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 Nov. 19, 20  
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 Sept. 5  
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BETWEEN :

DORWIN SHOPPING CENTER LIM-  
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APPELLANT;

AND

THE MINISTER OF NATIONAL  
 REVENUE ..... }

RESPONDENT.

*Revenue—Income—Income tax—Income or capital gain—Sale of newly  
 constructed shopping centre—Income Tax Act, R S C. 1952, c. 148,  
 ss. 3, 4, 85B and 139(1)(e).*

In 1954, Eastern Construction Limited, a company owned and controlled  
 by the Odette family of Windsor, Ontario, built a supermarket for  
 Dominion Stores Limited on a 36 acre parcel of land owned by  
 Dominion Stores Limited in Sandwich West Township, near the City  
 of Windsor The store and adjoining parking lot occupied about  
 4 acres Late in 1954, Dominion Stores Limited offered to sell the sur-  
 plus 32 acres to the Odette family for the purpose of erecting a shop-  
 ping centre thereon. The Odettes caused extensive surveys and studies  
 to be made by shopping centre specialists, architects, etc. to determine  
 the probability of success of a \$1,000,000 shopping centre on this site.  
 Upon receipt of favourable reports and an oral assurance from the  
 president of Detroit Mortgage and Realty Company that the required  
 \$800,000 mortgage financing was available, the Odettes accepted the

offer, Eastern Construction Limited being the purchaser. The deed conveying title to Eastern Construction Limited was dated April 29, 1955.

Appellant company was incorporated in May 1955, for the purpose of acquiring the said land and constructing and operating a shopping centre thereon. It was owned and controlled by the Odette family. The first wing of the proposed shopping centre was completed by Eastern Construction Limited in May 1956. The evidence was that the buildings and services were overbuilt, i.e. were above the minimum required standards. During construction, in August 1955, Detroit Mortgage and Realty Company withdrew its mortgage commitment. The appellant launched a drive for tenants and was comparatively successful. It also made vigorous but unsuccessful attempts to attract a large department store to the centre. Shortly after the withdrawal of Detroit Mortgage and Realty Company, the appellant came in need of funds. Efforts were made to borrow on mortgage from several insurance companies both in Canada and the USA, but without success. These activities of the appellant took place during the period from September 1955 to March 1956 and it was during this period that the appellant rejected several offers to purchase the shopping centre. Finally, in April 1956 when appellant had reached the limit of its financial resources, was without funds to pay sub-contractors and had been unable to gain access to additional funds, it contracted to sell the centre to Principal Investments Limited. On the sale, the appellant realized a profit of \$424,035.23, which the Minister of National Revenue assessed as income in the hands of the appellant.

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*Held:* That appellant was not in the business of dealing in real estate nor was it engaged in an adventure or concern in the nature of trade.

2. That when appellant acquired the land and constructed the shopping centre it did not intend to turn it to account by resale, although it was eventually compelled to do so, but rather to create a capital asset from which to realize rental income.
3. That appellant created a capital asset which it disposed of at a profit, which was not income within the meaning of sections 3, 4 and 139(1)(e) of the *Income Tax Act*.
4. That the appeal is allowed.

APPEAL under the *Income Tax Act*.

The appeal was heard before the Honourable Mr. Justice Cattanach at Windsor.

*Keith Laird, Q.C.* for appellant.

*F. J. Dubrule and E. E. Campbell* for respondent.

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

CATTANACH J. now (September 5, 1963) delivered the following judgment:

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This is an appeal against the appellant's income tax assessments for the taxation years 1957 and 1958, whereby the Minister added the sums of \$222,619.33 and \$7,606.47 as the estimated profit element on the sale of a shopping centre, known as Dorwin Shopping Center, in the respective taxation years.

The appellant, by notices of objection dated September 23, 1959 lodged its objection against the assessments contending that a profit of \$424,035.23 on the sale of the shopping centre was the capital accretion from an investment.

After reconsideration, the Minister by notification dated March 1, 1960 advised the appellant that he confirmed the assessments as being in accordance with the provisions of the *Income Tax Act*, R.S.C. 1952 c. 148 and particularly on the ground that the profit on the sale of the shopping centre had been properly taken into account in computing the appellant's income in accordance with the provisions of sections 3, 4, 85B and 139(1)(e) of the Act. It is against these assessments that the appellant brings its appeal to this Court.

The issue in the appeal is thus, a narrow one, namely, whether the profit accruing to the appellant in its taxation years 1957 and 1958 was income from a business, including therein, by virtue of section 139(1)(e) of the Act, an adventure or concern in the nature of trade.

There is no dispute as to the accuracy of the foregoing figures nor upon the facts, but the dispute lies in the proper deduction to be drawn from the facts.

In 1954 Dominion Stores Limited, (hereinafter called Dominion) a company operating an extensive chain of food markets, built a super food market on a site at the intersection of Dougall Avenue and Eugenie Street in Sandwich West Township just outside the city limits of Windsor, Ontario. The site had a frontage of 1840 feet on Dougall Avenue, a principal thoroughfare leading into the city of Windsor and contained approximately 36 acres, the entire area being owned by Dominion. The building and parking space contiguous thereto constructed by Dominion occupied approximately 4 acres leaving an unoccupied area of 32 acres.

The general contractor for the erection of this building for Dominion was Eastern Construction Limited (hereinafter referred to as Eastern) a company owned and controlled by the Odette family, a family long prominent in the business and social life of the Windsor community. Eastern was engaged in the business of a general contractor, that is the company built on behalf of others and did not engage in speculative building although the company did build and own an office building for its own use, the ownership of which building was subsequently transferred to another company.

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On completion of the Dominion store building one of the Odettes made a proposal to Dominion to purchase the store building and lease it back to Dominion. This proposal was briefly considered and rejected by Dominion because the proposed rental was less advantageous than that obtained by Dominion in a subsequent similar arrangement with another party.

However, Dominion countered with a proposal that the surplus land owned by it should be sold to the Odettes for the purpose of erecting thereon a shopping centre of which the Dominion food market would be a component part. This suggestion was made by the officers of Dominion on December 6, 1954. The Odettes interested in this proposal were T. C. Odette, a lawyer, his cousins L. L. Odette Jr. and E. G. Odette, and L. L. Odette his uncle, all of whom were shareholders and directors of Eastern.

At this time the development of shopping centres in Canada was not extensive but resort for information was had by the Odettes to the United States experience where the impetus to this type of merchandising was achieving major proportions.

They were impressed by the possibilities and projected a million dollar centre financed by a \$200,000 personal advance and an \$800,000 mortgage which they concluded would be self-liquidating in twenty years and yield an annual return of 19%.

The project was discussed with a firm of Detroit architects who recommended a firm of research specialists in this field, as well as Detroit Mortgage and Realty Company, as also having a wide experience and a record of successful participation in projects of this kind.

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The research specialists, Real Estate Research Corporation of Chicago, Illinois, was engaged and conducted a survey of the area. The results of this survey were embodied in a written report dated March 1, 1955, although frequent verbal reports were made by the investigators before completion of the written report which was introduced in evidence as Exhibit 1. It was concluded by the investigators so engaged that the site met all of the physical and locational requirements of an effective retail district and that a modern centre of 244,950 square feet of net sales area in enclosed space, built at this location, would have gross annual business volume of \$20,293,000. This volume estimate was based on the assumption that the centre would attract a major department store tenant not previously represented in Windsor by a full sized retail store.

It was estimated that in the primary shoppers' goods category alone there was a market for 156,950 sq. ft. of net sales area which would gross \$10,608,000 annually and in convenience goods categories alone there was a market for 36,000 sq. ft. of net sales area grossing an annual volume of \$6,033,000. It was also estimated that a department store of the type envisaged would gross an annual volume of business of \$5,077,000 and would require approximately 77,000 sq. ft. of sales area.

A local realtor was also engaged by the Odettes to make a survey of the downtown business section of Windsor and other sections to find the actual rents paid for stores of all types who made a report dated February 21, 1955, filed in evidence as Exhibit 2.

Discussions were initiated with Mr. Peas, the president of Detroit Mortgage and Realty Company (hereinafter referred to as Detroit Mortgage) who verbally assured the Odettes that financing by way of an \$800,000 mortgage would be readily forthcoming. In addition to being the financial agents of the proposed shopping centre, Detroit Mortgage was also to act as leasing agent and there was also the possibility of Detroit Mortgage buying shares in a company to be incorporated for the purpose of owning and operating the shopping centre.

Based upon the optimistic and favourable report of the research specialists engaged, the information as to prevailing rental rates, the oral assurance of the president of

Detroit Mortgage that mortgage financing would be available, coupled with their own appraisal of the possibilities and the encouragement of Dominion, the Odettes decided to undertake the project. Accordingly, L. L. Odette Jr. and E. G. Odette in the respective capacities of Secretary Treasurer and Vice President of Eastern Construction Limited as purchaser, executed an offer to purchase the surplus 32 acres owned by Dominion, the vendor, for a purchase price of \$127,304; \$10,000 of which price was deposited on the execution of the offer and the balance of \$117,304 was paid on the closing date of March 31, 1955. The offer was made and accepted subject to conditions summarized as follows; (1) that the property would be developed solely as a regional shopping centre in such a manner as to include the building erected by Dominion as an integral part thereof; (2) that the purchaser covenanted (such covenant to run with the land) for a period of 25 years not to erect or permit to be erected any building for the purpose of carrying on any business which would conflict or compete with the business carried on by Dominion, (3) that the general layout and minimum size of the shopping centre should be subject to the approval of Dominion, and (4) that the purchaser should commence actual construction of the initial phase of the shopping centre within 10 months from the date of the conveyance of the land and in the event of construction not being so commenced the purchaser was obligated to offer the land purchased for repurchase by the vendor at the same price as was paid therefor. The vendor was given forty days within which to accept or reject the offer and if the offer to repurchase was not accepted within that time, then the purchaser could deal with the property as it deemed fit subject to the restrictions laid down. There were other restrictions included in the offer which I have not included in the foregoing summary because they have no bearing on the issue involved in this appeal.

The offer was executed by Eastern Construction Limited through its signing officers as above described on March 15, 1955 and was accepted by Dominion Stores Limited also on March 15, 1955 although the date of the acceptance by Dominion Stores Limited was inserted in error in the instrument as being February 15, 1955.

By deed dated April 29, 1955 Dominion Stores Limited conveyed title in the lands in question to Eastern Construc-

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tion Limited subject to the restrictive covenant prohibiting competition with Dominion.

The offer to purchase was executed by Eastern Construction Limited and the land was conveyed to Eastern by Dominion because Dorwin Shopping Center Limited, the appellant herein had not been incorporated at that time, although the corporate name had been reserved with the provincial incorporating authority.

Letters Patent dated May 9, 1955 issued pursuant to the laws of the Province of Ontario incorporating the appellant under the corporate name of Dorwin Shopping Center Limited with an authorized capital divided into 100,000 preference shares of the par value of \$10 each and 300,000 common shares without nominal or par value which might be issued for a consideration not to exceed in amount or value the sum of \$300,000. The head office of the Company was fixed as being in the Township of Sandwich West and the objects for which incorporation was obtained read in part as follows, "to acquire by purchase, exchange, concession or otherwise lands and premises" and here is inserted the precise description of the lands conveyed by Dominion to Eastern, "and to develop thereon a shopping centre and, without limiting the generality of the foregoing, for that purpose to lay out parking areas and to erect stores, shops, offices, restaurants and buildings of every description and to own, operate and maintain the same and to rent, lease, mortgage or otherwise charge or encumber the same or any part thereof."

The appellant was forthwith organized and shares in the capital stock were allotted and issued to the extent of \$76,150, of which amount \$60,000 was in preference shares of the par value of \$10 each. L. L. Odette, E. G. Odette and L. L. Odette Jr. each subscribed and paid for 2,000 preference shares. The 161,500 common shares without nominal or par value were subscribed for and issued at 10¢ per share of which 126,020 were subscribed and paid for by the Odettes and members of their family, E. G. and L. L. Odette Jr. each subscribing for 45,000 common shares, L. L. Odette, 20,000 common and T. C. Odette 5,000 common. The balance of 11,020 common shares was acquired by the members of their families. A further balance of 35,480 common shares were issued to other persons closely associated with the Odettes.

The cash received in the treasury of the appellant was \$75,400, made up of \$60,000 for the preferred shares, \$15,400 for the common shares and \$750 was unpaid on 7,500 common shares subscribed for.

By deed dated July 26, 1955 the land which had been conveyed from Dominion to Eastern by deed dated April 29, 1955 was in turn conveyed by Eastern to the appellant. Neither of these deeds was registered in the Registry Office for the County of Essex until March 16, 1956. This delay was explained by the circumstance that both Eastern and the appellant had the utmost confidence in the business integrity of Dominion and further that the Odettes did not wish to disclose they were the principals in the shopping centre because of a bitter controversy in the City of Windsor concerning night shopping from which the Odettes wished to remain aloof and speculators, real estate agents and potential rivals could identify the principals in the centre by a search of the registry records.

The shopping centre in its ultimate development was to consist of three wings, Wing A, the initial phase was to be built immediately adjacent to the existing Dominion store building with a frontage of approximately 600 ft. Wing B was to be the department store with a frontage of approximately 200 ft. in the centre of the development and the third phase, Wing C was to be similar in size and structure to Wing A and on the other side of the department store, Wing B. There was also in contemplation the possibility of constructing at some future time a high rise office building beyond the third wing.

A formal agreement was entered into between Eastern and the appellant on June 8, 1955 whereby Eastern undertook to construct Wing A of the shopping centre for the appellant for the compensation of cost plus 3½ percent thereon.

However, prior to the incorporation of the appellant and the execution of the construction agreement between the appellant and Eastern, construction had already been begun by Eastern, which is understandable because the Odettes comprised the directorates of both Eastern and the appellant as well as owning all the shares in Eastern and an overwhelming majority of the shares of the appellant. A sub-contractor of Eastern began clearing the site of trees

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and a small cement block structure as well as filling and levelling during the latter part of April 1955.

On June 1, 1955 Eastern had placed an order for the bricks to be used and the Municipality of West Sandwich had begun the construction of a drainage sewer to serve the proposed parking area pursuant to an arrangement negotiated by Eastern.

Excavation for the building was begun during the first part of July 1955.

The form work was on the site on August 10, 1955 and the first concrete was poured on August 19, 1955. Also during the month of August the sub-contractor for paving was engaged in filling and laying asphalt on the parking area.

On August 18, 1955 the electrical sub-contractor began the installation and erection of lighting standards for the parking area. August was an extremely busy month.

The work order for the structural steel had been placed on September 19, 1955 and the steel was erected on October 20, 1955. The order for the steel roof deck had been placed on September 1, 1955 and its installation began on November 10, 1955.

Before the end of January 1956 the shell of the building was completed, that is the walls and roof excepting the front.

An outside canopy was erected in January of 1956. The final completion of the interior could not be undertaken until the requirements of the tenants were known.

The formal opening of the building took place on June 1, 1956. The tenants by the terms of their leases were entitled to four to six weeks notice of the premises being ready for occupancy. Accordingly it follows that for all practical purposes the building was completed on May 1, 1956.

Exceptional quality was built into the structure and novel features were incorporated. The Dominion store building was serviced by a septic tank installed at a cost of \$6,000. While it was possible to service Wing A of the shopping centre with a septic tank, nevertheless, a sewage disposal plant, sufficient to service the needs of the proposed department store and Wing C, was installed at a cost of \$35,000.

The drainage sewers for the run-off from the parking area were over built by the Municipality at the insistence

of the appellant, the cost of which would be borne by the appellant by way of increased taxes. Similarly the lighting capacity for the parking area was over built by 30 percent.

Structural steel was used throughout the building to permit easier variation in store sizes to suit the needs of tenants.

The suggestions of insurance brokers were invited and adopted so as to render each store fireproof with the result that the lowest of insurance rates was obtained.

The front of the building was raised to accommodate store signs with a consequent increase in building costs.

A 12 foot outside canopy was constructed in a manner to permit its eventual enclosure with heating and air conditioning in the appropriate seasons.

The parking area was constructed with an 8 inch compact fill and a two inch surface rather than with the usual four inch compact fill and lesser thickness of surface. All such features were designed to lower maintenance costs and for the increased convenience of tenants and patrons.

The estimated building cost of Wing A was \$1,000,000 and the actual building cost coincided with that estimate.

A calculation based upon the estimated rental income less maintenance costs allowing for a mortgage of \$800,000 at 5½ percent and a personal outlay of \$200,000 resulted in an estimated yield of 19 percent. A similar calculation based on a mortgage of \$700,000 and a personal outlay resulted in an approximate yield of 13 percent.

The method of financing contemplated by the appellant was by way of a first mortgage of \$800,000 and a \$200,000 outlay by it.

The appellant, through the Odettes who became directors of and shareholders in the appellant, was orally assured by the president of Detroit Mortgage that \$800,000 secured by a mortgage would be available, which assurance was made prior to the project being embarked upon.

However, no firm written commitment was given the appellant. It is not the practice in the trade to give a written mortgage commitment until the construction of the building is well advanced and a substantial portion of the building has been leased to responsible tenants.

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Accordingly interim financing was essential which was undertaken by Eastern and in part from the resources of the appellant.

Funds for interim financing came from the following sources, \$75,400 from the share capital of the appellant and \$125,652.06 from shareholders as loans to the appellant, a personal loan to Eastern in the amount of \$80,000 by L. L. Odette Jr. and E. G. Odette which they, in turn, had obtained from their bank, a tender loan of \$44,500 Eastern had obtained from its bank which had not been heretofore required or taken, and a bank overdraft carried by Eastern in the amount of \$193,000.

Prior to this time Eastern had never operated on a bank overdraft but had always sufficient cash available to discharge its business obligations and to cover any tender made by it. In addition the appellant borrowed \$100,000 from its bank on the security of a promissory note. I total the foregoing amounts to a rounded figure of \$518,500.

The mortgage monies, when and if received, would be used to discharge these obligations, as well as unpaid construction costs incurred, with the exception of \$75,400 from the share capital of the appellant and the possible exception of the shareholders' loans to the appellant in the amount of \$125,652.06. It was left to a future decision whether such shareholders' loans would be taken up by a further issue of shares from the treasury of the appellant or repaid in cash if mortgage funds were available for that purpose.

Meanwhile commitments for the costs of construction were incurred and assumed by Eastern. A monthly schedule thereof was filed in evidence as Exhibit 8. The costs incurred at the material dates of August 1955 and April 1956 were shown therein as \$211,442.92 and \$719,436.82 respectively. However, these amounts do not include the cost of verbal work and purchase orders but only those actual orders received. In many instances a verbal order would be placed for materials and the written order would not be given until some time later. Therefore, the schedule (Exhibit 8) does not reflect the cost of verbal orders placed in each month and the commitments in each month might well be and usually were greater than the amounts shown therein.

While construction was proceeding, negotiations were being conducted with prospective tenants. Mr. Peas, the president of Detroit Mortgage made several trips into Ontario to secure tenants and consulted well and favourably known retail merchants. His activities came to the notice of the provincial official in charge of the supervision of real estate and business brokers who advised Detroit Mortgage by letter dated July 25, 1955 that it could not qualify to act as a leasing agent in Ontario and was therefore precluded from doing so. However, Detroit Mortgage continued to act as leasing agent in the State of Michigan and the remaining States. Shortly after Detroit Mortgage was advised of its incapacity to act as leasing agent in Ontario, the time being fixed by witnesses as the middle of August 1955, Detroit Mortgage withdrew entirely from the project in all capacities so that mortgage money was not forthcoming from that source. At this time the construction of the centre was well advanced.

The officers of the appellant themselves began a vigorous campaign to obtain tenants which was comparatively successful. A letter of intent was received from S. S. Kresge Company, a variety store, and from Cunningham Drugs, a company which operated a large chain of drug stores in the United States and contemplated extending its operations into Canada. Because of the proximity of Windsor to the City of Detroit, this drug chain was extremely well known in the Windsor area. Further it was a condition of the S. S. Kresge Company lease that the centre should contain a drug store. On March 21, 1956 Cunningham Drugs advised the appellant it would not lease premises in the centre. However, the appellant was successful in leasing premises to another drug store chain.

The first three tenants were obtained in November of 1955. As at April 27, 1956 the centre was leased to the extent of over 60 percent but not exceeding 70 percent.

On November 1, 1956 the centre was leased to the extent of 75 percent. It had been a further condition of the S. S. Kresge Company lease that the centre should be leased to the extent of 80 percent but this condition was foregone at the request of the appellant.

The recommendations and conclusions of the research specialist engaged and as embodied in its report, Exhibit I,

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dated March 1, 1955 were predicated upon the assumption that the centre would contain a major department store, which the location and population would justify, and upon which assumption its estimate of business volume was based.

The officers of the appellant recognized that the presence of a major department store in the centre would be of great advantage, but not necessarily an essential feature. It was their opinion that the Dominion food market, as an integral part of the centre, the presence of the S. S. Kresge variety store, and the chain drug store, together with the remaining desirable tenants obtained, would ensure the success of a neighbourhood shopping centre. Nevertheless, they were fully conscious that a department store would render the centre much more attractive and profitable, for which reason efforts were made to induce such a store to locate in the centre.

There were overtures made by the appellant to such well known department stores as Eatons, Morgans, Woodwards, Simpsons-Sears and Great Universal Stores of England. Eatons and Morgans indicated some interest with a rental based upon a percentage of sales with no minimum provided. An arrangement of this nature was not acceptable to lenders as security for a loan.

The appellant also offered a gift of four acres of land to the department stores mentioned to induce them to erect a building and establish a store in the centre. None of the stores so approached accepted the appellant's offer.

The appellant resorted to other means to raise money and obtain a department store for the centre. A letter dated October 14, 1955, Exhibit 13, was written to John Penturn & Son Limited, realtors of Toronto, Ontario offering to sell land for an office building as well as for a department store. A letter dated October 20, 1955, Exhibit 15, was written to R. B. Slaven of Tower Investment Corp., Ltd. also of Toronto, Ontario, making a similar offer. Neither of such letters produced any result.

Within a short time from August 1955 when Detroit Mortgage withdrew its support of the project, the appellant came in need of further funds. Eastern had committed itself to construction costs in the excess of \$200,000 and had exhausted its bank credit. Therefore it became of paramount importance to obtain a mortgage loan.

The appellant then began to make applications to the outstanding lenders of mortgage monies. In September 1955 the appellant wrote to New York Life, in December 1955 to Prudential Life, on January 3, 1956 to Canada Life, on February 22, 1956 to Metropolitan Life, on March 28, 1956 to London Life, on March 29, 1956 to Great West Life, all of which, after consideration, declined to advance monies to the appellant on security of a first mortgage.

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The appellant's most promising effort was an application to Massachusetts Mutual Life Insurance Company (hereinafter referred to as Massachusetts), a company which did extensive financing of shopping centres. The appellant telephoned the head office in Springfield, Massachusetts and was referred to the regional office in Detroit, Michigan. Mr. T. Strehlow, the assistant regional supervisor of the company, together with the regional supervisor, thoroughly investigated the centre and other material factors and requested the appellant to complete the company's standard form of application for a mortgage in the amount of \$800,000 which was done on January 19, 1955. Mr. Strehlow testified the application was forwarded to head office with his recommendation for its approval and that he had every expectation the loan would be approved. On February 10, 1956 the head office requested to be supplied with further information which was supplied. The application was subsequently refused.

Mr. Strehlow began his investigation in November 1955 at which time only three of the twenty-three stores in Wing A had been leased. He explained that the small number of leases would not be an impediment to the Massachusetts giving a letter of commitment, but the commitment would be given subject to the requirement of leasing being completed to a specified percentage and he stated that satisfactory leasing was an important factor to a mortgage loan. Had a letter of commitment been forthcoming from Massachusetts, the bank would have been prepared to advance Eastern further funds by way of overdraft.

The first approach by the appellant to Canada Life was for a loan of \$800,000 which was refused. A second approach was made to Canada Life in March of 1956 for a loan in the lesser amount of \$600,000 which was also refused.

The appellant, through its officers, made frequent and continuous pleas to Dominion for assistance in financing.

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While Dominion gave help in negotiating leases by assuring prospective tenants that its supermarket on the site was one of its most successful markets, nevertheless, no financial help was given to the appellant.

T. C. Odette testified that during the latter part of 1954 and the initial half of the year 1955, mortgage money was in plentiful supply and that Mr. Peas of Detroit Mortgage had repeatedly and emphatically assured him that a mortgage loan of \$800,000 would be forthcoming to the appellant. Mr. Odette further testified that subsequent to the withdrawal of Detroit Mortgage from participation in the project in August of 1955, the appellant's attempts to obtain a mortgage from the other sources mentioned above were thwarted by a policy of tight money and retrenchment and that the lending institutions approached were stringently allocating their funds available to applications previously received. In this he was confirmed by Dr. Gilbert Horne, Director of the School of Business Administration at Assumption University at Windsor, who had made a survey of the money market in the years 1955 and 1956 from which he concluded that beginning in the third quarter of 1955 money tightened, credit conditions became tight and money rates went up until the end of 1956, as a consequence of which loans and mortgage funds became difficult to obtain during this period. Evidence to like effect was also given by Mr. Walter Blum, the manager of the Canadian Imperial Bank at Walkerville. Mr. Blum also testified that the appellant and Eastern for whom he acted as banker had both borrowed to the extent of their credit from the Bank.

While the appellant's centre was in the course of construction there were press announcements and rumours of several other shopping centres to be built in Windsor, few of which materialized.

In September 1955 L. Cousens, a real estate agent acting on behalf of Principal Investments Limited (hereinafter referred to as Principal), a company extremely active in shopping centre developments from 1953 forward, approached the appellant with an offer to purchase the appellant's centre which was summarily rejected. Cousens repeated his offer again in December 1955 and was again refused.

In March 1956 another real estate agent, acting on behalf of Ecclestone, a building contractor, attempted to buy the

appellant's shopping centre and was refused. Ecclestone thereupon built on another site far removed from that of the appellant.

Again in March 1956 a real estate agent named Casey made an offer to purchase the appellant's centre. The appellant informed the agent it was not interested and turned him down.

Cousens, on behalf of his principal, persisted in his efforts to acquire the centre, calling on the appellant on frequent occasions throughout January, February and March of 1956. On each visit he was rebuffed.

Following one such refusal to sell by the appellant, Cousens reported to Principal and an officer of that company then approached the president of Dominion suggesting the appellant was willing to sell the centre to Principal provided Dominion consented. Dominion therefore, by letter dated September 6, 1955, Exhibit 12, requested clarification from the appellant. The appellant replied by letter dated September 8, 1955, Exhibit 16, advising of the repeated approaches made to it by Cousens and stated that even appointments to discuss a sale were emphatically declined. The appellant also assured Dominion in this letter that no agreement for sale would be entered into without Dominion being consulted and the concluding assurance was made that "there is at present no thought of selling".

In March 1956 the appellant's financial situation had become desperate. It was unsuccessful in its efforts to obtain mortgage financing. Both the appellant and Eastern had reached the limit of their bank credit. Bills incurred for construction costs were unpaid. At that time the construction costs so incurred were in the amount of \$719,000 a substantial part of which was unpaid. The Bank was aware that Eastern was slow in making many payments and that many subcontractors and suppliers of material were unpaid and so advised Eastern and the appellant. Although no creditors had sued for payment, nevertheless, both the appellant and Eastern faced the prospect of bankruptcy. It was apparent to the officers of the appellant and Eastern that in order to salvage the successful and prosperous Eastern, the shopping centre must be sold.

On March 29, 1956 the appellant wrote a letter Exhibit 9, to William Zekendorf, president of Webb and Knapp Inc.

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of New York, a large real estate developer which had extended its operations into Canada. In its letter the appellant stated it was in the business of building shopping centres throughout Ontario and as they neared completion, selling them to investment firms. Data respecting the Dorwin Shopping Center was enclosed and the letter concluded by stating it was expected that the Windsor centre would be sold within the next month. Such statements were flagrant puffing. Neither Eastern or the appellant had constructed any shopping centres other than the Dorwin centre, nor were any centres sold. An acknowledgment was received from William Zekendorf dated April 2, 1956 expressing interest but no further communication was received from him.

Principal Investments Limited was very active in the development of shopping centres from 1953 to 1955 owning eleven which it had built during this period. This company was particularly anxious to obtain a shopping centre in the Windsor area and concluded that the site of the appellant was the most desirable one. Principal looked at land across the road from the appellant's centre, but concluded it would be more advantageous to purchase the appellant's centre than to build on its own account thereby eliminating a competitor. The anxiety of Principal to acquire the appellant's centre was obvious from the efforts of Cousens the real estate agent it employed for this purpose.

Accordingly the appellant having decided to sell, T. C. Odette visited Principal at its office in Toronto, Ontario to negotiate the sale of the shopping centre. He took with him a draft offer of purchase in which a great many particulars were incomplete and were dependent on negotiation on which T. C. Odette described the appellant's position as being flexible. The draft offer was left and after an exchange of correspondence with the legal department of Principal, L. L. Odette Jr. went to Toronto on either April 25 or 26, 1956 to discuss and complete an offer for purchase. The offer was completed by Principal and accepted by the appellant on April 28, 1956. A copy of the offer to purchase was introduced in evidence as Exhibit 10 and provided for a purchase price of \$1,500,000, a deposit of \$50,000 to be made forthwith, \$700,000 in cash on the closing date of June 15, 1956, and the balance of \$750,000 to be secured by a second mortgage on the developed land, being the 600 ft. shopping

centre and a first mortgage on the undeveloped land of the shopping centre site, with interest at 5 percent. The offer also included a provision for extending the time for closing and an assignment of all existing leases. The appellant undertook to negotiate and execute further leases on behalf of Principal. All leases of units in the premises as outlined in Exhibit 11, were negotiated by the appellant, but Principal did renegotiate a lease with Tamblyn Drug Store for a longer term.

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Principal did not close the transaction on June 15, 1956 as covenanted, expressing the wish to abandon the purchase and forego its \$50,000 deposit. The appellant, however, was adamant in its anxiety to sell with the result that a further deposit of \$50,000 was made and instead of a \$750,000 mortgage, the appellant took mortgages for \$1,000,000 at 5 percent, a \$600,000 second mortgage on the developed land and a \$400,000 first mortgage on the undeveloped land. The eventual closing date of the sale was November 1, 1956.

It was agreed among the appellant, Principal and Cousens that the appellant would pay Cousens a real estate commission of \$30,000.

As shown in Exhibit 8, the costs incurred by Eastern on behalf of the appellant for construction of the centre amounted to \$851,626.94. The contract of sale with Principal was for the centre with all store units fully finished which accounts for the ultimate cost of construction being in the approximate amount of \$1,000,000.

The centre was formally opened on June 1, 1956 and the sale to Principal was not consummated until November 1, 1956. Therefore, the appellant received rent from the tenants during that interval.

The Vice-President of Principal testified that in the year 1958 the gross income from the centre was \$141,840 with operating expenses of approximately \$25,000 leaving a net income of \$116,800 without provision for mortgage payments or depreciation. There were always a few vacancies in the centre.

The question to be determined on the facts outlined is whether the profit of \$424,035.23 realized by the appellant on the sale of its shopping centre was income within the meaning of sections 3 and 4 of the *Income Tax Act*. The

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appellant was certainly not in the business of dealing in real estate in the ordinary meaning of the term "business". Accordingly the question remains whether the appellant, by its actions, was within the meaning of "business" as defined by section 139(1)(e) in that it was engaged in "an adventure or concern in the nature of trade" and whether its profit was a profit from such an adventure as contended by the Minister or whether the amount so realized by the appellant was merely an enhanced value received upon the sale of a capital asset or an investment as contended by the appellant.

I have had no hesitation in concluding that the appellant was not in the business of dealing in real estate. I do not consider the offers of free land to department stores, or the possible sale of land for the erection of an office building as significant, firstly, because no sale or gift was made and secondly, the appellant's willingness to sell a portion of the land was dictated by the necessity of obtaining money therefrom and the presence of an office building and a department store would increase the attractiveness of the property as security for a mortgage loan.

Furthermore, I dismiss the offer to sell to Webb and Knapp as being without significance because the statements made by the appellant were wholly untrue and exaggerated and were made for the purpose of stimulating the interest of the recipient and were prompted by the desperation of the appellant.

From the facts, as above outlined, I am convinced that at the time of the acquisition of the land the appellant did not have the intention of turning it to account by profitable resale, but rather that the appellant sought to create a capital asset from which to realize rental income. The appellant did derive rental income from the centre during the period between June 1, 1956, the date of the opening of the centre and November 1, 1956, the date upon which the sale to Principal was finally closed, although the appellant received rental income by reason of Principal's inability to close the transaction at an earlier date as agreed.

There is no doubt that the Dominion food market on the site was a successful venture, the success of which Dominion wished to still further increase by the addition of a shopping centre. Eastern was favourably known to

Dominion as a building contractor, having undertaken several works on its behalf, and it was a logical consequence that the suggestion of building a shopping centre should have been made by Dominion to Eastern.

In my view the Odettes, as officers and directors of Eastern and prospective officers and directors of the appellant and successful and experienced businessmen, were justified in undertaking construction of Wing A, the initial phase of the shopping centre and placing reliance on the repeated and emphatic oral assurances of the President, the most responsible officer, of Detroit Mortgage, that a first mortgage of \$800,000 would be readily forthcoming. It was reasonable to begin construction without a formal written commitment because such commitments are not forthcoming in the trade until construction has reached a certain stage and a specified percentage of the space in the building has been leased. It follows that responsibility for interim financing and any attendant risk must be assumed by the initiators which Eastern and the appellant did assume. In fact personal financing was contemplated to the extent of \$200,000 at the outset and later when difficulties were encountered, the appellant was prepared to double that amount and get along on a mortgage for \$600,000 rather than \$800,000. Interim financing was done by Eastern and the appellant to the extent of and beyond their respective means and when the source of mortgage monies disappeared the appellant was left with the sole recourse of the sale of the centre dictated by the precarious position in which the appellant and Eastern found themselves.

On the positive evidence adduced, I have no doubt that in the latter part of 1955, that mortgage money was difficult to obtain and at the time when the appellant's need was most urgent. In this conclusion I am confirmed by the difficulty which Principal found in obtaining a first mortgage to close the sale by the appellant to it on the closing date and found it necessary to request an extension of time from the appellant thereby forfeiting two deposits in the amount of \$100,000. The appellant, on its part, was anxious to consummate the sale and was prepared to make concessions to do so since it was only by sale that the appellant could extricate itself and conserve the established and successful Eastern Construction Limited. It is my view that the agreement by the appellant to pay a commission of \$30,000 to

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the real estate agent, Cousens, was one of such concessions so made by the appellant to facilitate the sale.

The offer to purchase dated March 15, 1955 from Eastern as purchaser to Dominion as vendor, specifically provided that the property should be developed as a shopping centre with Dominion as an integral part thereof, the plans being subject to the approval of Dominion and that construction of the centre should be commenced within 10 months of the conveyance of the land, otherwise the purchaser was obligated to offer the land to the vendor for repurchase. These stringent provisions convince me that Dominion sought to ensure that a shopping centre would be built forthwith and that the provisions were also designed to preclude speculation in the land. The appellant accepted the land fully aware of the conditions imposed and conscientiously sought to fulfill them.

It is also my view that the high quality of construction incorporated in the building by the appellant is indicative of an intention to retain the building as its own rather than for resale because I am satisfied that on sale the cost of the built-in quality would not be reflected in the sale price commensurate with the cost thereof. If sale had been contemplated corners could have been cut without a corresponding diminution in the sale price.

The appellant, through its officers and directors, thoroughly investigated the possible yield from a shopping centre on this particular site and were impressed thereby. That its impressions were sound has been proven by subsequent events. The centre has been profitable. While a much more ambitious project was first contemplated complete with a department store with even greater possibilities for more substantial returns, nevertheless, the less pretentious undertaking has been a success yielding a reasonable return.

The cumulative effect of the foregoing facts leads me to the conclusion that the appellant was not engaged in an adventure or concern in the nature of trade and that the profit realized by the appellant on the sale of its shopping centre did not constitute "a gain made in an operation of business in carrying out a scheme for profit-making" within the meaning of that expression as used by the Lord Justice

Clerk in *Californian Copper Syndicate (Limited and Reduced) v. Harris*<sup>1</sup>.

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I do not regard the situation as one in which it should be inferred that the appellant purchased the land and built the shopping centre upon it as a speculation looking to resale or that it was intended to turn the property to account by any method whatsoever as might be expedient although as events turned out that is what the appellant found it necessary to do.

As I have previously stated, it is my view that the appellant sought to create and did create a capital asset which it disposed of at a profit.

I find, therefore, that the appellant was not engaged in an adventure or concern in the nature of trade and the profit made by it on the sale of its shopping centre was not income within the meaning of sections 3, 4 and 139(1)(e) of the Act. The Minister was, therefore, wrong in assessing the appellant as he did and its appeal against the assessments must be allowed with costs.

*Judgment accordingly.*