1963
*Feb. 18
Mar. 27

OSLER, HAMMOND & NANTON LIMITED ..... APPELLANT;

AND

Not Followed.
M.N.R. v. ...
65 D.T.C.
5221

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Profit on sale of shares retained in investment account—Underwriter—Whether capital gain or income—Admissibility of evidence of subsequent transactions—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).

The appellant carried on the business, *inter alia*, of an investment dealer. In 1954, it underwrote an issue of preferred and common shares of a company and retained 22,000 of the common shares in an "investment account". In 1956, the appellant received the right to acquire one new common share for each four it held. It thus received 5,500 shares which were immediately sold at a profit of $19,250. In 1957, the appellant sold 2,000 of its 22,000 shares at a profit of $57,032.88. The appellant contended that both profits were capital gains, but the Minister assessed them as income derived from business. The assessment was affirmed by the Exchequer Court. The taxpayer appealed to this Court.

Held: The appeal should be dismissed.

The shares were not purchased as an investment, they formed part and were received by the appellant as part of an underwriting transaction. They were sold in the course of the appellant's business of underwriting, and any profits arising from their disposition were profits from the appellant's business. It made no difference that they were retained in what the appellant chose to call an "investment account". This retention was inseparably connected with the underwriting activity, and the profits derived from this activity, whether immediate or deferred, were subject to income tax.

The trial judge erred in rejecting a tender of evidence by the Minister concerning the appellant's financial statements for 1958, 1959 and 1960 and purchases and sales of other securities recorded in the investment account. This was relevant to show a course of conduct and to show that at all times the shares in question were part of the appellant's stock-in-trade.

APPEAL from a judgment of Thorson P. of the Exchequer Court of Canada[1], affirming the appellant's assessment for income tax.

Alan Sweatmen, Q.C., for the appellant.

G. F. Henderson, Q.C., and *J. A. Irving*, for the respondent.

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

[1] [1961] C.T.C. 462, 61 D.T.C. 1291.

The judgment of the Court was delivered by

JUDSON J.:—The appellant company, among other activities, carries on the business of an investment dealer. In 1954 it agreed to purchase from Trans-Prairie Pipelines Limited a new issue of preference and common shares. It purchased 140,000 preference shares for $700,000, less a commission of $37,500, and 190,000 common shares for $140,000. We are concerned in this appeal with the common shares. The company sold 140,000 of these for $140,000, leaving it with a balance of 50,000 shares. 28,000 of these were used as a bonus on the sale of the preference shares at the rate of one common share for each five preference shares, leaving the appellant with 22,000 common shares which it retained in its investment account.

In 1956, Trans-Prairie Pipelines Limited gave its common shareholders the right to purchase one new common share for each four held. The appellant thus became entitled to 5,500 shares, which it immediately sold at a profit of $19,250. Counsel admits that this profit is taxable if the next mentioned profit in the year 1957 is taxable.

In 1957, the appellant sold 2,000 shares out of the block of 22,000 common shares which it had retained in its investment account since the 1954 underwriting. On this sale it realized a profit of $57,032.88. Both the profits on the sale of the rights in 1956 and on the sale of the 2,000 shares in 1957 were assessed for income tax as income derived from the appellant's business. The appellant argues that they were capital gains. The judgment of the Exchequer Court[1] was that they were income subject to taxation.

Much evidence was heard on the reasons why the appellant retained the block of 22,000 common shares but it is all adequately summarized in the reasons of the learned President of the Exchequer Court when he said that the appellant thought that it was a good investment and hoped that its retention would lead to further business from the issuing company. The ratio of the decision in the Exchequer Court which I wish to affirm is that the appellant did not purchase these shares as an investment. They formed part of and were received by the appellant as part of an

[1] [1961] C.T.C. 462, 61 D.T.C. 1291.

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Judson J.

underwriting transaction. They were acquired and, to the extent of 2,000 shares, were sold in the course of the appellant's business of underwriting, and any profits arising from their disposition were profits from the appellant's business. The fact that they were retained in what the appellant chose to call an "investment account" made no difference. This retention was inseparably connected with the appellant's underwriting activity and the profits derived from this activity, whether immediate or deferred, were subject to income tax.

I attach no importance to the fact that on the figures that I have quoted above, these 22,000 shares may be regarded as the appellant's commission for the underwriting of the common shares. Even if this had not been so, it would still be a case where the shares had been acquired and sold and the profits made in the course of the appellant's business.

Counsel for the Minister on this appeal argued that there was error in a ruling on evidence made at the trial. The learned trial judge, against counsel's objection, rejected a tender of evidence and cross-examination on the following matters:

(a) the financial statements of the appellant for its 1958, 1959 and 1960 taxation years;
(b) purchases and sales of securities recorded in the investment account in the years subsequent to the years under appeal;
(c) purchases and sales of securities recorded in the investment account in the 1956 and 1957 taxation years in the cases where the appellant at the end of the 1957 taxation year still held some of these securities.

In my opinion, there was error in the rejection of this evidence. It was relevant to show a course of conduct in trading in securities recorded in the investment account, and to show that at all times the shares of Trans-Prairie Pipelines Limited sold in 1956 were part of the appellant's stock-in-trade and that the profit from the sale of these shares arose from the business carried on by the appellant.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Pitblado, Hoskin & Company, Winnipeg.

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