Docket: 2007-3584(IT)G

BETWEEN:

RALPH BODINE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on January 18, 2010, at Victoria, British Columbia

Before: The Honourable Justice G. A. Sheridan

Appearances:

Counsel for the Appellant:	D. Laurence Armstrong
Counsel for the Respondent:	Michael Taylor

JUDGMENT

In accordance with the attached Reasons for Judgment, the appeals from the reassessments made under the *Income Tax Act* for the 2000 and 2001 taxation years are dismissed, with costs to the Respondent.

Signed at Ottawa, Canada, this 24th day of August, 2010.

"G. A. Sheridan"

Sheridan J.

Citation: 2010TCC426
Date: 20100824
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REASONS FOR JUDGMENT

Sheridan, J.

[1] The Appellant is appealing the assessment by the Minister of National Revenue of his 2000 and 2001 taxation years. The appeal of the 2001 taxation year was abandoned at the hearing; the only issue remaining is whether the gain realized by the Appellant in 2000 from the sale of a 20-acre parcel of land near Phoenix, Arizona ("Parcel 6") is taxable on account of capital or income. The Minister assessed the gain as income from a business, or alternatively, as income from an adventure in the nature of trade.

[2] The Appellant was the only witness to testify. He was forthright and credible in his testimony but, in any case, it is not so much the facts that are in dispute as their interpretation.

Background

[3] The transactions giving rise to the present appeal can be briefly summarized as follows: in 1940, the Appellant's father acquired land in what was at that time a rural area outside of Phoenix, Arizona. In 1977, the Appellant purchased his father's

property which included Parcel 6. In 1994, he transferred his interest in Parcel 6 to a partnership of which he was a controlling member. In 2000, Parcel 6 was sold to a third party. It is the tax treatment of the Appellant's share of the gain realized on that sale that is the subject of this appeal.

[4] Parcel 6 was part of the Appellant's father's vegetable and citrus fruit operation. The Appellant was actively involved with the farming operation from his earliest days. After completing his studies at Harvard, he returned to the farm and ultimately took over the business. By that time, the farm was exclusively in citrus fruit production. Over the years, the Appellant served as the Chairman of two very influential agricultural organizations, the Sunkist Growers' Co-operative and the Western Growers' Association and was appointed by President Bush Sr. to chair a committee on rural issues, including the delivery of electricity and other services. The Appellant owned other farmland and rental property in both Canada and the United States.

[5] Sometime in 1980, the Appellant was approached by The Westcor Company ("Westcor"), a Phoenix company engaged in developing and holding land for commercial purposes. The Appellant listened to Westcor's overtures but at that time, was not particularly interested in such a project. Nothing came of those discussions.

[6] Around the same time, the Appellant and his then wife, Charlene, divorced. As a result, the Appellant's assets, including Parcel 6, were divided and it was transferred to a revocable living trust. The Appellant and Charlene were both trustees and beneficiaries with beneficial interests of 80% and 20%, respectively.

[7] Meanwhile, the city of Phoenix continued to experience rapid growth. By the early 90's, its encroachment into the surrounding countryside was making farming increasingly untenable. The Appellant began to think about selling Parcel 6.

[8] On September 28, 1994, a partnership known as the Bodine Parcel 6 Limited Partnership ("Parcel 6 Partnership") was formed. Its members were the Appellant, Charlene and the Marlin Group.

[9] The Marlin Group was wholly owned by the Appellant and managed by one William Chaney, the Appellant's operating officer. Mr. Chaney enjoyed the respect and confidence of both the Appellant and Charlene; by making the Marlin Group the managing partner of the Parcel 6 Partnership, the Appellant hoped to reduce the risk of any delays in the sale of Parcel 6 by having Mr. Chaney act as a buffer between him and his former spouse. With that in mind, the Appellant transferred one per cent of his 80% beneficial interest in Parcel 6 to the Marlin Group.

[10] Also on September 28, 1994, the Appellant, Charlene and the Marlin Group transferred their respective interests in Parcel 6 to the Parcel 6 Partnership[1]. Each member held a share in the Parcel 6 Partnership proportionate to their original interests in Parcel 6, 79%, 20% and 1%, respectively.

[11] A few days later, on October 1, 1994, the Parcel 6 Partnership joined with the Westcor Company II Limited Partnership ("Westcor Partnership"), an Arizona limited partnership controlled by Westcor, to form the Parcel 6 Associates Partnership ("P6-Westcor Partnership"), each with a 50% partnership share[2].

[12] Nearly six years later, on April 20, 2000, the P6-Westcor Partnership entered into a property purchase agreement with Costco Wholesale Corporation ("Costco")[3]. Although the agreement was signed by the parties, title to Parcel 6 was not conveyed to Costco at that time.

[13] A few months later, on October 16, 2000, Costco assigned its interest in the property purchase agreement to The Price Company, Inc. ("Price Co.")[4]. Again, however, the purchase was not completed; nor was Parcel 6 ever transferred to P6-Westcor Partnership as originally anticipated.

[14] On November 6, 2000, several documents were executed. In anticipation of the pending sale to Price Co., the partners executed the "Agreement for Distribution of Property from [Parcel 6 Partnership]"[5] to cause the Parcel 6 Partnership, "the legal owner of [Parcel 6][6]", to distribute that property to the partners according to their respective partnership interests. It was further agreed that should the sale fall through, the partners would convey their interests in Parcel 6 back to the Parcel 6 Partnership[7]; if the sale were completed, however, the Parcel 6 Partnership was to be dissolved[8],

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[1] Joint Book of Documents, Tabs 4, 5, 6 and 7.

[2] Joint Book of Documents, Tab 8.

[3] Joint Book of Documents, Tab 10.

[4] Joint Book of Documents, Tab 12.

[5] Joint Book of Documents, Tab 17.

[6] Above, paragraph 2 of the Preamble.

[7] Above, Clause 6.

[8] Above, Clause 7.

which is, in fact, what happened[9]. By special warranty deed, the Parcel 6 Partnership conveyed its interest in Parcel 6 back to the Appellant (79%), Charlene (20%) and the Marlin Group (1%)[10]. Finally, the Appellant, Charlene and the Marlin Group, in their individual capacities, conveyed their respective interests in Parcel 6 to Price Co.[11]

[15] Parcel 6 remained in active citrus production from 1977 until its sale to Price Co. in 2000. The Appellant used at least some of the sale proceeds to acquire replacement farmland known as Whitewing farm. The United States tax authorities treated the gain realized as a capital gain.

[16] The facts assumed by the Minister in paragraph 15 of the Reply to the Notice of Appeal are attached in the Appendix to these Reasons for Judgment.

Appellant's Preliminary Objections

[17] Before dealing with the substantive issues, counsel for the Appellant raised the following preliminary concerns: first, that the Court ought to take into account the fact that the American tax authorities had accepted his treatment of the proceeds of disposition from Parcel 6 as a capital gain. Counsel further submitted that the Respondent should be precluded from arguing that there had been a change of intention as to the use to which Parcel 6 was intended to be put because this issue had not been properly pled: not only had the Minister failed to include in the Reply sections 13 and 45[12] of the *Income Tax Act*, but also, the assumptions underpinning the change of use were statements of law rather than fact:

> ttt) at the time that ownership of Parcel 6 was transferred to the Parcel 6 Partnership, the property changed from a capital property to inventory held for resale;

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[9] Joint Book of Documents, Tab 16.

[10] Joint Book of Documents, Tab 13.

[11] Joint Book of Documents, Tabs 14, 19 & 23 (executed November 8, 2000) and 15, respectively.

[12] And possibly section 44 which counsel for the Appellant included in the Appellant's Book of Documents but which I understood him to say in argument did not apply to the Appellant's situation.

uuu) the Parcel 6 Partnership disposed of Parcel 6 in the course of a business or an adventure in the nature of trade; and

[18] I see no merit in any of the above contentions. On the first point, the Appellant tendered no evidence of American tax law. Even if he had, how the IRS chose to treat the gains realized on Parcel 6 would not be binding on the Canada Revenue Agency.

[19] In respect of the impugned assumptions, paragraphs 15(ttt) and (uuu) are part of very detailed factual assumptions recounting, among other things, the historical use of the land and the various legal transactions that occurred up to and including its sale. Read in that context, it seems to me that they come within the acceptable ambit of mixed fact and law described by Rothstein, J.A. (as he then was) in *R. v. Anchor Pointe Energy Ltd.*[13]:

> 25 I agree that legal statements or conclusions have no place in the recitation of the Minister's factual assumptions. The implication is that the taxpayer has the onus of demolishing the legal statement or conclusion and, of course, that is not correct. The legal test to be applied is not subject to proof by the parties as if it was a fact. The parties are to make their arguments as to the legal test, but it is the Court that has the ultimate obligation of ruling on questions of law.
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> 26 However, the assumption in paragraph 10(z) can be more correctly described as a conclusion of mixed fact and law. A conclusion that seismic data purchased does not qualify as CEE within the meaning of paragraph 66.1(6)(a) involves the application of the law to the facts. Paragraph 66.1(6)(a) sets out the test to be met for a CEE deduction. Whether the purchase of the seismic data in this case meets that test involves determining whether or not the facts meet the test. The Minister may assume the factual components of a conclusion of mixed fact and law. However, if he wishes to do so, he should extricate the factual components that are being assumed so that the taxpayer is told exactly what factual assumptions it must demolish in order to succeed. It is unsatisfactory that the assumed facts be buried in the conclusion of mixed fact and law.

[20] In the present matter, the assumed facts in 15(ttt) and (uuu) can hardly be said to be "buried" in conclusions of mixed fact and law. First of all, there is really no other way to describe the factual basis assumed by the Minister without having recourse to legal terminology. When read in light of the many other assumed facts and the clear statement of the issues in paragraphs 16 and 18 of the Reply, it cannot be said that the facts in 15(ttt) and (uuu) have not been sufficiently extricated from the law so as to put the Appellant on notice of the case he must meet: that Parcel 6 was acquired by the Parcel 6 Partnership in 1994 and that, at the time of its

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[13] [2004] 5 C.T.C. 98. (F.C.A.).

acquisition, the intention was to change its use from a capital asset in the citrus fruit operation to a single item of inventory in the partnership's business of selling the property.

[21] As for subsection 13(7) and section 45, counsel for the Appellant contended that these provisions were fundamental to the Minister's position that there had been a "change of use" of Parcel 6 in 1994 and accordingly, they ought to have been included in the Reply. He went on to say, however, that even if they had been, subsection 13(7) and section 45 were without application because, as a matter of fact, Parcel 6 had remained in citrus production from 1977 to its sale in 2000 and there was no "change of use" as contemplated by those provisions.

[22] I am persuaded by the Respondent's argument that there was no need for the Minister to plead subsection 13(7) and section 45. The Minister's assessment of the 2000 taxation year was not based on whether, in 1994, there had been a change of intention as to the use of Parcel 6 that triggered its deemed disposition as contemplated by subsection 13(7) and section 45. Rather, the assessment was based on the gain realized on the actual disposition of Parcel 6 in 2000; the nature of that gain, is dependent upon whether in that year, the Appellant had transferred his interest in Parcel 6 to the Parcel 6 Partnership and if so, whether upon the partnership's acquisition of the property there had been an intention to change its use from a capital asset to inventory in a business. Accordingly, the governing provisions are sections 96, 97 and 98 of the *Act's* partnership rules, all of which were properly included in paragraph 17 of the Reply.

[23] Turning, then, to the substantive issue, counsel for the Appellant contended that nothing turned on the creation in 1994 of the Parcel 6 Partnership or the Appellant's subsequent transfer of his interest in Parcel 6 to the partnership. While acknowledging that all necessary legal steps had been taken to achieve these objectives, he argued that these were just paper transactions. Notwithstanding the legal effect of the duly executed documents, it was always understood that from the time of his acquisition of Parcel 6 in 1977 to its sale in 2000, the Appellant maintained an intention to treat it as a capital asset in the citrus farm operation.

[24] With respect, I found the Appellant's argument sometimes contradictory and generally unpersuasive[14]. In all the circumstances, it would be incorrect, for the

[14] See transcript, page 100, lines 7-25 to page 101, lines 1-11; page 105, lines 6-13; and page 108, lines 5-13.

purposes of determining intention, to disregard the effect of the creation of the Parcel 6 Partnership and the transfer of Parcel 6 to it in 1994.

[25] The Appellant is a successful, well-educated businessman with extensive experience in both agriculture and real estate. As counsel for the Appellant put it, "… Mr. Bodine is obviously a very capable and accomplished gentleman and doesn't come in here with gumboots smelling of manure …"[15].

[26] The Appellant was candid in his testimony that when he began to entertain the idea of selling Parcel 6, one of the reasons for setting up the Parcel 6 Partnership was to minimize any deleterious effects his relations with his former spouse might have on the management of the sale by putting the property into a partnership managed by an individual they both could trust, Mr. Chaney. He also said that as the individual with the majority interest in Parcel 6 and later, the Parcel 6 Partnership, he was able to control decisions in respect of the land and the partnership. It was not by accident, then, that all the documents necessary to create the partnership and to transfer Parcel 6 to it were duly prepared and executed.

[27] I agree with counsel for the Respondent that these were very real transactions that put in place a legal structure from which specific tax consequences flowed. The Appellant's argument makes no distinction between the Appellant in his capacity as the sole proprietor of the Bodine Company (somehow) engaged in the farming of Parcel 6, and as a partner in the Parcel 6 Partnership, to which that property had been duly transferred. The Appellant's own testimony shows that he considered these to be quite different undertakings:

> Q After the Parcel 6 partnership was formed, the partnership … with you and Charlene and Marlin, what was the -- what did that partnership do with the land that's known as Parcel 6?
>
> A Well, the partnership was just to accommodate the administration of the activity ["anticipated sales"[16]], the activity of farming still went forward. In fact, we had part of that. We had a parallel company called the Bodine Company which was really the arm that continued to farm. And so all of the farming supplies and the labour and the machinery all belonged to the Bodine company, which was, you know, involved with it, hands-on farming.
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> Q And that was you.

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[15] Transcript, page 99, lines 22-24.

[16] Transcript, page 22, line 14.

A Mm-hmm.[17]

[28] When the Appellant transferred his interest in Parcel 6 to the Parcel 6 Partnership in 1994, the legal landscape changed. The creation of the Parcel 6 Partnership triggered the application of the *Act's* partnership provisions; in particular, subsection 97(1):

> **97.** (1) Where at any time after 1971 a partnership has acquired property from a taxpayer who was, immediately after that time, a member of the partnership, the partnership shall be deemed to have acquired the property at an amount equal to its fair market value at that time and the taxpayer shall be deemed to have disposed of the property for proceeds equal to that fair market value.

[29] Applied to the facts of this case, when on September 28, 1994 the Parcel 6 Partnership acquired Parcel 6 from the Appellant who, immediately afterward, became a member of the Parcel 6 Partnership, that land was deemed to have become the property of the partnership. Accordingly, when in 2000 Parcel 6 was sold to Price Co., under subsection 96(1) the gain realized was that of the Parcel 6 Partnership and had to be allocated to its members at its year-end in accordance with their respective interests.

[30] Counsel for the Appellant argued that subsection 97(1) had no application because just prior to the sale of Parcel 6, the partnership transferred it back to the partners in their individual capacities and concurrent with that event, the Parcel 6 Partnership was dissolved. Only then did the Appellant sell his interest in Parcel 6 to Price Co. While admitting that there was no sale agreement to document that sale ("We farmers sometimes are a little sloppy"[18]), the Appellant said each partner had individually reported his or her own gain on the transaction.

[31] Again, I agree with the Respondent's contention that whether Price Co. acquired Parcel 6 from the Parcel 6 Partnership or from the Appellant after it was transferred back to him, the effect was the same. The Minister assessed on the basis that there had been a direct sale of Parcel 6 between the Parcel 6 Partnership and Price Co. with only a conditional transfer of Parcel 6 back to the partners to facilitate that sale. This conclusion, finds support in the fact that the "Agreement for Distribution of Property from [Parcel 6 Partnership]"[19] expressly provided that had

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[17] Transcript, page 30, lines 14-25 to page 31, lines 1-3.

[18] Transcript, page 85, lines 15-16.

[19] Joint Book of Documents, Tab 17.

the sale not been completed, the partners would have been obliged to convey Parcel 6 back to the Parcel 6 Partnership.

[32] However, even if the Appellant's version of events is correct, the transfer of Parcel 6 back to the partners just prior to the sale would have triggered a deemed disposition by the Parcel 6 Partnership under subsection 98(2):

> 98(2) Subject to subsections 98(3) and 98(5) and 85(3), where at any time after 1971 a partnership has disposed of property to a taxpayer who was, immediately before that time, a member of the partnership, the partnership shall be deemed to have disposed of the property for proceeds equal to its fair market value at that time and the taxpayer shall be deemed to have acquired the property at an amount equal to that fair market value.

[33] In these circumstances, the gain would be deemed to have been that of the partnership and would still be allocated back to its members under subsection 96(1).

[34] The evidence is clear that there was a valid transfer of Parcel 6 from the Appellant to the Parcel 6 Partnership on September 28, 1994. Thus, in determining whether Parcel 6 was intended to be used as a capital asset in the citrus farm operation or as inventory in the business of the sale of land, the relevant time is September 28, 1994, the date of its acquisition[20] by the Parcel 6 Partnership.

[35] The next question has to do with the nature of the transaction: capital or income? Counsel for the Appellant referred the Court to a recent decision of the Federal Court of Appeal, *Canada Safeway Limited v. Her Majesty the Queen*[21]. In that decision, Nadon, J.A. noted that the factors listed in *Interpretation Bulletin IT-218R* had been used by the courts[22]:

> [42] In Interpretation Bulletin IT-218R can be found a list of factors which courts have used to determine whether a transaction pertaining to real estate is an adventure in the nature of trade:
>
> (a) the taxpayer's intention with respect to the real estate at the time of its purchase;

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[20] *Hazeldean Farm Co. v. Canada (Minister of National Revenue—M.N.R.)*, [1967] 1 Ex.C.R. 245 at page 257.

[21] 2008 FCA 24; [2008] 2 C.T.C. 149. (F.C.A). Nadon, J.A. writing for the Court with concurring reasons by Pelletier, J.A.).

[22] Above, at paragraph 42.

(b) feasibility of the taxpayer's intention;

(c) geographical location and zoned use of the real estate acquired;

(d) extent to which intention carried out by the taxpayer;

(e) evidence that the taxpayer's intention changed after purchase of the real estate;

(f) the nature of the business, profession, calling or trade of the taxpayer and associates;

(g) the extent to which borrowed money was used to finance the real estate acquisition and the terms of the financing, if any, arranged;

(h) the length of time throughout which the real estate was held by the taxpayer;

(i) the existence of persons other than the taxpayer who share interests in the real estate;

(j) the nature of the occupation of the other persons referred to in (i) above as well as their stated intentions and courses of conduct;

(k) factors which motivated the sale of the real estate;

(l) evidence that the taxpayer and/or associates had dealt extensively in real estate.

> None of the factors listed in 3 above are conclusive in themselves for the purpose of determining that a gain arising on the sale of real estate constitutes income or a capital gain. The relevance of any factor to such a determination will vary with the facts of each case.

[36] Justice Nadon went on to say that "… the most determinative factor is the intention of the taxpayer at the time of acquiring the property. If that intention reveals a profit-making scheme, then the Court will conclude that the transaction is an adventure in the nature of trade."[23] At paragraph 61 of his Reasons, Nadon, J.A. set out a number of principles drawn from the case law to assist in this determination:

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[23] Above, at paragraph 43. See *Hazeldean Farm Co. v. Canada (Minister of National Revenue—M.N.R.)*, [1967] 1 Ex.C.R. 245 at p. 257; *Reicher v. R.*, [1975] 12 N.R. 31; [1975] C.T.C. 659; *Hiwako Investments Ltd. v. M.N.R.*, [1978] 21 N.R. 220; [1978] C.T.C. 378.

> [61] A number of principles emerge from these decisions which I believe can be summarized as follows. First, the boundary between income and capital gains cannot easily be drawn and, as a consequence, consideration of various factors, including the taxpayer's intent at the time of acquiring the property at issue, becomes necessary for a proper determination. Second, for the transaction to constitute an adventure in the nature of trade, the possibility of resale, as an operating motivation for the purchase, must have been in the mind of the taxpayer. In order to make that determination, inferences will have to be drawn from all of the circumstances. In other words, the taxpayer's whole course of conduct has to be assessed. Third, with respect to "secondary intention", it also must also have existed at the time of acquisition of the property and it must have been an operating motivation in the acquisition of the property. Fourth, the fact that the taxpayer contemplated the possibility of resale of his or her property is not, in itself, sufficient to conclude in the existence of an adventure in the nature of trade. In *Principles of Canadian Income Tax Law, supra*, the learned authors, in discussing the applicable test in relation to the existence of a "secondary intention", opine that "the secondary intention doctrine will not be satisfied unless the prospect of resale at a profit was an important consideration in the decision to acquire the property" (see page 337). I agree entirely with that proposition. Fifth, the *viva voce* evidence of the taxpayer with respect to his or her intention is not conclusive and has to be tested in the light of all the surrounding circumstances.

[37] In his concurring Reasons, Pelletier, J.A. noted some of the difficulties encountered by the courts in trying to distinguish between inventory and capital property on a "profit-making scheme" basis. Concluding from his review of the jurisprudence that it was often easier to show what a property was *not* than what it was, Justice Pelletier then suggested that the appropriate test was:

> … whether the property is acquired with the intention of being held for the purpose of producing income (or being used in the production of income), in which case it is capital property. If it is acquired for the purpose of being turned over, it is inventory.[24]

[38] The following passage from *Canada Safeway* provides an example of the application of his approach to the facts in that case:

> … It is clear that Canada Safeway did not acquire its co-ownership interest [in a shopping centre] with the intention of producing income from that interest. In other words, Canada Safeway did not acquire that interest with a view to generating rental income. Nor was the co-ownership interest to be used in the conduct of Canada Safeway's grocery business. Canada Safeway's intention at the time it acquired the property was not to hold the property as a source of income; as a result, its co-

[24] Above, at paragraph 78.

> ownership interest in the shopping centre must necessarily be inventory. Since the transaction was an isolated one, it amounts to an adventure in the nature of trade.[25]

[39] What were the intentions when the Parcel 6 Partnership acquired Parcel 6 in 1994? The Appellant testified that with each passing year, the city's incursion into the outskirts of Phoenix edged Parcel 6's highest and best use value away from farming and towards commercial development. While I accept that it was not known exactly when the tipping point might occur, nor do I doubt that when the Parcel 6 Partnership was created and Parcel 6 transferred to it in 1994, an intention had been formed to profit from the land, not by its use as an asset in the citrus farm operation, but rather from its imminent sale through the partnership.

[40] One of the three elements of a valid partnership is the intention to carry on the partnership business with a view to profit. What was to be the source of that profit? According to the partnership documents, its purposes included:

> …improving and developing the Real Property in order to maximize income therefrom, and selling all or a portion of the Real Property and any improvements constructed thereon at such time as it is appropriate in order to realize capital gains from the appreciation of the Real Property.
> …
>
> The Partnership does not intend to engage in business as a dealer in real property."[26]

[41] Counsel for the Appellant submitted that the above disclaimers precluded a finding that Parcel 6 was intended to be inventory. He also argued that the Parcel 6 Partnership and P6-Westcor Partnership were really nothing more than listing agents handling the sale of the citrus farm.

[42] I do not think the evidence supports either conclusion. On the latter point, there is documentary evidence to show that the partnership had engaged a real estate company, Phoenix Commercial Advisors, to handle the sale of Parcel 6 to Price Co.[27]. As for self-serving statements in the partnership agreement as to the nature of the gain, they can hardly be determinative of the issue.

[43] More interesting is what is not included in the description of the partnership's business activities: there is no mention of the Parcel 6 Partnership having any

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[25] Above, at paragraph 81.

[26] Joint Book of Documents, Tab 3, paragraph 1.5 at page K-151.
[27] Transcript, page 106; Joint Book of Documents, Tab 20.

involvement or interest in the citrus farm operation. This is consistent with the Appellant's own testimony that the farm was separate from the partnership, run in his name as a sole proprietorship[28]. He was also very clear that notwithstanding Charlene's 20% partnership interest in Parcel 6, she had no entitlement to any income from the farm operation[29]. Finally, while insisting that he had planned to keep Parcel 6 in citrus production as long as possible, he was quick to agree on cross-examination it would have ended immediately upon the Parcel 6 Partnership receiving a good offer on the property. And that is indeed what happened.

[44] It was only for the purpose of realizing that goal that the P6-Westcor Partnership was formed. Although ultimately, Parcel 6 was never transferred from the Parcel 6 Partnership to the P6-Westcor Partnership as originally anticipated, its sole *raison d'être* was the marketing and sale of Parcel 6. According to the partnership agreement, its stated business purposes included:

> …acquiring and owning the real property… and holding, developing, managing, encumbering, selling and leasing the same. … Development of the Property shall consist of the construction of road and utility installations both on and off the Property ("Infrastructure") and may consist of the construction of buildings on the Property ("Development Project"). It is the intention and purpose of the Partnership to hold the Property and all improvements constructed thereon for the production of income and capital appreciation and, at the appropriate time, to liquidate the Property and realize any capital gain. The Partnership does not intend to engage in business as a dealer in real property.[30]

[45] What Westcor brought to the table was its expertise in marketing and development. Mr. Chaney, as the Appellant's operations officer, the managing partner of the Parcel 6 Partnership and the representative of the P6-Westcor Partnership, provided the perfect conduit for all aspects of the sale of Parcel 6. He was in regular contact with Westcor and other experts to obtain current development and marketing data[31]. Throughout the six-year period between the Parcel 6 Partnership's acquisition of Parcel 6 and its disposition, Mr. Chaney provided detailed daily briefings to the Appellant on Westcor's activities in respect of the sale of the 480 acres of which Parcel 6 was a part. In fairness, the Appellant testified that

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[28] Transcript, pages 30-31.

[29] Transcript, page 92.

[30] Joint Book of Documents, Tab 8 at page 87.

[31] For example, Joint Book of Documents, Tab 21.

Mr. Chaney discussed "everything" with him, including the citrus farm operation. Whatever else he may have told the Appellant about Parcel 6, however, his only role in respect of the Parcel 6 Partnership and the P6-Westcor Partnership was to manage its sale.

[46] Applying the approach of Pelletier, J.A. in *Canada Safeway* to the present facts, the Parcel 6 Partnership did not acquire Parcel 6 in 1994 with the intention of producing income from the citrus grove located on it. Nor was it to be held, as some of Westcor's land parcels were, to generate rental income. By default, then, the intended use of Parcel 6 must have been as inventory to be turned over to a willing buyer.

[47] The evidence is such, however, that there is no need to reach that conclusion by default. It furnishes positive proof of the kind contemplated by Nadon, J.A.'s five principles to show that the only intention with respect to the use of Parcel 6 at the time it was acquired by the Parcel 6 Partnership in 1994 was its quick sale. Counsel for the Respondent also referred the Court to *Duthie Estate v. Her Majesty the Queen*[32] in which Rothstein, J. (as he then was) applied the approach in *Edmund Peachey Limited v. The Queen*[33]:

> … a clear and unequivocal positive act implementing a change of intention would be necessary to change the character of the land in question from a trading asset to a capital asset – and on the facts here present, there was no evidence of such a positive or overt act. There was no documentary evidence to indicate that a new intention had been carried into reality, there was no dedicating of the land for another purpose. All that we have here is the expressed intention of the appellant to thenceforth hold the land as a capital asset. That is not, in my view, sufficient of itself to convert the proceeds of sale from trading proceeds to proceeds from the sale of a capital asset.[34]

[48] From this it follows that, in determining whether there has been a change of intention in respect of the use of the property, there is a presumption in favour of the *status quo*. Here, there is no question that prior to the transfer of Parcel 6 to the Parcel 6 Partnership in 1994, the land had been a capital asset intended for use (and used) in the farming operation. However, as of September 28, 1994, that intention changed.

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[32] [1995] 2 C.T.C. 157. (F.C.A.).

[33] (1979), 79 DTC 5064. (F.C.A.).

[34] Above, at page 5067.

[49] Expressed in the language of *Edmund Peachey*, the evidence in the documents and of “clear and unequivocal positive” acts is consistent only with an intention to dedicate Parcel 6 to a new purpose and to carry that intention into reality. The Appellant himself admitted that Parcel 6 was created for the purpose of selling the land. That intention was put into reality with agreements creating the two partnerships, transferring Parcel 6 from the Appellant to Parcel 6 Partnership, and harnessing Westcor’s considerable expertise and providing for the development and marketing of Parcel 6. That some of the plans for Parcel 6 were never carried out (roads and sewers were not put in) does not detract from the force of all the other actions taken to sell Parcel 6 through the partnership. From the time Parcel 6 was transferred to the Parcel 6 Partnership in 1994 until its sale in 2000, marketing activities were carried on under the keen supervision of and with regular reports from Mr. Chaney. Following the same sort of practical analysis used in *Duthie Estate*, had it really been the Appellant’s intention simply to farm Parcel 6 until a good offer rolled down the road, why go to all the fuss and bother of the partnership arrangement? The only sensible conclusion to be drawn is that as of September 28, 1994, there was a clear intention to convert Parcel 6 from a capital asset used in the production of farm income to an item of inventory for sale in the Parcel 6 Partnership business. That the Appellant in his capacity as a sole proprietor kept it in citrus production did not in any way diminish the intention to use that property as inventory in an isolated sales transaction. For that reason, it amounts to an adventure in the nature of trade.

[50] Counsel for the Appellant also argued that because the Appellant used his share of the proceeds of the disposition of Parcel 6 to acquire other farmland sometime after November 2000, the intention must have been to treat Parcel 6 as a capital asset. Even if there were clear evidence of such a transaction, the relevant time for the determination of intention is when the property was acquired; how the proceeds of disposition were ultimately used does not come into it.

[51] For the reasons set out above, the Appellant has not proven wrong the basis for the Minister’s assessment. The appeals of the 2000 and 2001 taxation years are dismissed, with costs to the Respondent.

Signed at Ottawa, Canada, this 24th day of August, 2010.

“G. A. Sheridan”

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Sheridan J.

Appendix

15. In determining the Appellant's tax liability for the 2000 taxation year on May 14, 2007, the Minister made the following assumptions of fact:

The Appellant

a) the Appellant was a resident of Canada in the 2000 taxation year;

b) previously, the Appellant had been a resident of the United States, where he lived in the Phoenix, Arizona region;

c) in the 2000 taxation year, the Appellant earned income from breeding and racing horses in Canada, and from farming, property development and sale, gas station ownership and commercial property rental in the United States;

d) the Appellant operated his Canadian horse breeding and racing business personally;

e) the Appellant conducted his United States activities through a variety of corporations and partnerships;

Other Relevant Parties

f) the Appellant's former spouse is named Charlene Bodine ("Charlene");

g) the Appellant and Charlene separated in the early 1980s;

h) Charlene was not a resident of Canada at any material time;

i) the Marlin Group, Inc. (the "Marlin Group") is a California corporation 100% owned by the Appellant;

j) the Marlin Group was incorporated to manage the various entities through which the Appellant conducted business in the United States;

k) the Marlin Group has a staff of employees who handle the business and accounting operations for the Appellant's various United States entities;

l) the Marlin Group was not resident in Canada at any material time;

m) The Westcor Company II Limited Partnership (the "Westcor Partnership") was an Arizona limited partnership ultimately controlled by The Westcor Company ("Westcor");

n) Westcor is a property development company specializing in retail real estate development;

o) Westcor has been engaged in retail development for over 30 years, has developed nearly 20 million square feet of retail and office space and is the dominant shopping mall developer in Arizona;

The Parcel 6 Property

p) going back to the 1980s, the Appellant owned several parcels of land (the "Lands") in and around metropolitan Phoenix;

q) Parcel 6 comprised approximately 20.85 acres of the Lands;

r) the Lands were originally acquired by the Appellant's father in the 1940s and were used to farm citrus crops;

s) title to the Lands was held by the Bodine Produce Company from 1946 until 1980;

t) in 1980, title to 12 parcels of the Lands, including Parcel 6, was transferred to the Appellant;

u) in 1983, title to 9 parcels of the Lands, including Parcel 6, was transferred to a trustee to hold an undivided 80% interest for the benefit of the Appellant and an undivided 20% interest for the benefit of Charlene;

The Parcel 6 Partnership

v) on September 28, 1994, the Appellant entered into an agreement with Charlene and the Marlin Group to form the Parcel 6 Partnership;

w) the Parcel 6 Partnership was an Arizona limited partnership;

x) the Marlin Group was the general partner of the Parcel 6 Partnership, while the Appellant and Charlene were limited partners;

y) the respective partnership interests in the Parcel 6 Partnership were:

i) the Appellant 79%
ii) Charlene 20%
iii) The Marlin Group 1%;

z) the members of the Parcel 6 Partnership each agreed to contribute their respective undivided beneficial interest in Parcel 6 to the partnership;

aa) the principal business of the Parcel 6 Partnership included "…. selling all or a portion of [Parcel 6] and any improvements constructed thereon at such time as it is appropriate …";

bb) the members of the Parcel 6 Partnership anticipated that its primary business would be to become a general partner in Parcel 6 Associates, a proposed new Arizona general partnership anticipated to be formed for the purpose of master planning, developing and selling Parcel 6;

cc) by Deed recorded October 5, 1994, the trustee holding title to the Lands conveyed title to Parcel 6 as follows:

i) an undivided 79% beneficial interest to the Appellant,
ii) an undivided 20% beneficial interest to the Charlene, and
iii) an undivided 1% beneficial interest to the Marlin Group;

dd) by subsequent Deeds also recorded on October 5, 1994, the members of the Parcel 6 Partnership conveyed their interests in Parcel 6 to the partnership as their respective capital contributions;

<u>Parcel 6 Associates</u>

ee) on October 1, 1994, the Parcel 6 Partnership and the Westcor Partnership entered into an agreement to form Parcel 6 Associates;

ff) Parcel 6 Associates was an Arizona general partnership;

gg) the Parcel 6 Partnership and the Westcor Partnership were each 50% partners in Parcel 6 Associates;

hh) in entering into Parcel 6 Associates, the Parcel 6 Partnership agreed to contribute its undivided beneficial interest in Parcel 6 to Parcel 6 Associates, upon request by the managing partner, as its initial capital contribution;

ii) the purposes of Parcel 6 Associates included holding, developing, managing, encumbering, selling and leasing Parcel 6, as well as constructing road and utility installations on or off the property and buildings on the property;

jj) the Westcor Partnership was designated the managing partner of Parcel 6 Associates;

kk) as managing partner of Parcel 6 Associates, the Westcor Partnership was empowered to plan, implement and manage any development undertaken on

Parcel 6, including necessary rezoning applications, infrastructure construction and marketing involved in bringing Parcel 6 to market;

ll) the Parcel 6 Associates partnership agreement provided that if at least 140,000 square feet of building area had not been developed or sold by December 31, 2003, Parcel 6 Associates would distribute any and all remaining unsold portions of Parcel 6 to the Parcel 6 Partnership and would be dissolved;

mm) the Parcel 6 Partnership never contributed its undivided beneficial interest in Parcel 6 to Parcel 6 Associates;

The Sale of Parcel 6

nn) on April 20, 2000, Parcel 6 Associates entered into an agreement to sell Parcel 6 to Costco Wholesale Corporation ("Costco") for an anticipated purchase price of US $6,678,280.00;

oo) the final sale price of Parcel 6 was ultimately increased to US $6,781,387.50 to reflect the exact square footage of Parcel 6;

pp) the purchase agreement gave Costco 90 days to satisfy itself as to the suitability of Parcel 6 for its intended purpose, which period was ultimately extended by mutual agreement to October 24, 2000;

qq) on October 16, 2000, Costco assigned its right, title and interest in the Parcel 6 purchase agreement, with the consent of Parcel 6 Associates, to The Price Company, Inc., a California corporation;

rr) the sale of Parcel 6 to The Price Company, Inc. closed on November 9, 2000;

ss) by Deeds recorded on November 9, 2000, the Parcel 6 Partnership conveyed its interest in Parcel 6 to its members as follows:

i) an undivided 79% beneficial interest to the Appellant,
ii) an undivided 20% beneficial interest to Charlene, and
iii) an undivided 1% beneficial interest to the Marlin Group;

tt) under the terms of the Parcel 6 Partnership's partnership agreement, the transfer of ownership of Parcel 6 to its members on November 9, 2000 dissolved the partnership;

uu) by subsequent Deeds also recorded on November 9, 2000, the Appellant, Charlene and the Marlin Group all conveyed their respective interests in Parcel 6 to The Price Company, Inc.;

Computation of the Parcel 6 Profit

vv) in the course of the transfers referred to in paragraphs 14(ss) and (uu) above, the Parcel 6 Partnership disposed of its interest in Parcel 6;

ww) as at November 9, 2000, the fair market value of Parcel 6 was US $6,781,387.50;

xx) as at November 9, 2000, the Canadian dollar equivalent of US $6,781,387.50 was $10,071,716.62;

yy) as at November 9, 2000, the adjusted cost base of Parcel 6 to the Parcel 6 Partnership was US $4,310,000.00;

zz) expressed in Canadian dollars, the adjusted cost base of Parcel 6 to the Parcel 6 Partnership as at November 9, 2000 was $5,907,286.00;

aaa) the Appellant's 79% share of the gain realized by the Parcel 6 Partnership in respect of its disposition of Parcel 6 on November 9, 2000 was $3,289,900.00;

The Sale of Parcel 6 was an Income Transaction

bbb) through the 1990s, metropolitan Phoenix expanded rapidly and the area in which the Lands are located underwent extensive retail and residential development;

ccc) Parcel 6 is located close to the Arrowhead Towne Center, a 1.3 million square foot shopping mall developed by Westcor and opened in 1993;

ddd) as metropolitan Phoenix expanded, the Lands became more valuable for their development potential than as farm properties;

eee) the Appellant undertook an organized venture of systematically placing parcels of the Lands into limited partnerships for the purpose of developing and selling those parcels for profit as the opportunity to do so arose;

fff) on October 1, 1999, after the Parcel 6 Partnership formed Parcel 6 Associates to market and sell Parcel 6, but before Parcel 6 was actually sold, the Appellant formed a similar limited partnership to develop, market and sell another parcel of the Lands knows as the "Citrus Aire Property";

ggg) the Citrus Aire Property comprised approximately 55.6 acres of the Lands;

hhh) the Citrus Aire Property was also located close to the Arrowhead Towne Centre;

iii) the Appellant, Charlene and the Marlin Group were members of the limited partnership formed to develop and sell the Citrus Aire Property (the "Citrus Aire Partnership") and had the same respective interests in that partnership as they did in the Parcel 6 Partnership;

jjj) negotiations to sell the Citrus Aire Property were underway even before the Citrus Aire Partnershp was formed;

kkk) the members of the Citrus Aire Partnership elected to develop and market the Citrus Aire Property without the involvement of a property developer such as Westcor because the Marlin Group believed that its prior experience in marketing land through partnerships with Westcor had prepared it to manage the Citrus Aire Property venture itself;

lll) on December 22, 1999, the Citrus Aire Partnership entered into agreements to sell 22.43 acres of the Citrus Aire Property to Wal-Mart Stores, Inc. ("Wal-Mart") for US $5,989,500.00, and 14.38 acres of the property to Sam's West, Inc. ("Sam's West") for US $3,593,700.00;

mmm) the final sale prices for the land sold to Wal-Mart and Sam's West were adjusted to US $5,379,693.00 and US $3,445,035.00, respectively, based on the exact square footage sold;

nnn) co-ordinate with the Wal-Mart and Sam's West purchase agreements, the Citrus Aire Partnership entered into a Joint Development Agreement with those purchasers;

ooo) under the Joint Development Agreement, the Citrus Aire Partnership agreed to incur the cost of rezoning and certain infrastructure improvements required to facilitate access to, and the proposed use of, the land sold to Wal-Mart and Sam's West;

ppp) on July 19, 2000, the trustee holding title to the Lands conveyed title to the Citrus Aire Property to the Citrus Aire Partnership as the Appellant's, Charlene's, and the Marlin Group's respective capital contributions to that partnership;

qqq) the sale to Wal-Mart closed on December 29, 2000 and the sale to Sam's West closed on June 29, 2001;

rrr) during the 1990s, the Appellant developed and sold other parcels of land in addition to Parcel 6 and the Citrus Aire Property through similar partnership structures involving Charlene, the Marlin Group, and Westcor;

sss) when they transferred ownership of Parcel 6 to the Parcel 6 Partnership, the Appellant and the other owners of Parcel 6 intended it to be resold;

ttt) at the time that ownership of Parcel 6 was transferred to the Parcel 6 Partnership, the property changed from a capital property to inventory held for resale;

uuu) the Parcel 6 Partnership disposed of Parcel 6 in the course of a business or an adventure in the nature of trade; and

vvv) the primary reason for leaving Parcel 6 and other portions of the Lands intended to be sold for development in active agricultural production until sold was to quality for a lower property tax rate exigible on agricultural land until those properties were sold.

CITATION:	2010TCC426
COURT FILE NO.:	2007-3584(IT)G
STYLE OF CAUSE:	RALPH BODINE AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Victoria, British Columbia
DATE OF HEARING:	January 18, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice G. A. Sheridan
DATE OF JUDGMENT:	August 24, 2010

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