BETWEEN:

1955
Oct. 11 & 12
Dec. 9

GORDON CHUTTER ..... APPELLANT;

AND

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

Revenue—Income Tax—The Income Tax Act, R.S.C. 1952, c. 148, s. 3, 4, 139(1)(e)—"Business"—Profit or capital gain—Isolated transaction—Profit on isolated transaction subject to income tax—Appeal dismissed.

Appellant purchased four engines and resold them at a profit. Appellant's sole occupation is that of manager of a company manufacturing wire rope. Appellant was assessed for income tax on the profit realized from the sale of the engines and appealed to this Court. He contends that the engines were purchased for re-sale and not for use and that the profit is a capital gain the transaction being an isolated one.

Held: That the purchase of the engines cannot be regarded as an ordinary investment; they were purchased for the purpose of re-sale at a profit and not for the purpose of deriving any income through the leasing or rental of them; the transaction was a deal in machinery and constituted an adventure in the nature of trade or business and the profit is a gain made through an operation of business in the course of carrying out a scheme for profit making and attracted income tax.

APPEAL under the Income Tax Act.

The appeal was heard before the Honourable Mr. Justice Ritchie at Vancouver.

Harry R. Bray, Q.C. for appellant.

F. J. Cross for respondent.

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

RITCHIE J. now (December 9, 1955) delivered the following judgment:

This is an appeal from a reassessment made by the Minister of National Revenue on October 6, 1954 in respect to the income of Gordon Chutter of Vancouver for the 1952-1953 taxation years.

The appellant objects to the reassessments because a receipt amounting to $26,917.21, resulting from a sale of machinery, is added to 1952 income and a receipt amounting to $1,468.21 added to 1953 income.

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The appellant, during the taxation years in question and in subsequent years, has had no occupation other than that of managing director of Wright's Canadian Wire Ropes, Limited, a company engaged in the manufacture and sale of wire rope. Apart from the transaction on which is based the assessment appealed from, the appellant has had no dealings in machinery.

On March 30, 1951, the appellant purchased from Dulien Steel Products Inc., a United States corporation carrying on business at Seattle in the State of Washington, four used General Motors diesel engines, each weighing approximately twenty tons and having a horsepower of 1840 each. The aggregate purchase price for the four engines was $20,000.00. The cost in Canadian funds of the four engines landed in Canada was $29,614.58.

On April 19, 1951, the defendant entered into an agreement (Exhibit 1) to sell the four engines to General Machinery Limited of Vancouver for the sum of $65,000.00, payable by instalments, with the deferred payments carrying interest at five per cent. On or about January 31, 1952, the agreement was re-negotiated and the purchase price reduced to $58,000.00.

The appellant first learned of the engines through a Mr. Kaplan, who controls and is the manager of General Machinery Limited. Mr. Kaplan thought a profit could be made through purchasing the engines for re-sale and suggested to the appellant that he either loan him the money to purchase the engines or that they become partners in the transaction. The appellant declined the proposals made by Mr. Kaplan but became interested and about ten days later, accompanied by Mr. Kaplan, inspected the engines at Seattle and agreed to purchase them. The appellant says that he purchased the engines for re-sale and had no intention of using them.

Sections 3, 4 and 139 (1) (*e*) of the Income Tax Act read as follows:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

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;

The Minister contends that the profit realized from the sale of machinery was income from a business. The appellant denies that he was in the business of buying and selling machinery and says the profit realized was in the nature of a capital gain and so not taxable. Stress also was laid on the fact that the machinery transaction was an isolated one.

Application of the isolated transaction test alone for the purpose of determining whether a profit realized from one purchase and one sale is liable to income tax is neatly dealt with by the President of this Court in *Atlantic Sugar Refineries Limited* v. *Minister of National Revenue* (1) at page 630:

> There remains the contention that the appellant's gain was not taxable income because it was not income from any trade and because its venture was an isolated transaction outside its normal business operations and unconnected therewith. The appellant cannot escape liability merely by showing that its entry into the raw sugar futures market was an isolated transaction. While it is recognized that as a general rule an isolated transaction of purchase and sale outside the course of the taxpayer's ordinary business does not constitute the carrying on of a trade or business so as to render the profit therefrom liable to income tax—*vide Commissioners of Inland Revenue* v. *Livingston et al.* (1926) 11 T.C. 538 at 543, per Lord Sands; *Leeming* v. *Jones,* [1930] 1 K.B. 279; [1930] A.C. 415; it is also established that the fact that a transaction is an isolated one does not exclude it from the category of trading or business transactions of such a nature as to attract income tax to the profit therefrom. There are numerous expressions of opinion to that effect—*vide Californian Copper Syndicate* v. *Harris,* (1904) 5 T.C. 159; *T. Beynon and Co., Limited* v. *Ogg,* (1918) 7 T.C. 125 at 133; *McKinley* v. *H. T. Jenkins and Son, Limited,* (1926) 10 T.C. 372 at 404; *Martin* v. *Lowry,* (1925) 11 T.C. 297 at 308, [1926] 1 K.B. 550 at 554, [1927] A.C. 312; *The Cape Brandy Syndicate* v. *Commissioners of Inland Revenue,* (1920) 12 T.C. 358; *Commissioners of Inland Revenue* v. *Livingston,* (1926) 11 T.C. 538; *Balgownie Land Trust, Ltd.* v. *Commissioners of Inland Revenue,* (1929) 14 T.C. 684 at 691; and *Anderson Logging Co.* v. *The King,* [1925] S.C.R. 45 at 56.
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> Whether the gain or profit from a particular transaction is an item of taxable income cannot, therefore, be determined solely by whether the transaction was an isolated one or not.

(1) [1948] Ex. C.R. 622.

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And at page 633:

> While it may not be possible to define the line between the class of cases of isolated transactions the profits from which are not assessable to income tax and that of those from which the profits are so assessable more precisely than in the tests referred to, it is clear that the decision cannot be made apart from the facts. The character or nature of the transaction must be viewed in the light of the circumstances under which it was embarked upon and the decision as to the side of the line on which it falls made after careful consideration of its surrounding facts.

The judgment of the President was affirmed by the Supreme Court (1).

The often-made contention that because a profit realized on the purchase and sale of an article is an isolated case it is not subject to taxation also is dealt with in the judgments of my brother Cameron in *McDonough* v. *The Minister of National Revenue* (2) and of Lord Radcliffe in *Edwards* v. *Bairstow* (3).

At page 312 in the *McDonough* v. *The Minister of National Revenue* case *(supra)* Cameron J. said:

> But the mere fact that a transaction is an isolated one does not exclude it from the category of trading or business transactions of such a nature as to attract income tax to the profit therefrom.

At page 58 in the *Edwards and Bairstow* case *(supra)* Lord Radcliffe said:

> There remains the fact which was avowedly the original ground of the commissioners' decision—"this was an isolated case". But, as we know, that circumstance does not prevent a transaction which bears the badges of trade from being in truth an adventure in the nature of trade. The true question in such cases is whether the operations constitute an adventure of that kind, not whether they by themselves, or they in conjunction with other operations, constitute the operator a person who carries on a trade. Dealing is, I think, essentially a trading adventure, and the respondents' operations were nothing but a deal or deals in plant and machinery.

The purchase and re-sale of the four engines by the appellant bear the badges of trade. The purchase cannot be regarded as an ordinary investment. The engines were purchased for the purpose of re-sale at a profit and not with any thought of deriving any income through the leasing or rental of them. The transaction was a deal in machinery.

(1) [1949] S.C.R. 706. (2) [1949] Ex. C.R. 300.
(3) [1955] 3 All E.R. 48.

The circumstances surrounding the purchase and re-sale of the engines fall clearly within the well-known rule enunciated by the Lord Justice Clerk (Macdonald) in *Californian Copper Syndicate* v. *Harris*, (1).

It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise 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 realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.

What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

The words of Lord Radcliffe at page 58 in the report of *Edwards* v. *Bairstow* (*supra*) also have particular application:

If I apply what I regard as the accepted test to the facts found in the present case, I am bound to say, with all respect to the judgments under appeal, that I can see only one true and reasonable conclusion. The profit from the set of operations that comprised the purchase and sales of the spinning plant was the profit of an adventure in the nature of trade. What other word is apt to describe the operations? Here are two gentlemen who put their money, or the money of one of them, into buying a lot of machinery. They have no intention of using it as machinery, so they do not buy it to hold as an income-producing asset. They do not buy it to consume or for the pleasure of enjoyment. On the contrary, they have no intention of holding their purchase at all. They are planning to sell the machinery even before they have bought it. And, in due course, they do sell it, in five separate lots, as events turned out. And, as they hoped and expected, they make a net profit on the deal, after charging all expenses such as repairs and replacements, commissions, wages, travelling and entertainment and incidentals, which do, in fact, represent the cost of organising the venture and carrying it through.

(1) (1904) 5 T.C. 159.

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I find that the appellant's purchase of the four engines and their re-sale at a profit constituted an adventure in the nature of trade or business and that the profit is a gain made through an operation of business in the course of carrying out a scheme for profit making.

The appeal will be dismissed with costs.

Judgment accordingly.