1953

*May 25
*June 26

EDITH NOAK ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income—Excess profits—Dealings in real estate—Whether carrying on a business—Income War Tax Act, 1927, c. 97—Excess Profits Tax Act, 1940, c. 32.

The appellant was assessed for income and excess profits tax in respect of the years 1943, 1944 and 1945, on profits made from a number of purchases and sales of real estate. She was a partner in a meat business but testified that since 1930 she had, out of her savings, purchased from time to time a number of properties which she sold soon thereafter; that since 1940 she had capital gain in view in making these purchases. The terms of sale in most cases called for a small down-payment and for the balance in monthly instalments. She contended that these were capital profits but the assessment was upheld by the Exchequer Court of Canada.

*PRESENT: Kerwin, Rand, Kellock, Estey and Locke JJ.

Held: The appeal should be dismissed.

Held: The number of transactions entered into by the appellant and, in some cases, the proximity of the purchase to the sale amounted to a carrying on of a "business" within the meaning of the *Excess Profits Tax Act*.

Held further: Nothing has been shown to indicate any error in the method of assessment adopted by the respondent.

APPEAL from the judgment of the Exchequer Court of Canada, Hyndman J. (1), upholding the Minister's assessment.

G. H. Steer Q.C. for the appellant.

H. W. Riley Q.C. and F. J. Cross for the respondent.

The judgment of Kerwin, Estey and Locke JJ. was delivered by

KERWIN J.:—In this appeal nothing turns upon the credibility of the appellant but having read the record since the argument, I am of opinion that the trial judge (1) came to the right conclusion. The principle to be applied is well settled and its application is exemplified in two decisions of this Court: *Argue v. Minister of National Revenue* (2), where the taxpayer succeeded, and *Campbell v. Minister of National Revenue* (3), where the taxpayer failed. It is a question of fact in each case.

The number of transactions entered into by the appellant and, in some cases, the proximity of the purchase to the sale of the property indicates that she was carrying on a business and not merely realizing or changing investments. The method of assessment adopted by the respondent is indicated in a letter to the appellant's auditors from the Director of Income Tax at Edmonton, and nothing has been shown in evidence or in argument to indicate any error in that method. The appeal should be dismissed with costs.

RAND J.:—The question raised in this appeal is simply whether, during the years in question, the series of transactions carried out by the appellant amounted to a carrying on of a "business" as that word is used in the *Excess Profits Tax Act*. Hyndman, Deputy Judge, proceeding on a sound appreciation of the considerations applicable to

(1) [1952] Ex. C.R. 20. (2) [1948] S.C.R. 467.
(3) [1953] 1 S.C.R. 3.

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that determination, found that it did, and I am quite unable to say that, in reaching that conclusion, he was not amply supported by the facts disclosed.

The appeal must be dismissed with costs.

KELLOCK J.:—The sole question involved in this appeal is as to whether or not the profits here in question were derived from the carrying on by the appellant of a "business" within the meaning of the *Excess Profits Tax Act*. The learned trial judge (1), after a careful review of the evidence, concluded that they were so derived.

During the years 1938 to 1945, the appellant carried out some fifty-three transactions of purchase and sale of real estate, to the carrying out of which she devoted all her time outside of that devoted to the meat business which she was carrying on in partnership. She testified that before buying any property she would probably inspect as many as thirty; that since 1940 she had capital gain in view in the making of her purchase; and that she improved some of these properties "for purposes of sale." In a number of instances she had evidently arranged the sale before she consummated the purchase as sale followed immediately on the purchase.

The learned judge approached the question in issue from the standpoint of the principle laid down by Lord Justice Clerk in *California Copper Syndicate v. Harris* (2), approved by Lord Dunedin in delivering the judgment of the Judicial Committee in *Commissioner of Taxes v. Melbourne Trust* (3), and applied by Locke J., delivering the unanimous judgment of this court in *Campbell v. Minister of National Revenue* (4), as follows:

> 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.

(1) [1952] Ex. C.R. 20.
(2) (1904) 5 T.C. 159 at 165.
(3) [1914] A.C. 1001 at 1010.
(4) [1953] 1 S.C.R. 3.

In *Cooper v. Stubbs* (1), Atkin L.J., as he then was, in considering the question as to whether on the evidence in that case the appellant was carrying on a "trade" within the meaning of Schedule D of the *Income Tax Act 1918*, said at page 772:

> There are no doubt laymen who do indulge in speculative purchases in these commodities, and they repeat those speculative purchases more than once, being probably buoyed up by their initial successes. Nevertheless, it seems to me still to be a question of fact whether the professional man, to quote an extreme case, who makes purchases of that kind, and makes more than one of them in the year, can be said to be engaged in a trade or vocation in the course of these purchases. I should think it would probably be a question of degree. Now if it is a question of degree, it must be a question of fact . . . Of course, in all these matters there may be a state of facts which can only lead to one conclusion of law, but when it is, as I have said, a question of degree, it seems to me it must necessarily be a question of fact.

In the case at bar the learned judge below concluded that the only reasonable inference from the evidence was that the appellant had followed a course or system which had in view not just investment but the intention to make profits by sale, and that in so doing she was engaged in the carrying on of a business. I think the learned judge has properly appreciated the facts and has properly directed himself with regard to the law and that his finding should not be disturbed.

The appellant relies upon the judgment of this court delivered by Locke J., in *Argue v. The Minister of National Revenue* (2), as assisting her position. In that case, however, Locke J., said at p. 477:

> I find nothing in the evidence in this case which, in my opinion, justifies the conclusion that the appellant . . . was trading in securities or buying and selling them with a view to profit.

I think, therefore, this decision does not help the appellant.

I concur also with the learned judge in the view that the appellant has not satisfied the onus of establishing any error in the method of assessment, and would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Milner, Steer, Dyde, Poirier, Martland & Layton.*

Solicitor for the respondent: *F. J. Cross.*

(1) [1925] 2 K.B. 753.

(2) [1948] S.C.R. 467.