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*June 9
*June 24

ATLANTIC SUGAR REFINERIES LIMITED ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income Tax—Whether profits resulting from short sales of raw sugar—taxable income or capital gain—Income War Tax Act, R.S.C., 1927, c. 97, s. 3.

The appellant, incorporated as a Dominion company, carries on the business of refining raw cane sugar at Saint John, New Brunswick. After the outbreak of war in September 1939 an abnormal demand for refined sugar arose and the appellant, in common with other Canadian refiners, and pursuant to the Government's request, undertook to meet the demand out of its stocks of refined sugar. As a result, its normal stocks of raw sugar were depleted, and to re-establish its position it purchased raw sugar for immediate delivery at a considerable advance on pre-war prices. A ceiling having been fixed on refined sugar prices, the appellant was faced with a prospective loss and to offset this, speculated in raw sugar futures on the stock exchange and made a profit of some $71,000. In its income return it treated the sum as a capital gain. The respondent however assessed it as taxable income under the *War Income Tax Act* and from that assessment the present appeal arose.

Held: That, even if it were the only transaction of that character, in the light of all the evidence, it was a part of the appellant's business and therefore a profit from its business or calling within the meaning of section 3 of the *Income War Tax Act.*

Imperial Tobacco Co. v. *Kelly,* [1943] 2 All E.R. 119; *Anderson Logging Co.* v. *The King* [1925] S.C.R. 45; *Ducker* v. *Rees Roturbo Development Syndicate,* [1929] A.C. 132, applied.

Held: Per Kellock and Locke JJ., that the short sales in question were in effect hedges against possible loss on the cash purchases made and being made in the course of carrying on the appellant's business the profits realized were properly classified as income.

APPEAL from the judgment of the Exchequer Court of Canada, Thorson J., President, (1), dismissing the appeal of the appellant and affirming the assessment made by the respondent under the *Income War Tax Act* for the year 1939.

Salter A. Hayden K.C. and *J. W. Blain* for the appellant.

J. Ross Tolmie and *J. D. Boland* for the respondent.

*PRESENT: Rinfret C.J., and Kerwin, Taschereau, Kellock and Locke JJ.

(1) [1948] Ex. C.R. 622.

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THE CHIEF JUSTICE:—I agree with my brother Kerwin and would dismiss the appeal with costs.

The judgment of Kerwin and Taschereau JJ. was delivered by:—

KERWIN J.:—This is an appeal by Atlantic Sugar Refineries Limited against a judgment of the Exchequer Court (1) affirming an assessment of appellant to income tax for the year 1939, and the point in issue is whether a profit admittedly made by the company from sales and purchases of raw sugar futures on the New York Coffee and Sugar Exchange comes within the words "profits from a trade or commercial or financial or other business or calling" in s. 3 of the *Income War Tax Act*.

The company was incorporated by letters patent under the *Dominion Companies Act* in 1932. It buys raw cane sugar in order to refine it and sell the product. As a rule it did not buy futures, the only two occasions being in 1937 and in 1939. While the circumstances of these two cases are entirely different, the intention in each, as stated by Mr. Seidensticker, the company's president and manager, was the same, i.e., to offset losses either actual or feared. His intention, and therefore the intention of the appellant, was to do something as part of the latter's business and to secure a profit.

The Court of Appeal in England decided in *Imperial Tobacco Co.* v. *Kelly* (2), that the intention with which a transaction was entered into is a feature that should be considered under the British Income Tax Act. That is an important matter under our Act but the whole sum of the circumstances must be taken into account in determining whether a profit arose as part of the taxpayer's business. A number of cases are referred to in the reasons for judgment in the Court below and they, with others, were discussed fully in argument before us. Some are on the point whether the individual or company concerned was carrying on any business and, as has been pointed out several times, a company comes into existence for some particular purpose and, therefore, different considerations apply to it than would apply to an individual. Other decisions consider what bearing upon the issue has the

(1) [1948] Ex. C.R. 622.

(2) [1943] 2 All E.R. 119.

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circumstance that it was an isolated transaction, and it is settled that the mere fact that that was so does not dispose of the matter. The present appeal, however, may be decided by applying the principles set forth in the decisions now mentioned.

In *Anderson Logging Co.* v. *The King* (1) Duff J., as he then was, at page 48, in delivering the judgment of this Court upon a question arising under the British Columbia *Income and Personal Property Taxation Act* (1921) 2nd sess., c. 48, stated that he assumed the tests which had been applied in the decisions of the Courts upon controversies arising under the Income Tax Acts of the United Kingdom were those by which the liability of the Anderson Logging Co. was to be determined. He continues:—

> The principle of these decisions can best be stated for our present purpose in the language of Lord Dunedin in his judgment delivered on behalf of the Judicial Committee, in *Commissioner of Taxes* v. *The Melbourne Trust, Ltd.* (2).
>
> It is common ground that a company, if a trading company and making profit, is assessable to income tax for that profit * * * The principle is correctly stated in the Scottish case quoted, *California Copper Syndicate* v. *Harris* (3). It is quite a well settled principle in dealing with questions 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;

or, in the language of the judgment from which this quotation is made, which follows in sequence after the passage cited:

> 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?

or, in the form adopted by Sankey J.—in *Beynon* v. *Ogg* (4)—from the argument of the Attorney General—was the profit in question

> a profit made in the operation of the appellant company's business?

(1) [1925] S.C.R. 45.
(2) [1914] A.C. 1001 at pp. 1009 and 1010.
(3) 6 F., 894; (1904) 5 T.C. 159.
(4) [1918] 7 T.C. 125 at p. 132.

The decision of this Court was affirmed by the Judicial Committee (1). In *Ducker* v. *Rees, Roturbo Development Syndicate* (2), the House of Lords unanimously stated (and adopted) the test in the *California Copper Syndicate Case* as being whether the amount in dispute was "a gain made in an operation of business in carrying out a scheme for profit making".

Bearing in mind the principles set forth in these decisions, what do we find in the present case? In 1939 the company found, as a result of the outbreak of war and the tendency of the public to buy more sugar, that there was a greater demand than would be expected for seasonable requirements. At the request of an administrative committee set up by the Canadian Government, or of the Sugar Controller when finally appointed, the appellant, as well as others in the sugar refinery business, endeavoured to secure more raw sugar than they ordinarily would at that particular time. The appellant purchased a considerable quantity over and above what its usual requirements would be and it was because of the loss that Mr. Seidensticker feared, that he decided on behalf of the Company to speculate in sugar futures on the New York Coffee and Sugar Exchange. As to these speculations, he testified: "I think it is difficult to disassociate them from what took place in the first instance," i.e. in 1937, and I agree with the view of the trial judge that it is impossible to do so. At page 32 of the record, Mr. Seidensticker stated:—

> The raw sugars were allocated to them at a definite price fixed by the Sugar Administrator. In the interval between this initial control and commercial control the necessity of the Atlantic Sugar Refinery responding to this demand to supply raw sugar and the need therefore of buying raw sugars to overcome the deficiencies which normally and naturally occurred resulted in my attempting to, in some fashion, recoup what I feared might be a consequent loss.

The company finding itself in an abnormal situation because of the various factors mentioned, Mr. Seidensticker decided to protect the appellant's financial interests by the operations on the Exchange. The company was not investing idle capital funds nor was it disposing of a capital asset. In no sense may it be said that the operations were unconnected with the appellant's business and it is at least an added circumstance that the speculation was made

(1) [1926] A.C. 140. (2) [1928] A.C. 132.

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in raw sugar. Even if it were the only transaction of that character, it should be held, in the light of all the evidence, that it was part of the appellant's business or calling and therefore a profit from its business within section 3 of the Act.

The appeal should be dismissed with costs.

The judgment of Kellock and Locke JJ. was delivered by:—

LOCKE J.:—The matter to be determined is whether the profits earned on the short sale transactions in September and October 1939 were profits or gains from a trade, within the meaning of s. 3 of the *Income War Tax Act*, or from a speculation divorced from the ordinary trade or business of the company which should be classified as a capital gain.

While it was undoubtedly within the corporate powers of the appellant to buy and sell raw sugar, the evidence disclosed that its business was the purchase of this commodity, refining it and selling refined sugar, and that it was not its custome to hedge its purchases by transactions in the future market. On September 7th, 8th and 9th, 1939, the appellant made cash purchases of 15,515 tons of raw sugar for future delivery at prices considerably in excess of those theretofore paid. The necessity for these very large purchases was occasioned by the appellant company, together with other sugar refiners in Canada, complying with the request of the Canadian Government to supply out of their stocks the altogether abnormal demands for refined sugar consequent upon the anticipation of and the outbreak of the war. The resulting drain upon the raw sugar stocks of the refineries created the demand which caused the great increase in the price of raw sugar. On September 11th the appellant made its first short sales upon the New York Coffee and Sugar Exchange, and between that date and October the 9th it sold some 3,500 tons short. In giving evidence as to these transactions, Mr. Lewis Seidensticker, the president and manager of the company, said that these sales were not in the nature of hedges but speculative transactions entered into in the hope of recouping part at least of an anticipated loss in the purchases made at such high figures.

Explaining the circumstances under which the sales were made, the witness said that, expecting an operating loss, he consulted a broker in New York and on his advice "those transactions which have been submitted as descriptive of what took place on the New York Sugar Exchange were entered into and what would in any wise be termed a hedging transaction was defeated by the control which fixed the conditions and the price situation here while it in no wise influenced or affected the listing and movement of quotations on the raw sugar exchange." Later, being asked by the learned trial judge to explain this statement, the witness said that "anything that would have *led us to continue to function in the market towards hedging* was defeated by the control," but added that the transactions were really speculations and not intended as hedging operations.

The control referred to was that imposed by the Government under the *War Measures Act*: on October 2nd the Sugar Administrator first fixed the price of refined sugar and thereafter required the refiners to purchase raw sugars through him and the first of such purchases was made in this manner by the appellant on October 6th. According to Mr. Seidensticker, after October 2nd the refineries no longer acted as free agents. Of the short sales in question transactions aggregating 3,100 tons were made in September: those made after October 2nd aggregated only 400 tons and of these there was but one sale of a 50 ton lot after October 6th. According to the witness, in the ordinary case of a hedge, the selling for future delivery synchronizes with the purchase of the commodity while, in the present case, the short sales were made over the period of a month following the cash purchases. I think that this circumstance does not affect the matter to be determined. While not carried out contemporaneously with the purchases, the short sales were in effect a hedge by the company against a possible loss on the purchases made and it was only the imposition of control on October 2nd that rendered further hedging operations inadvisable. In trades where natural products are purchased in large quantities, hedging is a common, and in some cases, a necessary practice, and the cost of such operations in trades of this nature is properly allowable as an operating expense

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of the business. Where, as in the present case, the trader elects to close out his short sales and take a profit, this is, in my opinion, properly classified as profit from carrying on the trade. Mr. Hayden contended that this was simply a speculation in raw sugar resulting in a capital profit such as might have resulted from a speculation in shares or some other commodity but, upon the evidence in this case, that position cannot, in my opinion, be supported.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *McCarthy & McCarthy.*

Solicitor for the respondent: *A. A. McGrory.*