1963
Nov. 12
1964
Mar. 9

BETWEEN:

C. B. JEAN LORENZEN ..... APPELLANT;

AND

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

Revenue—Income tax—Income Tax Act R.S.C. 1952, c. 148, s. 15(1) and 139(1)(e), (m) and (2)(b)—Whether taxpayer an employee or proprietor of a business—Real estate salesman—Taxation year—The Real Estate and Business Brokers Act, R.S.O. 1960, c. 332, ss. 3 and 45.

During the period from 1953 and including the 1955 and 1957 taxation years the appellant was engaged in selling real estate in the City of Windsor, Ontario and vicinity as a saleslady for one George Lawton, a real estate broker. At the same time she operated a rooming house and cared for her two children so that her real estate activities were confined to the afternoons, evenings and weekends. She was registered under the *Real Estate and Business Brokers' Act* as a saleslady employed by George Lawton, a registered real estate broker, who was described in her application for registration as her employer. For the taxation years 1955 and 1957, the appellant adopted a fiscal period ending on March 31 for her taxation year but the respondent reassessed her income for the two years using the calendar year.

The evidence disclosed that the appellant worked under a commission arrangement with Lawton, that all of the properties dealt with by the appellant were listed with Lawton, that Lawton's name but not that of the appellant appeared on the listing agreement form used by the appellant, that all commissions receivable on the sale of properties by the appellant were payable to and the property of Lawton, that the appellant was provided with a desk, telephone and secretarial services at Lawton's office, that the appellant did not pay any municipal business tax, did no advertising, did not pay a commercial telephone rate, that her name did not appear on or about Lawton's business premises and that advertising done by Lawton on her behalf indicated that he was her employer.

Held: That on the facts the appellant was not the proprietor of a business within the meaning of s. 15(1) of the *Income Tax Act* and therefore was not entitled to adopt a fiscal year ending at a date other than the end of the calendar year.

2. That the appeal is dismissed.

APPEAL under the *Income Tax Act.*

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

A. B. Weingarden 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.

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CATTANACH J. now (March 9, 1964) delivered the following judgment:

These are appeals against the appellant's income tax assessments for the taxation years 1955 and 1957.

As the identical problem is involved in both appeals they were heard together. The sole issue between the parties is whether the appellant is entitled to adopt fiscal periods ending March 31 in the years in question for her taxation years as contended by her, or whether her income should be ascertained on the basis of the calendar years as contended by the Minister and upon which basis the assessments appealed against were made by him.

In order for the appellant to be entitled to adopt a fiscal period other than a calendar year, she must be the "proprietor of a business" within the meaning of those words as used in section 15(1) of the *Income Tax Act*, 1952, R.S.C., c. 148 which reads as follows:

> 15. (1) Where a person is a partner or an individual is a proprietor of a business, his income from the partnership or business for a taxation year shall be deemed to be his income from the partnership or business for the fiscal period or periods that ended in the year.

If the appellant is not the proprietor of a business, then her taxation years must be the calendar years in accordance with section 139(2)(*b*) wherein, "taxation year" is defined as follows:

> (2) For the purposes of this Act, a "taxation year" is
>
> . . .
>
> (*b*) in the case of an individual, a calendar year,
>
> . . .

The appellant resided in the City of Windsor, Ontario, as the wife of a medical practitioner in that city for sixteen years after which time they separated. There were two children of that marriage then aged seven and three who remained in the care of the appellant. This responsibility required the appellant to augment her income and accordingly she opened her home to paying guests. In addition, she obtained employment as a saleslady in a department store. However, the regular hours of such employment detracted from the time the appellant could devote to her children. She, therefore, turned her thoughts to becoming a real estate salesman because of her wide

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social acquaintanceship in Windsor and particularly since she felt such occupation would permit of working hours best suited to her convenience.

Accordingly she sought and obtained an interview with George Lawton, a well established real estate broker who was personaly known to the appellant, who agreed that she should sell real estate on his behalf.

There was no written agreement between the appellant and Lawton.

However, the appellant was precluded by section 3 of *The Real Estate and Business Brokers' Act,* 1950, R.S.O., c. 332 from selling real estate unless she was registered as a salesman of a real estate broker registered as such under the Act. Lawton was so registered as a real estate broker.

Accordingly, the appellant, at the suggestion and with the assistance of Lawton, made an application dated October 13, 1953 for registration as a salesman for George Lawton on a form prescribed by the Act. The printed portion of the form described Lawton as the employer of the appellant and the nature of her employment was described as a saleslady. The application was supported by the affidavit of the appellant verifying the information contained therein. Also attached to the application was a "Certificate of Employer" completed by Lawton who was described as the appellant's employer. It was also certified therein by Lawton that the appellant "will not share in either the expenses or profits of my/our real estate business, but will be paid on a commission basis for work performed."

This application was made by the appellant under the name C. B. Jean Seymour and was introduced in Evidence as Exhibit I. In the interval between the appellant's 1955 income tax return wherein she was also described as C. B. Jean Seymour and her return for 1957 wherein she was described as C. B. Jean Lorenzen, she married a Mr. Lorenzen which accounts for the appellant's change of name and her description in the present style of cause.

The appellant was duly licensed as a salesman for Lawton and began her duties forthwith.

The commission arrangements between the appellant and Lawton were that for any property exclusively listed for sale with the broker, i.e. Lawton, of which the appellant negotiated the sale she received 40 percent of the commis-

sion received by the broker. If the appellant persuaded a vendor to list a property with Lawton she was entitled to 20 percent of the broker's commission regardless of who sold the property. However, if the appellant both listed and sold a property, she would then receive both the 20 percent and 40 percent shares of the broker's commission.

In addition to properties listed exclusively for sale with one broker, many properties were listed with a broker on a co-operative basis now described in the trade as multiple listing. The significance of multiple listing is that if the listing broker is a member of a Real Estate Board, then every other broker who is also a member of the Board may offer the property for sale.

The commission on the sale of a property subject to multiple listing is divided three ways among the listing broker, the selling broker and the Real Estate Board.

Since the appellant was entitled to 20 percent of the commission received by Lawton on the sale of a property listed with him by her, it follows that when a property listed by her is subject to multiple listing and is sold by another broker, her share of the commission is correspondingly less.

The appellant became keenly aware of this circumstance and in company with other salesmen on Lawton's staff, although not all of them, she pointed out this iniquity suggesting that it was contrary to the salesman's financial interest to recommend multiple listing to a vendor. Lawton agreed with these representations and increased the listing salesman's share of the broker's commission on the sale of properties subject to multiple listing to 60 percent. This revised arrangement was applicable to all salesmen on Lawton's staff and not solely to the appellant.

The balance of any commissions as arranged between the appellant and Lawton was retained by him.

A specimen form of listing agreement used by the appellant and furnished to her by Lawton was introduced in evidence as Exhibit R2. By this document a vendor authorizes George Lawton to sell the property. The appellant's name does not appear on this form, although she testified that she invariably signed as witness when she persuaded a vendor to sign the form.

The appellant freely admitted that under the provisions of *The Real Estate and Business Brokers' Act* (*supra*) she

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could make sales only on behalf of the broker with whom she was registered, any listings she obtained must be made with that broker and she could be registered as a salesman with only one broker at a time. I agree that such is the effect of the Act.

Within two months of beginning as a real estate salesman with Lawton, the appellant was put on a maximum $60 per week drawing account against her share of the broker's commission earned by her with quarterly accountings between the appellant and Lawton.

All commissions receivable on the sale of properties were payable to and the property of Lawton with subsequent distribution to the appellant in accordance with commission divisions arranged between them as above described.

The appellant was neither required, nor expected to spend any stipulated time in Lawton's business premises, nor to report at any specific time, although she testified that she normally went there in the forenoon when her household chores were done. She was allowed the utmost latitude as to when and where she would work. At Lawton's office she was provided with a desk, telephone and secretarial services, access to the broker's listing records and all like facilities.

The appellant's selling activities necessitated long periods of absence from the broker's office. She estimated the time so spent as being equally apportioned between the usual daytime working hours and the evenings and weekends.

The appellant provided her own automobile and bore the expense thereof. She also paid the fee for her real estate salesman licence and the cost of a surety bond.

Because of the time required by her real estate activities, the appellant employed a housekeeper to assist in the rooming house which the appellant continued to operate. Although the housekeper answered the telephone and recorded messages for the appellant, this was incidental to her housekeeping duties and in no way was she directly employed in connection with the appellant's real estate selling.

The appellant did not pay any municipal business tax. She conducted no newspaper advertising, nor did she advertise in the local telephone directory or have a business listing therein. She did not pay a commercial telephone rate.

The appellant's name did not appear in any manner on or about Lawton's business premises, nor did she exhibit any sign indicative of her capacity as a real estate salesman about her home. In fact she was precluded from doing so by municipal zoning by-laws and regulations.

Any advertising on behalf of the appellant was done by Lawton. Under section 45 of *The Real Estate and Business Brokers' Act, (supra)* a broker is required in any advertising of property to clearly indicate his own name as the person advertising and that he is the broker and that any reference to the name of a salesman in an advertisement must clearly indicate the broker as being the employer of the salesman. This method of advertising was done consistently by Lawton.

On the basis of the facts above recited, the appellant contends that she was not an employee in the service of George Lawton in his business as a real estate broker, but rather that she was an independent agent and, therefore, the proprietor of a business and as such entitled to adopt for a taxation year a fiscal period in accordance with section 15(1) of the *Income Tax Act* as quoted at the outset.

In section 139(1) of the *Income Tax Act, "business"* is defined in paragraph (*e*) as including, "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" and in paragraph (*m*) the terms "employment", "servant" and "employee" are defined as follows:—

> (*m*) "employment" means the position of an individual in the service of some other person (including Her Majesty or a foreign state or sovereign) and "servant" or "employee" means a person holding such a position; . . .

The question to be resolved is whether the appellant was the "proprietor of a business" or an "employee".

On the facts I find that the appellant was not the proprietor of a business within the meaning of section 15(1) of the Act and, therefore, was not entitled to adopt a fiscal year ending at a date other than the end of the calendar year.

It follows that the Minister was right in assessing the appellant as he did and the appeals herein must be dismissed with costs.

Judgment accordingly.