

1961
Sept. 27
1962
Aug. 17

BETWEEN:

THE MINISTER OF NATIONAL REVENUE } APPELLANT;

AND

MAX WOLFE RESPONDENT.

Revenue—Income tax—The Income Tax Act, 1948, S. of C. 1948, c. 52, ss. 3, 4, and 127(1)(e)—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, and 139(1)(e)—Bonus on mortgages—Mortgage discounts—Capital gains or income—Taxpayer engaged in speculative or adventurous undertakings in nature of trade—Appeal allowed.

Respondent, engaged in the wholesale produce business, from time to time purchased mortgages recommended to him by his solicitor at a discount and also made direct loans to mortgagors receiving a bonus on such. All these mortgages were for short terms and most were second mortgages on real property, some were second chattel mortgages. The Minister of National Revenue assessed the respondent for income tax on the discounts and bonuses realized on 31 of these transactions for the years 1948 to 1953 inclusive. An appeal to the Tax Appeal Board was allowed and from that decision the Minister appeals to this Court.

Held: That the discounts and bonuses realized by the respondent are income and subject to tax.

- 2. That while the respondent could not be said to be operating a business in the ordinary sense of the term he was engaged in speculative or adventurous undertakings of a trading nature within the provisions of s. 139(1)(e) of the *Income Tax Act*.
- 3. That respondent's mortgage dealings were short-term profit-making transactions frequently repeated, highly speculative and could not be regarded as ordinary or normal investments.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Kearney at Toronto.

H. D. Guthrie, Q.C. for appellant.

J. J. Robinette, Q.C. for respondent.

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

KEARNEY J. now (August 17, 1962) delivered the following judgment:

The Court is here concerned with an appeal from a decision of the Income Tax Appeal Board reported as *No. 565 v. The Minister of National Revenue*¹, wherein the

respondent's (hereinafter sometimes referred to as "the taxpayer") appeal from reassessments of his income tax for the years 1948 to 1953, inclusive, was allowed.

In his reassessments, the appellant added to the respondent's reported income, for each of the above-mentioned years, the sums of \$9,225, \$1,790, \$1,570, \$7,950, \$4,350 and \$4,250 respectively, representing either bonuses or discounts received by the taxpayer in respect of direct loans which he made to mortgagors or discounts on mortgages which he purchased.

The case turns on whether the foregoing amounts constitute income from a business within the meaning of s. 3 of *The Income War Tax Act*, R.S.C. 1927, ss. 3, 4 and 127(1)(e) of the *Income Tax Act*, S. of C. 1948, c. 52, and ss. 3, 4 and 139(1)(e) of the *Income Tax Act*, R.S.C. 1952, c. 148.

Although the taxpayer, in the first year in question, was assessed under *The Income War Tax Act*, in the later years under the *Income Tax Act 1948*, and still later, under the present Act as contained, for the purposes of the present appeal, in the 1952 revision, counsel agreed that nothing turns on this differentiation and that we may direct our attention solely to the *Income Tax Act* as it stood in 1952, the relevant provisions of which 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)(e). 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.

At the opening of the hearing, counsel for the appellant tendered as exhibits the returns filed by the taxpayer for the six years in question, the Minister's reassessment for each of such years, the taxpayer's notices of dissatisfaction and the Minister's replies thereto, which, by consent, were filed as a single exhibit marked "Ex. 1". Similarly, a

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memorandum, containing fifteen consecutively numbered pages, plus four additional pages some of which are unnumbered and hereinafter referred to as a supplement, giving, *inter alia*, particulars and the number of each mortgage transaction entered into by the respondent during the six years in question, as well as similar transactions effected by the taxpayer in years prior and subsequent to the 6-year period in question, was filed as Exhibit 2.

The only witness heard on behalf of the respondent was the taxpayer himself.

At the date of trial, he was in his 70th year. Born in Warsaw, he came to Canada in 1905. He resides in Forest Hill Village, Toronto, where he has been "for many, many years engaged in the fruit and vegetable business". From a modest beginning, he caused to be incorporated in 1911 the Ontario Produce Company, of which, at the time of the hearing, he was vice-president, owning 50 per cent of the issued stock of the company, his brother being the owner of the other 50 per cent. He held a similar office and stock ownership in Oshawa Wholesale Limited, which was a distributor of fruits and vegetables to the IGA stores and groceries. Prior to 1930 the respondent had been able to effect savings which he invested in the stock market and which he totally lost following the 1929 crash.

Since the above loss, the respondent, as he modestly put it, has been able to buy some odd few shares of stock as the money came to him. I say "modestly" because the schedules of his dividends attached to his income tax returns show that during the six years in issue his average dividends from his stock market investments have amounted to about \$10,000 per annum.

In respect of mortgage transactions, leaving aside the interest he derived therefrom, the respondent's average realization on discounts and bonuses during the same period amounted approximately to \$5,000 per annum. His evidence also indicates that he attended to his own stock market investments and these show very little variation from year to year. The respondent does not appear to have invested in bonds but very largely in what are sometimes termed "growth stocks", consisting of dividend yielding common shares.

Any time the question of putting his money into mortgages arose, Mr. Wolfe relied entirely on Mr. Shifrin who was his nephew and legal adviser. The respondent stated that he was wholly occupied from early morning to late at night in his fruit and vegetable business and had neither the time nor the required knowledge to appraise the worth or otherwise of the mortgages which he acquired through his legal adviser. He testified that he did not see or interview any of the mortgagors nor did he inspect any of the properties on which his mortgages were to be registered. Whether he acquired a mortgage recommended by his legal adviser only depended on whether he happened to have sufficient funds on hand to pay for it. Incredible as it may seem, he stated that he did not even enquire about the rate of interest nor whether he was entitled to any bonus or discount. Mr. Shifrin made the collections, attended to necessary insurance and had possession of all documents in connection with the mortgages.

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The following is a cumulative copy of Schedule "A" which is attached to each reassessment made by the Minister for the six-year period in question in respect of the 31 mortgages which are in issue. The last column shows the amounts which he added to the respondent's taxable income in each of the six years, and, for ready reference, I have taken the liberty of adding a first column indicating the number which has been assigned in exhibit 2 to each mortgage transaction mentioned therein.

MINISTER'S SCHEDULE "A" FOR THE YEARS 1948 TO 1953,
 INCLUSIVE

<i>No.</i> <i>(Ex. 2)</i>	<i>Mortgagor</i>	<i>Type of Mortgage</i>	<i>Mortgage Face Value</i>	<i>Max Wolfe Share</i>	<i>Max Wolfe Share of 1948 Profits</i>
<i>1948</i>					
50	Brittania Hotel	2nd	\$16,200.00	All	\$1,500.00
63	Windsor Hotel	2nd	5,000.00	All	600.00
48	Autoguild Motors	2nd	8,800.00	All	800.00
40	Dominion Hotel	2nd	8,500.00	All	400.00
50	Brittania Hotel	3rd	22,000.00	All	3,000.00
Supp.,	Governor Simcoe Hotel Ltd.	2nd	31,000.00	½	2,500.00
p. 2					
"	Repath, T. B. and A. V.	2nd	2,400.00	½	125.00
47	Andrews, Marie	2nd	1,500.00	All	300.00
					<u>\$9,225.00</u>

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MINISTER OF	<i>No.</i>	<i>Mortgagor</i>	<i>Type of</i>	<i>Mortgage</i>	<i>Face Value</i>	<i>Wolfe</i>	<i>Share of</i>	
NATIONAL	(<i>Ex. 2</i>)		<i>Mortgage</i>			<i>Share</i>	<i>1948 Profits</i>	
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	37	Anthony-Wilkie-York	2nd	\$ 4,978.00	All	\$ 600.00		
	41	Gamble, Gertrude C.	2nd	2,500.00	All	250.00		
	42	Gunning-Mason	2nd	2,140.00	All	140.00		
	40	Dominion Hotel	2nd	3,200.00	All	400.00		
	33	Rochester House	2nd	* 10,200.00	All	400.00		
		* November 1, 1948—Cancelled January 1949.					<u>\$1,790.00</u>	
				1950				
	27	Grand Trunk Hotel	2nd	\$ 7,000.00	All	\$ 500.00		
	34	Sieverling, P. & A.	2nd	2,350.00	All	220.00		
	25	Dutch Inn	2nd	6,350.00	All	550.00		
	32	Raxlen-Lewis	2nd	5,500.00	All	300.00		
						<u>\$1,570.00</u>		
				1951				
	22	Oakville House	2nd	\$14,200.00	All	\$1,450.00		
	26	Richelieu Hotel	2nd	15,000.00	All	3,000.00		
	20	Jasper Hotel	2nd	10,000.00	All	1,750.00		
	24	Bright House	2nd	17,500.00	All	1,750.00		
						<u>\$7,950.00</u>		
				1952				
	11	Lowe-Secord	2nd	\$ 2,350.00	All	\$ 500.00		
	6	Davidson-Browning	2nd	1,400.00	All	350.00		
	15	Quinte Hotel	2nd	29,000.00	All	3,000.00		
	14	Piskor-Lane	2nd	4,250.00	All	500.00		
						<u>\$4,350.00</u>		
				1953				
	9	Lewis, David	2nd	\$ 1,900.00	All	\$ 200.00		
	12	Norris, H. R.	2nd	7,000.00	All	900.00		
	2	Baldwin, A. H.	2nd	2,500.00	All	250.00		
	4	Calder, Charles	3rd	2,000.00	All	500.00		
	16	Tabone, Harry	2nd	5,500.00	All	1,400.00		
	Supp.,	Downey, Thomas and Mary	2nd	3,600.00	All	1,000.00		
	p. 4					<u>\$4,250.00</u>		

Besides assigning a particular number to each transaction Exhibit 2 gives further information regarding the 31 mortgages in issue as described in the aforementioned Schedule, e.g., it distinguishes chattel mortgages from other mortgages; indicates the rate of interest on each mortgage and how it is payable; the manner in which the principal is repayable; the life or duration of the mortgage; and whether the taxpayer obtained a bonus or discount in respect thereof.

I do not think it necessary to put on record the above-mentioned further particulars in respect of all the mortgage transactions of the taxpayer between 1948 and 1953, but the following graph sets out such particulars in respect of the year 1948, being the one in which the respondent's mortgages, both numerically and in amount, were larger than any other subsequent year. I have inserted, after the figures under the title "Discount or bonus", the letter (b) or (d) to indicate under which of the two categories the figure falls.

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No. (Ex. 2)	Mortgagor	Face value and type	Discount or Bonus	Duration	Rate of interest	Repay- ment a/c of principal
50	Brittania Hotel	\$16,200 2nd chattel	\$1,500(b)	Apr. 22/46 " ?/48	8% per an. payable monthly	\$300 monthly
63	Windsor Hotel	\$ 5,000 2nd	600(b)	Apr. 1/46 " ?/48	8% "	\$125 monthly
48	Autoguild Motors	\$ 8,800 2nd	800(d)	Apr. 13/47 " 13/48	10% "	\$400 monthly
40	Dominion Hotel	\$ 8,500 2nd	400(b)	July 1947 Aug. 1948	? .	\$200 monthly
50	Brittania Hotel	\$22,000 3rd chattel	300(b)	Oct. 1947 Aug. 1/48	5% "	\$150 monthly
*Governor Simcoe Hotel Ltd.	\$31,000 2nd chattel	\$5,000(b)	Oct. 31/47 Dec. 9/48	5% "	\$800 monthly	
(See Ex. 2—Supplement, p. 2)				(assigned)		
47	Andrews, Marie	\$ 1,500 2nd	300(b)	Jan. 30/48 Nov. ?/48	5% "	\$ 50 monthly
*Repath, T. B. and A. V.	\$ 2,400	250(b)	Feb. 20/48 Dec. 15/48	5% "	\$150 monthly	
(Supplement, p. 2)				(assigned)		

*These chattel mortgages were held by Max Wolfe and his brother Maurice in equal shares and were assigned by the holders to Ontario Produce Co. Limited, the assignors receiving full amount owing at that time, namely, \$20,600 and \$1,650 respectively.

As appears on Exhibit 2, page 1 of the Supplement, the respondent and his brother made assignments similar to those above-mentioned in respect of earlier first mortgages which are not in issue.

The following is what I might term a combined analysis of Exhibit 2 made in argument by counsel for the parties, which, except in one instance—I will refer to it later—I find to be substantially accurate.

During the aforementioned 6-year interval all of the 31 mortgages fell due or were realized. The great majority of the mortgages represented direct loans to the mortgagors

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in respect of which the respondent received a bonus and the remainder was purchased by the taxpayer at a discount. According to my count, 22 of them were 2nd mortgages on real property, one was a 3rd mortgage on realty, seven were 2nd chattel mortgages and one was a 3rd chattel mortgage on hotel furnishings and equipment. Sixteen of them bore interest at 5 per cent, one at $5\frac{1}{2}$ per cent, eight at 6 per cent, two at 8 per cent and one at 10 per cent. No rate of interest is mentioned as regards one of the two Dominion Hotel mortgages.

The period from the acquisition by Mr. Wolfe of the mortgages to maturity, either by purchase or by an original direct loan to the mortgagor, ranged from one to five years, nine of them matured in less than two years, twelve in two years and five in more than two but less than five years. It was necessary for the respondent in the case of six of the said mortgages to extend the due date thereof for one year, at which time they were paid by the mortgagor. Mr. Wolfe was the sole proprietor of 29 of the said 31 mortgages and shared a 50 per cent interest with his brother Maurice in the other two. Between 1937 and 1945 his mortgage investments consisted exclusively of 1st mortgage transactions, which were 19 in number, bearing interest from 5 to 7 per cent, but the great majority of them yielded 6 per cent and in no case was any discount or bonus involved. Apparently in 1946 the respondent first became interested in 2nd mortgages and acquired eleven of them during 1946 and 1947. Counsel for the respondent considered that, among the 31 mortgages with which we are concerned, the maturity date of ten of them was five years, and this statement gives rise to the aforementioned instance which I think calls for some detailed consideration and consequent modification.

In perusing Exhibit 2, which contains some obvious typographical errors and omissions, I found one mortgage transaction (Anthony-Wilkie, No. 37) in which the principal fell due in something over three years; the Jasper Hotel mortgage (No. 12) fell due in a little over two years; and the same was true in connection with No. 15, The Quinte Hotel. But I was only able to discover five instances in which a 5-year term was mentioned.

The first of the said five transactions was the Lowe-
Secord mortgage (No. 10—Ex. 2), which was assumed by
Enrico Carfagnini and dated August 29, 1947, maturing
August 30, 1952. It was assigned to Max Wolfe on Septem-
ber 12, 1947 at a discount of 500 and was discharged on
September 23, 1952—but this appears to be the only
instance in which the respondent held a 5-year mortgage
to maturity.

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The said five transactions were as follows:

The Grand Trunk Hotel mortgage was dated Decem-
ber 30, 1947 and matured on December 16, 1952.

The Davidson-Browning mortgage (See Ex. 2—No. 6),
which was dated January 15, 1948, maturing in five years,
was assigned to Max Wolfe with a discount of \$350 on
February 23, 1948, and discharged on May 1, 1952, or eight
months and a half prior to the date of its maturity.

The Charles Calder transaction concerns a \$2,000 3rd
mortgage for five years (Ex. 2—No. 4) dated April 1, 1952.
It was assigned to Max Wolfe on August 11, 1952 and
reassigned by him on July 11, 1953 to Ontario Produce Co.
Limited, at which time there was \$1,900 owing on it, and
as appears by a pencilled notation, Max Wolfe received full
payment of this sum.

Re Downey (See last page of Supplement—Ex. 2). This
was a 5-year mortgage for \$3,600 dated February 16, 1953.
The mortgagee was Gordon I. Gonthier, who assigned it to
Max Wolfe on March 5, 1953 at a discount of \$1,000, who
in turn reassigned it on June 16, 1953 to Ontario Produce
Co. Limited, which paid to Max Wolfe the amount then
owing on the said mortgage, viz., \$3,571.44.

I now pass on to consideration of the evidence given by
the two witnesses heard on behalf of the appellant. Mr.
John S. MacLeod, Assistant Treasurer of The Toronto
General Trusts Corporation, who had charge of mortgages,
stated that his company only invests in 1st mortgages to
the extent of 60 per cent of the mortgage lending value of
the property concerned, as provided in *The Trustee Act* of
Ontario. The prevailing rate of interest from the early
1940's until 1951 was 5 per cent. During that year and until
mid-1954 it varied between 5 and 5½ per cent. Shortly there-
after it rose to 6 per cent, where it remained until 1956. At
the time of hearing it was 7 per cent. Mr. MacLeod added

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that, although the Trust Company with which he is connected does not deal in 2nd mortgages, he had occasion to observe that in the Toronto area substantial investments were made in 2nd and 3rd mortgages and that it was not uncommon for the mortgagee, in addition to a rate of interest which corresponded with the going rate on 1st mortgages, to ask for a bonus or discount, and, in instances where the money was borrowed to provide part of a purchase price, it was normal investment practice to do so.

While Mr. MacLeod's testimony, particularly on cross-examination in respect of investment practice, indicates that individuals in need of money frequently borrowed on 2nd mortgages, it does not throw any light on what was the status or business of the grantors of mortgages concerned, or whether it was customary for such individuals not publicly engaged in the business of lending to deal in them to the extent to which the respondent did, nor does it take into consideration the respondent's even more speculative dealings in chattel mortgages.

Reginald F. Heal, who for 30 years was engaged in the Real Estate and Mortgage Brokerage business in Toronto, was next heard on behalf of the appellant. The witness stated that he had dealt in 2nd mortgages by obtaining them for clients in need of money and then disposing of them to would-be purchasers. He stated that while each 2nd mortgage loan had to be judged on its own merit, in respect of prevailing interest rates from 1946 to 1950, when 1st mortgages were yielding 5 or 5½ per cent, 2nd and 3rd mortgage rates would be between 2 or 3 per cent higher. On temporary building loans 2 per cent per month was a common rate.

Speaking of discounts and bonuses, he said they occurred in both 1st and 2nd mortgages, and, when added to the interest rate in the case of 2nd mortgages, the calculated yield, depending on the security and how pressing was the need of the borrower, would be as high as 12 per cent. He rarely dealt in chattel mortgages because of the "terrific risk" involved, and in respect of 2nd chattel mortgages the interest charges, he stated, could be ridiculously high.

On cross-examination Mr. Heal testified that between 1948 and 1953 it was normal practice for investors to demand a discount on 2nd and 3rd mortgages, and this was sometimes true of 1st mortgages, particularly when "the

principal was higher in relation to the value of the property." In 98 per cent of such cases a person who wanted to sell a 2nd mortgage could not do so unless he gave a discount off the principal.

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The issue with which we are here concerned has been commonly described as a *capital gain* or *income* case—and the following are four most recent decisions which are reported in the current edition of the 1962 Canadian Tax Cases and which, together with the authorities therein referred to, comprise a very complete review of what has been so far said on the question in issue: *Minister of National Revenue and Minden*¹; *Irrigation Industries Ltd. and Minister of National Revenue*²; *Minister of National Revenue and MacInnes*³; *Minister of National Revenue and Rosenberg*⁴. The said jurisprudence indicates a sometimes divergent approach to the subject which I think illustrates the appositeness of what was said more than half a century ago in the oft-quoted case of *Californian Copper Syndicate v. Harris*⁵, wherein Lord Justice Clerk observed:

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?

I propose to examine the question of the applicability to the case at bar of the various helpful tests or indicia referred to in the above-mentioned jurisprudence with a view to determining whether or not it can be said that the respondent was engaged in an *adventure in the nature of trade*. In the first place, I believe that, in a case such as this, the word "adventure" is, to all intents and purposes, synonymous with speculation and risk. The securities in issue certainly could not be regarded as approved investments under *The Trustee Act*, R.S.O. 1950, c. 400 (as amended), and I believe the same may be said of the corresponding acts of the other provinces. The evidence shows that six mortgagors could not pay their mortgage when it fell due but that after being granted a delay of a year they were able to do so.

¹[1962] C.T.C. 79 at 91.

²[1962] C.T.C. 215.

³[1962] C.T.C. 350.

⁴[1962] C.T.C. 372.

⁵5 T.C. 159 at 166.

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The evidence clearly shows the respondent not only agreed to accept ordinary second mortgages as security but also risked large sums, I would not say on the strength, but rather on the weakness of chattel mortgages.

Mr. Heal, whose business includes transactions in 2nd mortgages, stated that, beyond having an odd chattel mortgage, he did not deal in them "because you would have to be a great gambler to take one"; and the witness added that he had never heard of such a thing as a 2nd chattel mortgage. The evidence shows that the respondent, in respect of the year 1948, after allowing for the discounts and bonuses which he had received, had made a so-called investment of \$15,875 in four ordinary 2nd mortgages and over \$55,000 in 4 chattel mortgages, three of which were 2nd chattel mortgages and the other was a 3rd chattel mortgage, which, in my opinion, shows that the adventurous nature of the said transactions is established beyond question.

Counsel for the respondent, relying on the evidence of Mr. MacLeod, submitted that, unlike, for instance, the case of *Minister of National Revenue v. Spencer*¹, there was evidence in the present case establishing that the mortgages in issue constituted usual or normal forms of investment.

The chattel mortgage transactions above described added to the frequent acquisitions of 2nd mortgages, in my opinion, serve to give to the respondent's entire mortgage dealings an extraordinary speculative character which, I think, removes them from the category of what is regarded as normal or ordinary investments.

Another factor often referred to is the matter of relationship between the taxpayer's ordinary occupation and his mortgage dealings. I think this facet of the case should be resolved in favour of the taxpayer because the evidence indicates that no significant relationship of this nature existed.

As I read the jurisprudence, a most important, if not the most telling test referred to, concerns the repetitious nature of short term quick profit making transactions. In contrast to his portfolio of stocks which varied very little during the six-year period in question, his mortgage investments cannot, on the evidence, be regarded otherwise than as of

¹ [1961] C.T.C. 107.

very short duration, accompanied by a system of frequent replacements. As Kerwin J. (as he then was) observed in *Noak and Minister of National Revenue*¹, "the number of transactions, and, in some cases, the proximity of the purchase to the sale, indicates the carrying on of a business."

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What was said by Kerwin J. in respect of sales of securities is equally applicable when they are converted or realized upon. See Kellock J. (*supra*) at p. 138. At page 139, this learned judge concluded by saying that in the case in question he concurred with the learned trial 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."

The respondent stated that he never sold any of his 2nd mortgages. I do not question his good faith in saying this, but in strict point of fact it is not so because, as I have already indicated, he made assignments of such mortgages to Ontario Produce Co. Ltd. and did not pass on to the Company any part of the bonuses or discounts which he had obtained; he thus received full payment of the amount outstanding thereon. It is true that he and his brother owned and controlled the last-mentioned Company, but from the point of view of taxation the Company and the respondent were distinct entities. These above-mentioned occurrences, while not overly important in themselves, are just what one would expect to find where a person was engaged in the business of lending money or a scheme for profit-making.

The respondent testified that he never resorted to advertising in connection with his mortgage transactions—and whether or not Mr. Shifrin did, he did not know.

Neither did he have recourse to borrowing in order to make possible his acquisitions in mortgages: He did so out of his savings—and, insofar as these criteria may constitute a factor, his evidence in respect of them would operate in his favour.

Another important indicia is the proof of the taxpayer's intent in entering into the transactions which he did. Whether the respondent was attracted to the ventures upon which he embarked was because of the profit he would make

¹ [1953] 2 S.C.R. 136 at 137.

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or the interest he would receive, or a combination of both, we will never know, since, on his own evidence, due to lack of knowledge, he was incapable of forming any intent. The President of this Court, in the *Minden* case (*supra*), held that the fact that the taxpayer knows nothing about his mortgage investments cannot exempt him from responsibility for the conduct and acts of his agent. But here again, the Court is left in the dark, because Mr. Shifrin, in whom the taxpayer had implicit confidence, was not called as a witness. Insofar, therefore, as intent is concerned, it is to be determined by the inferences to be drawn from the nature of the transactions—and I consider that the proof on this score weighs heavily against the respondent.

To what extent, if any, can it be said that the respondent organized himself in order to carry out the transactions in issue?

Apart from sharing a 50 per cent interest with his brother Maurice in the Britannia Hotel and The Governor Simcoe Hotel mortgages, he was the sole party having any interest in the remaining transactions. The only thing, in this case, which might savour of organization was Mr. Shifrin's status in the case. That a considerable amount of administrative work fell on Mr. Shifrin's shoulders appears from the fact that replacement of mortgages was frequent and all of them bore interest on a monthly basis or a quarterly basis, and the same is true with respect to repayments on account of capital. No evidence was offered with respect to the contractual relationship between Mr. Wolfe and Mr. Shifrin and I do not think that any important deductions, one way or the other, can be drawn under this heading.

In my opinion, on balance the evidence in this case, while it likely falls short of establishing that the respondent was engaged in operating a business in the ordinary sense of the term, it nevertheless proves he was engaged in speculative or adventurous undertakings of a trading nature within the extended meaning of the word "business" as contained in s. 139(1)(e) of the Act.

For the reasons above-mentioned I find in favour of the appellant and I would allow the Minister's appeal herein with costs.

Judgment accordingly.