RONALD K. FRASER .....APPELLANT;

1964
*June 23
Oct. 6

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Purchase of land for shopping centre and apartment house project—Transfer of land to private companies for shares—Sale of shares—Whether profit realized capital gain or income from business—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e).

In 1952, the appellant and an associate, both of whom were experienced operators in the field of real estate, jointly acquired four contiguous parcels of land, intending to build a shopping centre and apartment houses for investment purposes. The two associates then formed two corporations, and sold the land intended for the shopping centre to one and the land intended for the apartment houses to the other. The associates received all the issued shares of both corporations in equal proportions. Construction of a store was started on the shopping centre site, but before it was finished, the associates sold all their shares in the corporation holding that land, and shortly afterwards all their shares in the other corporation. The Minister assessed the appellant's profit as income. The assessment was confirmed by the Exchequer Court. An appeal was launched to this Court.

Held: The appeal should be dismissed.

The associates 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. The fact that they incorporated companies to hold the real estate made no difference. The sale of shares, rather than the sale of land, was merely an alternative method they chose to adopt in putting through their real estate transactions. The profit was therefore taxable as income.

APPEAL from a judgment of Cameron J. of the Exchequer Court of Canada[1], confirming an assessment made by the Minister for income tax purposes. Appeal dismissed.

P. N. Thorsteinsson and *James A. Grant,* for the appellant.

D. S. Maxwell, Q.C., for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—The appellant, together with an associate, both of whom were experienced operators in the field of

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

[1] [1963] Ex. C.R. 334, [1963] C.T.C. 130, 63 D.T.C. 1083.

1964

FRASER v. MINISTER OF NATIONAL REVENUE

Judson J.

real estate, bought vacant land in 1952, incorporated two companies to hold the land in two parcels, built on one parcel a store in the year 1953 and sold the store shortly before completion to Dominion Stores. The other parcel they sold at about the same time to a single purchaser. The mode of sale in each case was by way of shares, the appellant and his associate being equal shareholders in the two companies. The appellant claims that he made a capital gain. The Minister of National Revenue assessed the profit as income. The judgment of the Exchequer Court was that the profit was income. This is a bald outline of the problem involved in complicated dealings. But notwithstanding the complexity of the dealings, I think that both the issue and the result are plain and I would affirm the judgment of the Exchequer Court on the ground that the appellant made a business profit.

The appellant between 1937 and 1950 worked in the mortgage department of a large insurance company and there acquired some experience in real estate development and financing. He became associated with one Grisenthwaite and at the time of the trial was secretary of Grisenthwaite Investments Limited, which had been incorporated in 1950 with the appellant owning 49 per cent of the issued shares and Grisenthwaite owning 51 per cent. That company was in the business of construction and sale of commercial and industrial buildings. It had constructed and sold buildings to International Business Machines Limited and Singer Sewing Machines Limited. At the date of the trial it owned six buildings and one shopping centre. It also owned a number of subsidiary companies, one of them in the business of building houses and apartment buildings, three in the business of dealing in real estate, two limited dividend housing companies, one in the heavy construction business and lastly, one which owned a shopping centre.

In 1952, an official of Dominion Stores in charge of real estate, one Foster, approached the appellant to seek his assistance in locating and developing a Dominion Store in the Aldershot area near the City of Hamilton. Originally it was intended that this official, together with the appellant and one other person, would be members of a syndicate of three to be formed for the purpose, but before any lands were purchased, this third person dropped out. The appellant, who was dissatisfied with his minority position in the

Grisenthwaite companies, then made a deal with Grisenthwaite that his project would, as between the two of them, be done on a 50-50 basis and not within Grisenthwaite Investments Limited. The appellant, on behalf of Foster, Grisenthwaite and himself, then acquired through a nominee four contiguous parcels of land totalling 132 acres for a total purchase price of $205,000. Upon the completion of the purchase of the land, Foster held a 50 per cent interest and Grisenthwaite and the appellant each had a 25 per cent interest. The land purchase was completed in the year 1952, but in the spring of 1953, Foster withdrew as a participant. His investment at that point was $60,000. He left this in as an interest-free loan to the appellant and Grisenthwaite.

Before the acquisition of these lands, a town planning expert had given an opinion that a shopping centre would not be economically feasible without an adjoining apartment dwelling project. For this reason, the lands which had been acquired were divided between two companies. 36.17 acres were transferred to Aldershot Investments Limited in June of 1953. The remaining lands were transferred to Aldershot Realty Limited in March of 1954. It was on the 36.17 acres held by Aldershot Investments that the Dominion Store was built. The appellant and Grisenthwaite were equal shareholders in each of these companies. In March of 1953 Aldershot Investments Limited sought a building permit for the erection of a supermarket. The Township of East Flamboro refused this building permit. There were mandamus proceedings which were settled in June of 1953 by the issue of a building permit for a supermarket but it was apparent by this time that zoning regulations would prevent apartment building on the lands which had been conveyed to Aldershot Realty Limited.

Barclay Construction Company Limited, a subsidiary of Grisenthwaite Investments Limited, undertook the construction of the supermarket. In the fall of 1953 a competitor of Dominion Stores approached the appellant with a view to acquiring a site on the lands owned by Aldershot Investments Limited. Dominion Stores objected and offered to buy out Aldershot Investments Limited either by purchase of assets or shares. The transaction was completed by a sale of the shares of Aldershot Investments Limited on

1964

FRASER
v.
MINISTER OF NATIONAL REVENUE

Judson J.

April 14, 1954. The appellant realized a profit of $140,198.38. This is one of the items in dispute.

The appellant in his evidence stated that it was his intention in acquiring the lands and that it was also the intention of Aldershot Investments Limited, to develop the lands acquired by that company as a shopping centre and to hold them as a long-term investment. However, it should be noted that the town planning expert had told them that a shopping centre would not be economically feasible without the nearby apartment development. This advice had been given in 1952 and the dispute with the township knocked out any possibility of any such development. The adjoining lands were zoned for single residence dwellings.

In August of 1952 the appellant, in a letter to Dominion Stores, had mentioned two possibilities, rental of the proposed store to Dominion Stores Limited or, in the alternative, an outright sale. In October of 1952, in correspondence with Dominion Stores, the appellant was saying that he and his associate would like to build the building on their own account and lease it to Dominion Stores for a 25 or 30 year lease.

The fact is, however, that this one store was built by the two associates operating through a construction company, which was a subsidiary of Grisenthwaite Investments, and sold to Dominion Stores. This is all that happened. The agreement of sale was made in April of 1954 when the store was about 80 per cent completed. Dominion Stores agreed to buy all the shares of the appellant and Grisenthwaite for $360,000 cash, subject to the condition that the liabilities of Aldershot Investments should not exceed $350,000, which sum included $297,000 payable to the contractor, Barclay Construction Company, which up to that date had been paid nothing. The agreement was carried out and the purchase price divided equally between the appellant and Grisenthwaite. The appellant's profit on the sale of these shares was $140,198.38, which the Minister, in making his re-assessment, added to the appellant's reported income.

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

The same observations apply to the sale of the shares of Aldershot Realty Limited. The contract for the sale of these shares was made in April of 1954 and completed in 1955. On this transaction the appellant made a profit of $23,498.88. This was added by the Minister to his 1954 income. The profit on this sale, however, was realized in 1955 and should have been assessed in that year. This is the only change made by Cameron J. in the re-assessment and there is no cross-appeal on this point.

Some point was made of the fact that the appellant did not in one case sell a store and in the other case vacant land but shares in two companies. I agree with Cameron J. that this was merely an alternative method that they chose to adopt in putting through their real estate transactions. The fact that they incorporated companies to hold the real estate makes no difference. *Associated London Properties, Ltd. v. Henriksen (H. M. Inspector of Taxes)*[1].

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Stikeman, Elliott, Tamaki, Mercier & Turner, Montreal.

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

[1] (1944), 26 Tax Cas. 46.