1963
Mar. 18
1964
Jan. 30

BETWEEN:

RUSSEL W. FYKE .....APPELLANT;

AND

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

Revenue—Income Tax—Income Tax Act R S C. 1952, c. 148, ss. 3, 4 and 139(1)(e)—Income or capital gain—Purchase and sale of real estate—Series of real estate transactions—Adventure in the nature of trade.

The appellant was a farmer who, in 1950, sold part of his farm near Regina, Saskatchewan, and moved into Regina but continued to farm actively until 1960, when he sold the balance of his farm. In 1951, the appellant bought a house in Regina in which he resided with his family for about one year when he sold it because it was too small and was otherwise unsatisfactory. He then bought a lot and had a house built thereon in which he lived from July 1952 to 1954, when he sold it at a profit, allegedly because the basement flooded and it was generally unsatis-

factory. He had another house built in which he resided from July 1954 until April 1957 when he sold it at a substantial profit because, he said, the traffic had increased and the area had been rezoned. He took possession of another house he had built for himself in August 1957, in which he resided until March 1960 when he sold it at a profit, allegedly because of poor bus service and the distance from schools. From 1960 until 1963 appellant lived in a house he had had constructed for himself and which he sold when he moved to Calgary in 1963. The appellant had also purchased another house in Regina in 1953 as an investment, which was rented until it was sold in 1955 to enable the appellant to finance the construction of an apartment house. In 1956 construction was completed on an apartment house owned by the appellant in Regina, which he sold at a substantial profit in 1958. In that year he acquired four lots in Regina and had an apartment building erected thereon upon which he gave an option to purchase before it was completed, the sale being completed in 1959. He built two more apartment buildings in 1959, one of which he sold in 1962 or 1963 when he moved to Calgary.

The respondent reassessed the appellant's income for the taxation years 1957 and 1958 by adding to the 1957 income the profit realized by the appellant when he sold his residence in April 1957, and to his 1958 income the profit he made on the sale of his first apartment house in that year.

Held: That each of the five houses purchased and occupied by the appellant was acquired solely as a home for himself and his family, and there is no evidence to suggest that there was an alternative intention at the time of acquisition to dispose of the properties at a profit or that there was anything speculative about the transactions or anything which could be described as a business or even as an adventure in the nature of trade.

2. That when in 1955 the appellant had constructed the first of a series of apartment houses he was entering upon an adventure in the nature of trade and that the profit from the sale of the first of such apartment houses in 1958 was properly assessed as income of the appellant.

3. That the appeal of the taxpayer with respect to his reassessment for the taxation year 1957 is allowed but the appeal for 1958 is dismissed.

APPEAL under the *Income Tax Act.*

The appeal was heard before the Honourable Mr. Justice Cameron at Regina.

M. Neuman for appellant.

J. G. Sheppard for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (January 30, 1964) delivered the following judgment:

From re-assessments dated May 23, 1961, for the taxation years 1957 and 1958, the appellant has appealed to this

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Court and by consent the appeals were heard together. The appeals relate to the profits realized by the appellant on a sale of his house (3312 Portnall Avenue, Regina, Saskatchewan) in 1957, and on the sale of an apartment house (3801 Princess Drive, Regina) in 1958. Both items of profit were added to the declared income of the appellant and while the Notice of Appeal for the year 1957 puts in question the amount of the profit realized on the sale of the residence, it was admitted at the trial that the profit actually realized was that added by the Minister, namely, $5,100.

The Minister, for that year, had also added a further item of $200 in respect of another matter, but the appeal in relation thereto was abandoned at the trial. The profit realized on the sale of the apartment house in 1958 was admitted to be $34,163.42.

The appellant had for many years farmed in the vicinity of Regina. In 1950 he sold part of his farm and decided to move with his wife, young son and daughter (aged 10 and 11 years) to Regina so as to obtain better educational facilities for his children. While he remained in Regina until the spring of 1963, when he moved to Calgary, he continued farming actively until 1960 when the balance of his farm was sold.

The circumstances under which the residence and the apartment house were acquired and sold will be discussed later. For the moment it is sufficient to say that the evidence of the appellant, corroborated by that of his wife (these were the only two witnesses called by the appellant and none were called by the respondent), establishes to my satisfaction that when considered alone there is nothing to suggest other than that the two properties were acquired solely as investments, the residence as a home for the appellant and his family and the apartment house as an investment from which he expected to and did receive rental income. Were there no further evidence, I think that the Minister in all likelihood would not have added the profits so realized to the declared income, and in any event I would have had no hesitation in allowing the appellant's appeals as regards the profits so added.

But in the period 1951 to 1963 there were a number of other real estate purchases and sales by the appellant, and for the Minister it is submitted that, taking into consideration the whole course of conduct of the taxpayer in the light

of all the circumstances (*Cragg v. Minister of National Revenue*[1]), the only proper deduction to be drawn is that the profits so realized were profits from a business. He relied on ss. 3 and 4 of the *Income Tax Act*, as well as on s. 139(1)(*e*) thereof, which defines business as follows:

> 139. (1) In this Act,
>
> (*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment;

It seems to be now well settled law that in income tax matters the transactions of purchase and sale of a taxpayer, subsequent to the taxation years in question as well as prior thereto, may be put in evidence in order to ascertain the taxpayer's whole course of conduct (*vide Osler, Hammond and Nanton Ltd. v. Minister of National Revenue*[2]—a decision of the Supreme Court of Canada).

It becomes necessary, therefore, to set out briefly the evidence relating not only to the two properties in question, but also to the other purchases and sales of real property by the appellant. All the properties referred to are in Regina, Saskatchewan, and they will be referred to by their street numbers. It is significant to note that counsel for the Minister did not attempt to challenge the evidence of the appellant or his wife (except on one matter which I shall refer to later), but was content to rely entirely on the fact that the appellant, between the years 1951 and 1963, had acquired and sold a number of properties, mostly at a profit.

It is important to note at the outset that the appellant at all relevant times was actively engaged in farming. He was not a builder nor a real estate agent and his evidence that in every case the properties acquired, and later sold, were acquired as investments, was not challenged by any oral evidence on behalf of the Minister. In fact, counsel for the Minister seemed to accept all the evidence of the appellant and his wife as true except on one point which I shall now refer to briefly.

The title to all five residences in which the appellant and his family resided between 1951 and 1963 was taken in the names of the appellant and his wife as joint tenants and not as tenants-in-common; and the evidence of the appel-

[1] [1952] Ex. C.R. 40 at 45. [2] [1963] C.T.C. 164.

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lant and his wife was that they were so taken so that the survivor would become the sole owner. Each also said that the wife in each such case contributed financially to the cost of the houses so purchased, but neither was able to give any details as to when or how much the wife had contributed. In view of the conclusions which I have come to, it is not necessary to consider the alternative plea of the appellant that, if the profit so realized in 1957 was in reality a profit from a business, only one-half thereof should be added to his income, the remaining half being the property of the joint owner, namely, his wife.

I shall consider first the various residences acquired and later sold. As I have said, the appellant swears that all five residences were acquired as a home for his family without any intention whatever of selling them and all were, in fact, occupied for varying periods by the appellant and his family. I will deal with these residences in chronological order.

1. *2326 Montague Street.* This was bought for $14,000 in the spring of 1951 and occupied at once by the appellant and his family who continued in occupation until March, 1952, when it was sold for $14,900. The reasons given for selling the property were that it had only two bedrooms and was small, the appellant needing a larger home with at least three bedrooms for his growing family. It was found to be unsatisfactory, also, as water flooded the basement at times and the ground was very low.

2. *1456 York Street.* The appellant then bought a lot and had a contractor construct a residence thereon, the property being known as 1456 York Street. The appellant and his family took possession in July, 1952 when it was partially completed. It had a small suite in the basement which the appellant rented. The total cost was $12,000. The appellant used this property as his home for about two years. He disposed of it in 1954 as he found that it too was unsatisfactory, situated on low ground, with water flooding the basement and consequent damage to the cement foundation. It was also in an old and undesirable area. It was sold for $16,500—a profit of $4,500. Moreover, the appellant wanted a home without a separate suite so as to have greater privacy for his family.

3. *3312 Portnall Avenue.* This is the property in question for the year 1957. The appellant arranged for a contractor

to construct a residence, the total cost being $12,000. The appellant and his family took possession in July, 1954 and remained there until April, 1957. This was a small bungalow with three bedrooms. When the lot was acquired, the area was zoned for dwellings only, but the municipal authorities later re-zoned the area so as to permit the construction of apartments, a number of which were constructed in the immediate vicinity. As a result, the traffic increased so greatly that the appellant and his wife, desiring to live in a quieter area, disposed of the property for $17,100—a profit of $5,100.

4. *42 Lamont Crescent.* The appellant acquired a building lot, had a contractor construct a residence thereon at a total cost of $14,000. Possession was taken in August, 1957 and the appellant and his family continued to reside there until March, 1960—a period of nearly three years—when it was sold for $17,500. The reasons for selling were that there was no bus service to the downtown area, although such service had been promised, and that the appellant's son was obliged while living there to attend a school in another and distant area.

5. *3337 Queen Street.* The appellant and his wife acquired a lot in the spring of 1960 and again had a building contractor construct a home for them at a total cost of $26,800. This was an excellent home, possession being taken by the appellant and his family in 1960. They remained in possession until 1963 when it was sold for $26,500 (less real estate commission) when the appellant moved to Calgary.

It will be seen, therefore, that in each of the five residences the appellant and his family resided for very considerable periods of time. In my opinion, each of the residences was acquired solely as a home for the appellant and his family and without any intention whatever of selling them until, after several years of occupation, each was found to be unsatisfactory for the reasons stated, and which were not in any way challenged. The last property, of course, was sold only because the appellant was moving to Calgary.

I find no evidence to suggest that in any of these cases there was an alternative intention at the time of acquisition to dispose of the property at a profit or that there was anything speculative about the transactions or anything which could be described as a business or even as an adventure in the nature of trade. I accept unreservedly the evidence of

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the appellant and his wife and have come to the conclusion for these reasons that the appeal for 1957 must be allowed.

The appellant also bought another house known as 4736 Seventh Avenue in May, 1953. It was purchased as an investment in the appellant's name with the intention of renting it. It was occupied by tenants until it was sold in 1955 at about its cost in order to secure funds to assist in building the apartment house known as street number 3801 Princess Drive.

The only question remaining is whether the profit realized in 1958 on the sale of the apartment at 3801 Princess Drive was profit from a business as that term is defined in s. 139(1)(*e*).

In April, 1955 the appellant bought two lots from the City of Regina and by the terms of the agreement (Exhibit 7) covenanted to construct thereon a modern apartment to cost at least $25,000, construction to begin not later than July 31, 1955, and to be completed within one year of the purchase, namely, April 28, 1955. The appellant engaged a contractor to construct the apartment known as 3801 Princess Drive, consisting of seven suites; it was finished at the beginning of 1956 and tenants took possession. The appellant states that in constructing this apartment, as well as the others to be referred to later, he was merely investing his money, looking for a return from rentals and not by re-sale. In 1956 he added four more suites to this apartment house. The total cost was about $30,000, its construction being financed in part by the sale of his rented property on Seventh Avenue and by mortgaging his home at 3312 Portnall Avenue. The appellant sold the apartment house in April, 1958, realizing a profit of $34,163.42. He gave as his reason for selling the property that the property was never satisfactory; it had been built in two parts and was difficult to heat. He also stated that he wanted to build a better type of apartment.

In my view, this purchase and sale marked the beginning of the appellant's entry into the "business" of buying lots, having apartment houses erected thereon and then disposing of them at a profit as soon as a reasonable opportunity presented itself. In the first place, his evidence as to the reasons for the sale of 3801 Princess Drive are uncorroborated in any fashion and his explanation is rather frail. It seems to me that while he may have had the primary intention of

making an investment only, he had a secondary intention of disposing of the property at a profit if a suitable opportunity arose. He stated that he wanted to construct a better type of apartment and it is clear that in order to do so, he had to sell this property.

But it is evident from what next transpired that he was quite prepared to realize profits by sale of his apartment buildings rather than by renting the property. When his first apartment house was sold at a substantial profit, he bought four lots on Retallick Street and again had a contractor construct an apartment of 12 suites thereon, known as 3837 Retallick Street, in the spring of 1958. In the same spring, before the building was completed, he gave an option to sell it and transferred title in 1959 when the construction was complete. This building cost a total of $72,000 and was sold for $94,000—a profit of $22,000. This matter is not directly before me as the profit was realized in 1959.

In the spring of 1959 he decided to have another apartment building of 12 suites constructed on these lots. He stated that this was built for his daughter and that he paid all the costs of construction. The evidence is not clear as to whether it was in fact transferred to his daughter, or whether, if title passed to her, she agreed to pay anything for the property. In the same year he constructed another apartment building on these lots, namely, 3871 Retallick Street, which he states was merely an investment; and that he was looking to the income from rentals rather than from sales. He retained ownership thereof until 1962 or 1963, when he sold it as he was about to move to Calgary. For the same reason he sold the fourth lot on Retallick Street, no building having been erected thereon.

The appellant stated that in buying the lots on Retallick Street he intended only to build apartment houses as investments—one for each member of his family; that he had no intention of selling them if a favourable opportunity for profit making arose. I am far from being satisfied on the evidence that such was the case. Within a period of five years he had had built four substantial apartment buildings, all of which have now been disposed of and in the main at substantial profits. Even omitting from consideration the

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sale of the apartment at 3871 Retallick Street, due it is said to the appellant's move to Calgary, the fact remains that one apartment house was sold shortly after completion and another was sold long before it was completed, both at very substantial profits. At to the other apartment house, said to have been built for his daughter, the appellant has not satisfied me that if it was transferred to her in 1959 (the year in which it was constructed), that the transaction was a gift rather than a sale.

In regard to the taxation year 1958, the appellant in my view has failed to displace the onus cast on him to satisfy the Court that there is error in law or in fact in the assessment (see *Johnston v. Minister of National Revenue*[1]). I am satisfied from a consideration of the evidence and the whole course of conduct of the appellant in relation to the apartment houses, that when in 1955 he had constructed the first of a series of apartment houses, he was entering upon an adventure in the nature of trade and that in 1958 the profits from the sale of the first of such transactions were realized when he sold 3801 Princess Drive.

For these reasons, the appellant's appeal from the re-assessment for the taxation year 1958 will be dismissed and the re-assessment affirmed.

The re-assessment for the year 1957 having been allowed, it will be referred back to the Minister to re-assess the appellant in accordance with my findings.

Success being divided, I direct that no costs be allowed to either party.

Judgment accordingly.

[1] [1948] S.C.R. 486.