

1962
Oct. 17
1963
Aug. 6

BETWEEN:

ESTATE OF DAME ADOLORATA }
FABI

APPELLANT;

AND

THE MINISTER OF NATIONAL }
REVENUE

RESPONDENT.

Revenue—Income—Income tax—Income or capital gain—Business or adventure in nature of trade—Passive role of deceased in business—Subdivision and sale of land purchased several years previously allegedly for its supply of sand and gravel—Income Tax Act, R.S.C. 1952, c. 148, s. 139(1)(e).

The late Dame Adolorata Fabi, who died on February 18, 1957, was the mother of Samuel Fabi, the appellant in *Samuel Fabi vs. M.N.R.* ante p 299; by consent, all the evidence adduced in that case was accepted as evidence in this appeal, with the exception of evidence concerning purchases and sales of property by Samuel Fabi or his wife Claire Fabi.

In 1946, 1947 and 1948, the Brault farm consisting of lots 4 and 5, Township of Orford near Sherbrooke, P.Q. was purchased in 3 separate transactions by Samuel Fabi and his mother, the late Adolorata Fabi. The said lands were subdivided and the lots sold during the period from 1952 to 1958 This appeal concerned the sale of lots from the Brault farm subdivision in 1955 and 1956.

Held: That although the role played by the late Adolorata Fabi in the purchase and subdivision of the Brault Farm and the sale of lots therefrom in 1955 and 1956 was a passive one, it must be presumed, in the absence of proof to the contrary, that she, as a half owner, was well aware of what was going on, saw the subdivision being made and was party to the many deeds of sale which were executed.

2. That the late Adolorata Fabi was a knowing and willing party to and engaged in an adventure in the nature of trade within the meaning of s. 139(1)(e) of the *Income Tax Act*.

APPEAL under the *Income Tax Act*.

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

Albert Bissonnette for appellant.

Paul Boivin, Q.C. and *R. Boudreau* for respondent.

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

KEARNEY J. now (August 6, 1963) delivered the following judgment:

The late Dame Adolorata Fabi died on February 18, 1957 and this appeal concerns two assessments to tax against her estate on profits arising from the sale of lands described as Part of Lots 4 and 5 in the Township of Orford near the City of Sherbrooke, in the Province of Quebec, during the years 1955 and 1956, whereby the sums of \$441.11 and \$6,272.84 respectively were added to the appellant's previously declared income for the said years.

Counsel for the parties in this case are the same as those who acted for *Samuel Fabi* and *The Minister of National Revenue* respectively in case No. 162232. (*ante* p. 299)

By written consent filed on October 26, 1962 the said attorneys agreed that all the evidence adduced in the Samuel Fabi case be accepted as evidence in this case, with the exception of any evidence concerning purchases and sales of property by Samuel Fabi or his wife Claire Fabi.

Attached to the said consent was a schedule of purchases and sales of land made by the late Adolorata Fabi and entitled "Mrs. Adolorata Fabi". Also a second schedule, marked "Appendix 1", of purchases and sales covering four pages which were made jointly by Samuel Fabi and his mother in connection with lots 4 and 5 (Brault Farm).

Counsel for the appellant under date of July 20, 1959, filed objection to the two aforesaid assessments. The respondent having reconsidered the said assessments confirmed them as per notification dated May 14, 1960. No evidence was offered as to the extent to which the late Adolorata Fabi participated with her son in the real estate activities in connection with the acquisition, subdivision and subsequent sale of lots in 1955 and 1956 as described in

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Appendix 1. It is not unlikely that her role was a passive one and that it was her son, with her approval, who was master of the situation at all times. On the other hand, in the absence of proof to the contrary, it must, I think, be presumed that Mrs. Adolorata Fabi, as a half owner, was well aware of what was going on, saw the subdivision being made and was party to the many deeds of sale which were executed.

On the proof before me I consider that the late Adolorata Fabi, while she may not have carried on a real estate business in the ordinary sense of the term, nevertheless was a knowing and willing party to and engaged in an adventure in the nature of trade within the meaning of s. 139(1)(e) of the *Income Tax Act* and that her estate must bear the consequences.

For the above and other reasons given in case No. 162232 (*supra*) I consider that the present appeal must be dismissed. The respondent will be entitled to costs as taxed.

Judgment accordingly.