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*Oct. 12
Nov. 21

REGAL HEIGHTS LIMITED .....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Profit from land purchased for development of a shopping centre and later sold—Whether taxable income as profit derived from a venture in the nature of trade—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).

A group of persons formed a partnership and purchased certain lands for the purpose of developing a large shopping centre in the City of Calgary. They later incorporated the appellant company to which all the property in question was transferred. Due to the failure to negotiate a lease with a major department store the shopping centre plan was dropped, and the holdings of the company were disposed of at enhanced prices resulting in a substantial profit to the company.

The appellant was assessed for income tax on this profit. An appeal by it to the Income Tax Appeal Board and a further appeal to the Exchequer Court were dismissed. Appellant then appealed to this Court.

Held (Cartwright J. *dissenting*): The appeal should be dismissed.

Per Fauteux, Martland, Judson and Ritchie JJ.: As found by the trial judge, the promoters and the company failed to promote a shopping centre and they then disposed of their speculative property at a profit. This was a venture in the nature of trade and the profit from it is taxable within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act*.

There is no analogy between the sale of long-held bona fide capital assets and the realization of a profit from a speculative venture in the nature of trade, as was the case here. *Sutton Lumber and Trading Co. Ltd. v. Minister of National Revenue*, [1953] 2 S.C.R. 77, distinguished.

Per Cartwright J., *dissenting*: The evidence does not support the view that the appellant or its promoters would have purchased, or did purchase, the lands in question as a speculation looking to re-sale. The sales of the lands were a realization of its capital assets when the purpose for which they had been acquired was defeated, owing to circumstances beyond the control of the appellant.

The result is not affected by the circumstance that these capital assets were held for a much shorter time than those which were under consideration in *Sutton Lumber and Trading Co. Ltd. v. Minister of National Revenue, supra.*

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], affirming a decision of the Income Tax Appeal Board. Appeal dismissed, Cartwright J. dissenting.

*PRESENT: Cartwright, Fauteux, Martland, Judson and Ritchie JJ.

[1] [1960] Ex. C.R. 194, [1960] C.T.C. 46.

R. H. Barron, Q.C., for the appellant.

D. S. Maxwell, for the respondent.

CARTWRIGHT J. (*dissenting*):—The relevant facts out of which this appeal arises are set out in the reasons of my brother Judson. I agree with his view that the question to be determined is what business the appellant did in fact engage in, and that cases of this sort must all depend on their particular facts.

The respondent seeks to uphold the assessment on the ground that the profit resulting from the sale of the lands in question was income of the appellant for the year 1955 from its business. There is no doubt that the appellant was carrying on a business which it wound up when it became apparent that its scheme to develop a shopping centre could not be carried out. The question to be determined is whether the gain which resulted to the appellant from the sale of the lands was a capital gain or was income within the meaning of the applicable provisions of the *Income Tax Act*.

It is clear from many decisions that the *Income Tax Act* does not impose tax upon a profit which is in truth a capital gain. On this point it is sufficient to refer to the unanimous judgment of this Court delivered by Locke J. in *Sutton Lumber and Trading Company Ltd. v. Minister of National Revenue*[1], in which are set out the principles by which the Court should be guided in dealing with the question, essentially one of fact, whether a particular profit is in truth a capital gain.

In the case at bar the question whether the profit realized by the appellant is subject to tax is dependent upon whether in fact the true nature of the business in which it engaged was, (i) the purchase of lands with a view to reselling them at a profit or, (ii) the development of a shopping centre to be held and operated as an investment or, (iii) both of these.

As I read the reasons of the learned trial judge, he has accepted as truthful the evidence of the appellant's witnesses and has found that the "motivating intention" of the appellant and its promoters and directors was to purchase the lands as the first step in the erection and development

[1] [1953] 2 S.C.R. 77, [1953] 4 D.L.R. 801.

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of a shopping centre to be held and operated as a revenue-producing investment. He has however held the profit realized subject to tax on the ground that reasonable and experienced business men, such as the promoters were, must have envisaged the possibility of being unable to carry out the scheme of developing the shopping centre and have hoped in that event to dispose of the lands at a profit. Accepting this as a reasonable inference, it does not appear to me to justify the finding that the appellant was in fact engaged in the business of buying and selling lands. I do not think the evidence supports the view that the appellant or its promoters would have purchased, or did purchase, the lands in question as a speculation looking to re-sale.

Applying the principles set out in the *Sutton Lumber* case it appears to me that the sales of the lands made by the appellant were a realization of its capital assets when the purpose for which they had been acquired was defeated by the decision of the department store mentioned in the evidence to build on a nearby site. To put the matter colloquially, the lands were acquired and disposed of not as the stock-in-trade or inventory of a dealer in land but as capital assets of a developer of a shopping centre which, owing to circumstances beyond the control of the appellant, it became impossible to develop. The result is not affected by the circumstance that these capital assets were held for a much shorter time than those which were under consideration in the *Sutton Lumber* case.

I would allow the appeal with costs throughout and direct that the judgment of the Exchequer Court and the assessments should be set aside.

The judgment of Fauteux, Martland, Judson and Ritchie JJ. was delivered by

JUDSON J.:—Regal Heights Limited appeals from the judgment of the Exchequer Court[1] which dismissed its appeal from the judgment of the Income Tax Appeal Board. The issue is whether the appellant was properly assessed on a profit of $135,704.73 arising from its dealings with certain real property in the City of Calgary. The appellant reported an income for the year 1955 of $970.94. The department re-assessed at $135,704.73. Both the Income Tax

[1] [1960] Ex. C.R. 194, [1960] C.T.C. 46.

Appeal Board and the Exchequer Court have held that the re-assessment was correct. Hence this appeal. The question is whether the appellant's profit from the sale of this real estate in the 1955 taxation year was a profit derived from a venture or concern in the nature of trade and was therefore income from a business within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act*, R.S.C. 1952, c. 148.

In September 1952 one Benjamin Raber became interested in the purchase of 40 acres of land in the City of Calgary which was then being operated as the Regal Golf Course. Mr. Raber took in three other associates and the four, as partners, purchase the property for $70,000. They intended to attempt to establish a large shopping centre on the property.

In May 1953 the partners purchased for $14,700 a property on the other side of the road which would be useful in giving more ready access to a shopping centre. They also purchased in March 1954 an undivided one-third interest in a property some distance away which they proposed to use for the purpose of advertising the existence of the shopping centre. The total outlay of the partners for the acquisition of these properties was, therefore, $88,700. In February 1954 they incorporated Regal Heights Limited and transferred all the property in question to the company in return for shares. The partners were the sole shareholders of the company. It became apparent in September 1954 that a shopping centre of the kind intended could not be established on the property. The reason was that a large department store, which the promoters hoped to interest in their centre, announced publicly that it intended to locate in the neighbourhood but on another site 20 blocks away.

The company, in December 1954, disposed of 30 acres for $88,500. In May 1955 the shareholders passed a resolution to wind up the company. The company next sold the property on the other side of the road, which had been purchased for the purpose of access, for $20,000, and finally, in May 1955, it sold 6.3 acres of the remaining property for $143,200.

There is no doubt that the primary aim of the partners in the acquisition of these properties, and the learned trial judge so found, was the establishment of a shopping centre but he also found that their intention was to sell at a profit if they were unable to carry out their primary aim. It is

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the second finding which the appellant attacks as a basis for the taxation of the profit as income. The Minister, on the other hand, submits that this finding is just as strong and valid as the first finding and that the promoters had this secondary intention from the beginning.

The appellant adduced much evidence concerning the efforts of the promoters to establish what was described as a "regional shopping centre". This means the largest of this type of enterprise and requires an area of from 30 to 60 acres. These promoters undoubtedly had the necessary land but a scheme of this kind involves an expenditure of anything from $2,000,000 to $5,000,000 and its financing and establishment depend upon the negotiation of leases with satisfactory tenants, and above all, upon the negotiation of a lease with a major department store as the centre of attraction.

It is necessary to set out the efforts made by the promoters to develop this property in this way. The acquisition of the two additional properties, the one for the purpose of easy access and the other for the purpose of advertising the centre, fits into the scheme. In February 1953 they secured a favourable opinion from the Calgary Planning Board that the property would be re-zoned from residential to commercial purposes although the Board withheld formal approval until there should be some indication that construction would begin. In addition, they had sketches made to show what the centre would look like. These sketches were no more than promotional literature. They made studies of other shopping centres; with professional help they compiled lists of prospective tenants; they entered into discussions with four department stores although the evidence shows that there was only one which might possibly be interested; they had discussions with one of the banks concerning the financing of the project; they had a special survey made at a fee of $3,000 for the purpose of influencing one particular department store; and they incorporated this company.

These efforts were all of a promotional character. The establishment of a regional shopping centre was always dependent upon the negotiation of a lease with a major department store. There is no evidence that any such store did anything more than listen to the promoters' ideas. There

is, understandably, no evidence of any intention on the part of these promoters to build regardless of the outcome of these negotiations. There is no evidence that these promoters had any assurance when they entered upon this venture that they could interest any such department store. Their venture was entirely speculative. If it failed, the property was a valuable property, as is proved from the proceeds of the sales that they made. There is ample evidence to support the finding of the learned trial judge that this was an undertaking or venture in the nature of trade, a speculation in vacant land. These promoters were hopeful of putting the land to one use but that hope was not realized. They then sold at a substantial profit and that profit, in my opinion, is income and subject to taxation.

Throughout the existence of the appellant company, its interest and intentions were identical with those of the promoters of this scheme. One of the objects stated in the memorandum of association of the company was

> To construct and operate apartment houses, blocks, shopping centres and to otherwise carry on any business which may be conveniently carried on in a shopping centre.

Nothing turns upon such a statement in such a document. The question to be determined is not what business or trade the company might have carried on but rather what business, if any, it did in fact engage in. (*Sutton Lumber and Trading Co. Ltd. v. Minister of National Revenue*[1]). What the promoters and the company did and intended to do is clear to me on the evidence, as it was to the learned trial judge. They failed to promote a shopping centre and they then disposed of their speculative property at a profit. This was a venture in the nature of trade and the profit from it is taxable within the meaning of ss. 3, 4 and 139(1)(*e*) of the *Income Tax Act*. These cases must all depend on their particular facts and there is no analogy between the sale of long-held bona fide capital assets, as in the *Sutton Lumber* case, and the realization of a profit from this speculative venture in the nature of trade.

I would dismiss the appeal with costs.

[1] [1953] 2 S.C.R. 77 at 93, [1953] 4 D.L.R. 801.

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Appeal dismissed with costs, CARTWRIGHT J. *dissenting.*

Solicitors for the appellant: Helman, Fleming & Neve, Calgary.

Solicitor for the respondent: A. A. McGrory, Ottawa.