux lots qu'elle avait reçus de la cité. En 1958, la compagnie a subdivisé un de ces terrains en 3 lots dont l'un a été vendu pour du comptant et en échange d'un autre lot. Cet autre lot a été vendu immédiatement. Le Ministre a cotisé le profit réalisé lors de ces 2 ventes comme faisant partie du revenu de l'appelante. L'appelante a soutenu que ces ventes devaient être considérées comme étant une réalisation non sollicitée d'un placement. L'appelante s'est aussi objectée à ce que le Ministre présente une preuve à l'effet que la compagnie aurait vendu en 1959 la balance du terrain qu'elle avait reçu de la cité à une compagnie opérant un centre d'achats. La Cour de l'Échiquier a maintenu la cotisation du Ministre. La compagnie en appela devant cette Cour.

Arrêt: L'appel doit être rejeté.

La preuve concernant la vente en 1959 de la balance de la propriété que l'appelante avait reçue de la cité était admissible. Cette preuve était pertinente pour montrer une ligne de conduite de la part de l'appelante. Malgré le fait que la compagnie appelante pouvait avoir eu originairement l'intention de construire des maisons de rapport sur ce terrain, la preuve a démontré qu'elle avait l'intention secondaire de vendre ces terrains à un profit si elle était incapable de mettre à exécution son premier objectif. La propriété reçue de la cité doit être considérée comme ayant été acquise par l'appelante comme une partie de l'inventaire de son entreprise et d'avoir fait partie de son inventaire lorsque le profit en question a été réalisé. En conséquence, le profit était un profit provenant de l'entreprise de l'appelante dans le sens des arts. 3 et 4 de la *Loi de l'Impôt sur le Revenu.*

APPEL d'un jugement du Juge Kearney de la Cour de l'Échiquier du Canada[1], en matière d'impôt sur le revenu. Appel rejeté.

APPEAL from a judgment of Kearney J. of the Exchequer Court of Canada[1], in an income tax matter. Appeal dismissed.

J. M. Hope, for the appellant.

G. W. Ainslie and *L. R. Olson,* for the respondent.

[1] [1966] Ex. C.R. 198, [1965] C.T.C. 409, 65 D.C.T. 5221.

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The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of Mr. Justice Kearney of the Exchequer Court of Canada[1] directing that an order of the Tax Appeal Board be set aside and restoring the assessment of the Minister of National Revenue for the appellant's taxation year 1958, whereby income tax was levied on a net gain of $23,384 realized by the appellant in a series of real estate transactions which are hereinafter described.

The appellant is and always has been engaged in the business of general contracting, and the objects expressed in its Memorandum of Association read, in part, as follows:

> 3. The objects for which the Company is established are:—
> (*a*) To purchase, take on lease or in exchange, or otherwise acquire any lands and buildings, and any estate or interest in, and any rights connected with, any such lands and buildings.
> (*b*) To develop and turn to account any land acquired by the Company or in which the Company is interested, . . .

Nothing turns on the language of this Memorandum of Association standing alone but it is apparent to me from the evidence that in conformity with these objects the appellant in fact engaged in the business of purchasing land in the Province of Alberta and elsewhere primarily for the purpose of building houses thereon for sale, but also with a view to constructing apartment blocks for renting. The appellant's course of conduct indicates to me that the lands alone were also available for resale if "somebody came along" who was prepared to offer a sufficiently high price.

In the course of its business in the year 1953, the appellant purchased a number of parcels of land in the west end of the City of Edmonton which it later assembled into a block with the approval of the city. This land came to be known as the "Parkview Subdivision" and the company there built approximately 300 houses which were later sold. It was one of the conditions of the city's approval of this scheme that the appellant should provide the necessary land for public services including schools, and when the city decided to construct a large high school in this subdivision the appellant was required to transfer to it about 100 small lots in exchange for which in the month of April 1955 the city transferred to the appellant a number of city lots

[1] [1966] Ex. C.R. 198, [1965] C.T.C. 409, 65 D.C.T. 5221.

which the appellant itself selected and which included a property of about 2.85 acres at the corner of 86th Avenue and 83rd Street, then described as lot 42 and sometimes referred to as the "Bonnie Doon" property. A further property of approximately 9 acres which was transferred to the appellant was located on the west side of 85th Street. There was also included in the exchange a lot of a little more than 2 acres which was in another area and which is hereinafter referred to as property "x".

The profit of $23,384 which the Minister of National Revenue has assessed as part of the appellant's income for the year 1958 arose as the result of a replotting of lot 42, hereinbefore referred to. The effect of this replotting was that lot 42 was subdivided into lots 43, 44 and 46, and the appellant transferred the new lot 44 to the Imperial Oil Company Limited in exchange for which Imperial Oil transferred lot 48 to the appellant and paid the sum of $20,000. The appellant then transferred the newly acquired lot 48 to the Lutheran Church for $18,000. It is agreed that this series of transactions gave rise to the profit now sought to be taxed.

The contention advanced on behalf of the appellant, which found favour with the Tax Appeal Board, was that at the time when the city lots were transferred to it in exchange for the Parkview School property the appellant had already determined that, apart from property "x", all the lands were to be used for the construction of apartment buildings which would be held as capital assets so as to provide a permanent source of income for the appellant's controlling shareholder and his family. On this assumption, it was argued that when the properties were sold without any apartment buildings having been built the sales were sales of capital assets and that any profit realized by the appellant as a result thereof was a capital gain and not income.

In the course of delivering the reasons for judgment of the Tax Appeal Board, the learned Assistant Chairman observed that apartment buildings built by the appellant had always been retained by it for the rental income to be had and he went on to say:

> The plan was that any apartment building put up should be treated as for investment purposes only. On this account, the appellant has never disposed of or parted with any apartment building erected by it. Having

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been through a heavy housebuilding programme over a period of years and achieved a position of financial independence, the appellant's controlling shareholder, Mr. G. W. Golden, became more interested in creating and enlarging a permanent source of income for himself and family than in money-making through further building operations.

Although plans and a model of an apartment building to be erected on lots 43, 44 and 46 were prepared for the appellant, none was ever constructed on any part of the property acquired from the city. This was chiefly due to the fact that a very large shopping centre was constructed on adjacent property which, it was felt, would interfere with the value of the appellant's lands as an attractive site for the apartment building, and negotiations were conducted with the builder of the proposed shopping centre with a view to erecting a large screen to block the view of the back of the shopping centre from the proposed apartments but nothing came of this and the project was abandoned.

The evidence of Mr. G. W. Golden, the president and controlling shareholder of the appellant, was clearly to the effect that when it acquired these lands from the city its primary purpose and intention was to use them for the construction of apartment buildings, and steps were undoubtedly taken to this end, but when it became apparent that the sites were not as desirable for this purpose as they had originally appeared to be, the appellant was willing and ready to turn them to account if a sufficiently profitable sale offered itself.

In this latter regard, I am of the opinion, for the reasons stated by Mr. Justice Kearney, that the evidence which was tendered as to the sale in 1959 of the balance of the property which the appellant had acquired from the city is admissible. See *Osler, Hammond & Nanton Limited v. M.N.R.*[1], per Judson J. When questioned about this sale, Mr. Golden said:

> I couldn't afford to build apartments on land that I could get $20,000.00 an acre for. I thought it was a windfall myself. So that the sale was something over $200,000.00.
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> Q. Let us put it that way, Mr. Golden, you finally reach a point, you may intend to build an apartment or houses on property, and that may be your intention all along. A. I didn't go looking for it. It was not for sale.

[1] [1963] S.C.R. 432 at 434, [1963] C.T.C. 164, 63 D.T.C. 1119, 38 D.L.R. (2d) 178.

Q. If you were offered enough money or it is a good deal and you are willing to sell, you are willing to sell? A. Well, it was not economical for me to build if somebody came along like this.

Q. In other words with a price like that it didn't pay you to keep it for apartments no matter what your original intention had been? A. No.

I think this evidence is relevant to show a course of conduct on the part of the appellant, and when it is remembered that all of the property which the city transferred to it in exchange for the Parkview School site, amounting in all to about 12 acres, was sold off within four years after the appellant had acquired it, I think it is only reasonable to infer that, at least after the abandonment of the apartment project, these lands were being held for resale as a part of the appellant's inventory. It is of some significance to note in this connection that the lands were entered in the books of the company in an account under the heading "Land for Resale".

Notwithstanding the fact that the appellant may originally have intended to build apartments on this land, I think the evidence disclosed that it had the secondary intention of selling the lands at a profit if it were unable to carry out its primary objective.

In this regard, I find it difficult to distinguish this case in principle from the situation which was considered by Judson J. in *Regal Heights Ltd. v. M.N.R.*[1], although that was a case in which the profit to the promoters arose out of a single transaction for the carrying out of which Regal Heights Ltd. had been expressly incorporated, whereas in the present case the taxpayer is an experienced real estate operator of long standing.

An even closer analogy to the situation here in question is, in my opinion, to be found in the case of *Fraser v. M.N.R.*[2], where the appellant and his associate were found to be experienced operators in the field of real estate and where Judson J., giving the unanimous decision of this Court, reviewed the situation in the following passage at pp. 660-1:

Cameron J., accepted the evidence of the appellant that when the two associates acquired the property, they did intend to attempt to develop the

[1] [1960] S.C.R. 902 at 907, [1960] C.T.C. 384, 60 D.T.C. 1270, 26 D.L.R. (2d) 51.

[2] [1964] S.C.R. 657, [1964] C.T.C. 372, 64 D.T.C. 5224, 47 D.L.R. (2d) 98.

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property for rental purposes. He calls this their dominant intention and he says that he is far from satisfied that it was their sole intention at any time. He also finds that they intended to sell at least part of the property if they were unsuccessful in developing it as they planned. His conclusion is contained in the following extract from his reasons:

> In my view, the whole scheme was of a speculative nature in which the promoters envisaged the possibility that if they could not complete their plans to build and retain as investments a shopping centre and apartments, a profitable sale would be made as soon as it could be arranged.

In spite of the Judge's emphasis on primary and secondary intention, when applied to the facts of this case it amounts to no more than this. He was saying that two active and skilled real estate promoters made a profit in the ordinary course of their business, and this they obviously did. They were carrying on a business; they intended to make a profit, and if they could not make it one way, then they made it another way.

This language appears to me to have direct application to the present case.

I regard the property originally described as lot 42 as having been acquired by the appellant as part of the inventory of its business and as being so held by it when the profit which is here in question was realized. I therefore agree with Mr. Justice Kearney that the profit was a profit from the appellant's business within the meaning of ss. 3 and 4 of the *Income Tax Act*.

For these reasons, as well as for those contained in the reasons of Mr. Justice Kearney, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Milner, Steer, Dyde, Massie, Layton, Cregan & MacDonnell, Edmonton.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.