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BETWEEN:

GENERAL CONSTRUCTION COMPANY LIMITED ..... APPELLANT;

AND

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

*Revenue—Income Tax—Whether payment on sale of interest in joint venture agreement, income or capital—The Income Tax Act, S. of C. 1948, c. 52, ss. 3, 4, 6(c) and 127(1)(e) (R.S.C. 1952, c. 148, ss. 3, 4, 6(c) and 139(1)(e)).*

The appellant company, under what was termed a "joint venture agreement", advanced 15 per cent of the working capital a contractor required to finance the laying of a pipe line and, upon final payment for the work, was to be refunded the amount it contributed plus 15 per cent of the profits. When the job was nearing completion the appellant sold its interest to the prime contractor and was repaid the sum advanced plus $90,000. The evidence was that the appellant had previously entered into a number of similar joint venture agreements but had never sold its interest in any of them prior to the completion of the contract. The Minister added the $90,000 payment to the appellant's reported income. The assessment was affirmed by the Income Tax Appeal Board. On an appeal from the Board's decision the appellant contended the sum was realized on the sale of a capital asset, namely its interest in the partnership created by the joint venture agreement and was not subject to income tax.

*Held:* That the $90,000 constituted the appellant's share of the profit earned under the joint venture agreement or, alternatively, its profit from an adventure or concern in the nature of trade and was taxable by virtue of ss. 3, 4, 6(c) and 127(1)(e) of *The Income Tax Act*.

APPEAL from a decision of the Income Tax Appeal Board.

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

*W. Murphy, Q.C.* and *H. W. Thomson* for appellant.

*J. A. MacDonald* and *F. J. Cross* for respondent.

DUMOULIN J. now (April 17, 1958) delivered the following judgment:

This is an appeal from a decision of the Income Tax Appeal Board[1], dated August 30, 1956, dismissing a previous appeal from a decision of the Minister of National Revenue in respect of an income tax assessment for appellant's 1950 taxation year.

[1] 56 D.T.C. 1089; 15 Tax A.B.C. 337.

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General Construction Co. Ltd., as its trade style implies, is engaged in heavy constructional undertakings: roads, paving jobs, erection of dams and buildings. It was incorporated in 1923, with Head Office in the City of Vancouver.

For the 1950 taxation year, respondent added to the Company's income tax return an amount of $90,000, assessable business profits received from Fred Mannix & Co. Ltd., pursuant to an agreement dated September 27, 1950, exhibit 5 in this case. General Construction Co. Ltd. objected on the grounds that the amount of $90,000 in issue was enhancement of a capital asset and therefore not an operational receipt.

Antecedent facts, leading up to the above-mentioned deal, show that on November 12, 1949, Fred Mannix & Co. Ltd., Canadian Bechtel Limited, and Bechtel International Corporation, collectively contracted with International Pipe Line Company for the construction of 441 miles of pipe line in the provinces of Alberta and Saskatchewan.

Shortly after, on November 23, 1949, a covenant, labelled "Joint Venture Agreement", exhibit 2A, intervened between the three firms above-mentioned, setting out, *inter alia,* the percentage of their respective participation to an interest in the construction contract (exhibit 2) of November 12 with International Pipe Line Company, to wit: forty per cent (40%) of the total undertaking in the case of Fred Mannix & Co. Ltd. ". . . *including,* reads article II, *the profits which may be realized by the joint venture . . .*"

A month later, December 19, 1949, a second "Joint Venture Agreement", exhibit 4, was entered into between, more particularly, General Construction Co. Ltd. and Fred Mannix & Company ". . . for the better procurement of the monies required for the performance of the said work . . . under the Mannix interest in the prime agreements," i.e. those of November 12 and 23, same year.

The significant provisions of this deal (exhibit 4) state that:

> II. AS between themselves and to the extent of the following percentages, respectively to wit:
>
> FRED MANNIX & COMPANY LIMITED ..... 70 per cent
> STANDARD GRAVEL & SURFACING COMPANY LIMITED ..... 15 per cent
> GENERAL CONSTRUCTION COMPANY LIMITED .. 15 per cent
>
> the joint venturers shall have and own an undivided interest in the Mannix

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interest, and in each and every asset thereof, including *the profits* which may be realized by the Mannix interest by virtue of the prime agreements; and likewise and to the same percentages, the said joint ventures shall assume and bear all of the obligations and liabilities arising from or out of the Mannix interest under the prime agreements, including losses.

* * *

III. THE initial *working capital* of the joint venture shall be contributed in cash by the joint venturers . . . in the percentages set opposite their respective names in Paragraph II above. It is agreed that additional working capital of the joint venture, as and when needed, shall be contributed by the joint venturers in the same percentages as set forth above.

And now, in para. VII of the agreement, the line of conduct, the obligations to obtain upon normal winding up of this enterprise are set out thus:

VII. UPON receipt of final payment for the contract work, the assets and liabilities of the joint venture shall be liquidated and the *capital contributions* of the joint venturers shall be returned and *profits* of the joint venture shall be distributed to the joint venturers in proportion to their interests in the joint venture as specified in Paragraph II above. By mutual agreement distribution of a portion of the *profits* of the joint venture *may be made before receipt of final payment for the contract work.*

Two conclusions, even at this early stage, may be safely reached, out of appellant's own words, namely: that this transaction was a joint venture, initiated with a view to reaping profits. In para. VII, just cited, the contrasting correlation is clearly drawn between the productive capital and the ensuing, hoped for, profits.

General Construction merged with Fred Mannix Company and another, or in business jargon "chipped in" to assist as associate "bailleur de fonds" in the ready financing of the pipe line contract. Nor was this participation a new departure for appellant, something unheard of so far in the policy of its business initiatives. Mr. Donald McAlister, the company's secretary, testified that similar engagements were contracted by General Construction before and after the joint venture of December 19, 1949, in sixteen or seventeen cases. However, cautions Mr. McAlister, this was the only time the Company disposed of its interest before the fruition of a scheme, a contingency nevertheless provided for in the concluding lines of para. VII, exhibit 4, and powerless, of itself, to impart any qualifying aspect to this matter.

From December, 1949, to the last days of September, 1950, the appellant company, in furtherance of its obligations, advanced to Fred Mannix & Co. Ltd. no less than $117,021.93, on the basis of a 15% contractual interest.

Early in September, 1950, appellant sold its interest to Fred Mannix & Co. Ltd., in circumstances explained at some length by Mr. Donald McAlister, from whose evidence these excerpts are taken (*vide* Transcript, pp. 11 and 12):

> Sometime in 1950, early September, Fred Mannix and company advised us *that it wouldn't be too long before the work would be completed,* and a decision would have to be made as to disposal of the equipment that had been rented to Bechtel . . . we met Mr. Mannix and the suggestion was made that since our company wasn't in the pipe line business . . . and due to the fact that Fred Mannix and company were active in pipe line business . . . we suggested to Mannix that . . . the logical person to take over the equipment would be Fred Mannix and Company, so we said, "Fred Mannix and Company [we] will sell you our interest and you automatically take over the equipment".

This suggestion, in perfect keeping with the terms of the joint venture deed, exhibit 4, could brook no reasonable refusal and materialized in a final indenture, exhibit 5, dated September 27, 1950, reading:

> AND WHEREAS General [Appellant] is desirous of assigning to Mannix all its right, title and interest in the said joint venture agreement;
>
> * * *
>
> 1. MANNIX agrees that it will assume all liabilities of the joint venture and shall pay and discharge same, and General hereby assigns to Mannix absolutely all its interest in and to the joint venture, and in consideration thereof Mannix shall pay to General all monies advanced by General to the joint venture less all monies paid by the joint venture to General, *plus the sum of Ninety-Thousand ($90,000) Dollars;*

Now, if this arrangement is not a clear cut, typical, instance of commercial profit taking, I must own I know of none that would be.

It received due implementation one month later, November 2, 1950, (letter, exhibit 13) in the dual form of a cheque from Mannix to General Construction for $138,249.74, and a summary statement as hereunder:

| | |
|---|---|
| Cash advanced to Joint Venture | $117,021.93 |
| Less repaid to date | 68,772.19 |
| | 48,249.74 |
| Plus | 90,000.00 |
| | $138,249.74 |

The appellant relies, *inter alia,* upon ss. 3 and 4 of *The Income Tax Act* (1948, S. of C. c. 52) to establish "... that the said sum of $90,000 was a capital receipt . . . on the sale of a capital asset namely, its Partnership interest in the Partnership created by the Partnership Agreement . . ." (Notice of Appeal, para. 10).

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Respondent, on the other hand, urges that ss. 3 and 4, properly construed, apply, and also ss. 6(*c*) and 127(1)(*e*), since the sum of $90,000 "was the appellant's share of the profit earned under the joint venture agreement . . ." or, alternatively, "profit from an adventure or concern in the nature of trade and therefore taxable by virtue of ss. 3 and 4, and para. (*e*) of s-s. (1) of s. 127." (Reply to Notice of Appeal, paras. 11 and 12).

Throughout, appellant's line of attack seemed predicated on the more than shallow assumption that what undisputably would be a trade receipt, if paid after completion of the pipe line job (exhibit 2), constituted enhancement or the selling price of a capital asset, merely because it was proferred and received some few weeks in advance.

The initial undertaking by Fred Mannix & Company (exhibit 2) to lay out 441 miles of pipe line was, admittedly, a commercial, profit seeking enterprise, within the ambit of the taxing statute. Subsequently, for financing convenience, the "Joint Venture Agreement" of December 19, 1949, (exhibit 4) was grafted on it. with provisions had for a profit taking percentage of 15%, in line with appellant's frequent practice. Surely then if the parent transaction is liable to income tax, its legitimate issue cannot claim a different surname or quality.

Moreover, the text of s. 6 and its s.s. (*c*), as well as of s. 127(1)(*e*), hereunder, does not permit of any other interpretation save that submitted by the respondent.

> 6. Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year
>
> (*c*) the taxpayer's income from a *partnership* or syndicate for the year whether or not he has withdrawn it during the year,
>
> * * *
>
> 127(1)(*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* . . .

I am of opinion, therefore, that the decision of the Income Tax Appeal Board was right in subjecting to income tax the amount of $90,000 paid to appellant by Fred Mannix & Company Limited, during the 1950 taxation year, as properly being a trade profit.

For the reasons above, this instant appeal is dismissed and the respondent entitled to its taxable costs.

*Judgment accordingly.*