BETWEEN:

RONALD K. FRASER .....APPELLANT;

AND

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

1961
Jun. 23, 26
1963
Dec. 24

Revenue—Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 8(1)(c) and 139(1)(e)—Transfer of real property to Company in consideration of allotment of non-voting shares—Consideration conceded by taxpayer to be income—Consideration to be evaluated on date of transfer of property.

In October, 1952, the appellant and one Grisenthwaite, as equal partners, purchased a 32 6 acre tract of land in the Township of Grantham, on

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the outskirts of the City of St. Catharines, Ontario, fronting on the Queen Elizabeth Way. The price paid was $97,800, of which $45,000 was paid in cash, the remainder being secured by a mortgage to the vendors. The purpose of the purchase was to acquire a site for a Dominion Stores Supermarket and to develop the remainder of the land as a shopping centre. In February, 1953, the partners sold a 4.427 acre parcel of the land to Dominion Stores Limited for $50,000. The supermarket was built but the partners eventually abandoned the shopping centre project.

In June, 1953, Geneva Investments Limited, a private company, was incorporated under the *Ontario Companies Act,* with an authorized capital of 30,000 redeemable, non-voting preference shares with a par value of $10 each, and 40,000 common shares of no par value. All of the common shares but three were allotted to one Mitchell, a Grisenthwaite Construction Company superintendent, for a consideration of 5 cents per share, and on the same date, June 10, 1953, the 28 173 acres of land still owned by the appellant and Grisenthwaite was conveyed to the company in consideration of the allotment and issue of 8,172 fully paid preference shares to the appellant and an equal number to Grisenthwaite, and of the assumption by the company of the mortgage on the said lands on which the balance then remaining was $41,550. Both the appellant and Grisenthwaite held all the preference shares issued to them at the date of hearing of the appeal. The only assets of the company in June, 1953, were the $2,000 paid for the common shares and the 28 173 acres of land. Neither the appellant nor Grisenthwaite ever owned any of the common shares of the company or ever had any right to acquire any interest in any of the common shares. At the time of the conveyance of the said land to the company, it retained the appellant to represent the company in negotiations with various governmental agencies concerning registration of a subdivision plan. Seven weeks after the company acquired the said 28.173 acres of land, Principal Investments Ltd. agreed to purchase 11.98 acres thereof for $150,000, provided the company installed certain services and had an amended subdivision plan registered.

In 1958, the respondent reassessed the appellant's income for the 1953 taxation year by adding to his reported income the sum of $60,240 51, and in calculating this amount, he took the value of the preference shares owned by the appellant to be their par value. On appeal, the Tax Appeal Board held that the preference shares should be valued at the end of 1953, and that they were then worth the then true value of the equity in the land transferred plus the net gain on a portion of the land sold in July, 1953.

Held: That the sole question to be determined was the market value of the 28.173 acres of land on June 10, 1953, this amount, less the balance outstanding on the mortgage on the said land, being the value of the preference shares issued by Geneva Investments Limited to the appellant and Grisenthwaite on that date.

2. That the market value of the said land on June 10, 1953, as established by the acceptable valuations, was $59,163 and the value of the 16,345 preference shares on that date was accordingly $59,163 less the mortgage liability of $41,550, or $17,613.

3. That the appeal is allowed and the cross appeal is dismissed.

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APPEAL from a decision of the Tax Appeal Board.

The appeal was heard before the Honourable Mr. Justice Ritchie, Deputy Judge of the Court, at Toronto.

E. D. Hickey, P. N. Thorsteinsson and *D. J. Johnston* for appellant.

Max Bruce, Q.C. and *M. A. Mogan* for respondent.

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

RITCHIE D.J. now (December 24, 1963) delivered the following judgment:

This appeal is from a decision of the Tax Appeal Board allowing in part an appeal from a May 14, 1958 re-assessment of income tax by the Minister of National Revenue adding $60,240.51 to the income reported by the appellant for the 1953 taxation period. The transactions on which the re-assessment is based relate to the purchase of 32.6 acres of farm land and the subsequent sale of 28.173 acres of it to Geneva Investments Limited. For convenience of reference that company sometimes hereinafter shall be referred to as "Geneva". The $60,240.51 additional income was computed as follows:

Total cost of land purchased (32.6 acres)	$ 97,800 00
Cost of land sold to Dominion Stores Limited (4 427 acres)	13,281.00
	$ 84,519.00
Sale of land to Geneva (28 173 acres)	$205,000.00
Cost of land sold to Geneva	84,519.00
Net profit	$120,481.00

50% of $120,481.00—$60,240.51

In making the re-assessment the Minister took the par value of the preference shares to be their value in the hands of the appellant. The Tax Appeal Board, however, held the preference shares should be valued as of the end of 1953; that, as of then, the preference shares were worth the then true value of the equity in the land transferred plus the net gain on a portion of the land sold in July 1953; that the realizable value of the equity in the land as at the end of 1953 was nearly $82,000; that $5 per share was a fair and

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proper valuation for the preference shares; and that the nominal value of the preference shares was of no significance. The Board deducted the sum of $30,120.25 from the appellant's taxable income for the 1953 taxation year, as determined by the re-assessment, vacated the assessment for that year and referred the matter back to the Minister for a further re-assessment giving effect to the $30,120.25 deduction. The deduction is one-half the amount which the re-assessment added to the appellant's taxable income.

The appellant now appeals from the decision of the Tax Appeal Board. He concedes the consideration received on the sale to Geneva is income and should be brought into account for the purpose of computing 1953 taxable income. A plea that any gain realized was a capital gain was abandoned.

The Minister, by way of a cross-appeal, appeals from so much of the decision of the Tax Appeal Board as directs the $30,120.25 deduction from the appellant's taxable year for the 1953 taxation year.

In support of the re-assessment, the Minister invokes sections 3, 4, 8(1)(*c*) and 139(1)(*e*) of the *Income Tax Act*. They are:

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.

8. (1) Where, in a taxation year,

(*c*) a benefit or advantage has been conferred on a shareholder by a corporation,

otherwise than

(i) on the reduction of capital, the redemption of shares or the winding-up, discontinuance or reorganization of its business,

(ii) by payment of a stock dividend, or

(iii) by conferring on all holders of common shares in the capital of the corporation a right to buy additional common shares therein,

the amount or value thereof shall be included in computing the income of the shareholder for the year.

139. (1) 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.

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The appellant describes his occupation as the general manager and the secretary of both Grisenthwaite Construction Company Limited and Grisenthwaite Holdings Company Limited. He owns 49% of the issued shares in the capital stock of the latter company. The remaining 51% is owned by William H. Grisenthwaite. Both the appellant and Mr. Grisenthwaite also own shares in the capital stock of Grisenthwaite Construction Company Limited but the extent of their holdings in that company is not stated. The record discloses no information respecting the field of activity in which Grisenthwaite Holdings Company Limited is engaged.

In October 1952 the appellant and William H. Grisenthwaite, as equal partners, purchased 32.6 acres of land from the beneficiaries under the will of the late Thomas Nihan. The land, then known as the Nihan Estate property, was situate on the outskirts of St. Catharines and formed part of Lot 17 in the Fourth Concession of the Township of Grantham. It had a southern frontage of about 1,364.1 feet on the Queen Elizabeth Way, an eastern frontage of about 1,084.8 feet on Geneva Street and was bounded on the west by railway tracks and on the north by the old Welland Canal property. The price paid for the land was $97,800, equivalent to $3,000 per acre. Forty-five thousand dollars of the purchase price was paid in cash and the land mortgaged to the vendors to secure payment of the unpaid balance of $52,800. In order not to identify the real purchasers, title to the land was taken in the name of Edwin D. Hickey, their solicitor. His status was that of a trustee for his two clients.

The primary purpose of the purchase of the 32.6 acres was the acquisition of a site for a Dominion Stores Supermarket and development of the remaining land as a shopping centre. The evidence is obscure but it is suggested that, prior to committing themselves to the purchase of the Nihan land, the appellant and Grisenthwaite had an agreement or assurance of some nature from Dominion Stores Limited to the effect it would purchase from them for the price of $50,000 a corner lot at the southeast corner of the property. In any event, a corner lot having an area of 4.427 acres was conveyed by the partners to Dominion Stores Limited on February 2, 1953 for a consideration of $50,000. This corner lot

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had frontages of 442.1 feet on the Queen Elizabeth Way and 561.7 feet on Geneva Street. A Dominion Supermarket now is situate thereon but there is no evidence as to when construction of the supermarket commenced or the date on which it opened for business.

The appellant and his partner did not proceed immediately with the development of the remaining 28.173 acres and they, eventually, abandoned the shopping centre project. The appellant says a great many more zoning problems than anticipated were encountered in respect of such development. One difficulty was a requirement that sanitary sewage must flow through an already overloaded trunk sewer in the City of St. Catharines while storm water had to flow in the opposite direction through a strip of land owned by the City of St. Catharines and the Township of Grantham. Opposition from the St. Catharines "down town merchants" developed. Mr. Grisenthwaite was then quite active in the Hamilton area and became willing to sell the land en bloc. William Mitchell, a Grisenthwaite Construction Company superintendent, who had built an apartment building and some houses in the St. Catharines district for his own account and was anxious to establish a business of his own, displayed interest. Several discussions between the appellant, Grisenthwaite and Mitchell resulted in the negotiation of an agreement under which the land would be sold to a company to be incorporated for a consideration consisting of the allotment and issue to the appellant and his partner of 16,345 preference shares in its capital stock and the assumption by it of liability for the mortgage debt covering the balance owing on the purchase price which, as of then, had been reduced to $41,550.

The appellant testified that the discussions with Mitchell covered possible methods of developing the land; that they guessed as to how it might be developed and what the ultimate net realization might be over a period of ten years; and that they tried to peer into the future. As he put it, the Geneva agreement gave Mitchell an opportunity to acquire land for building purposes at a minimum investment, and gave the vendors preference shares then practically worthless, but with some hope of acquiring value over a ten year period. My understanding of the appellant's evidence is he and Grisenthwaite estimated that by the end of the ten years the eventual net realization from the land

could give the preference shares a break up value equivalent to their par value. On cross-examination he said that on June 10, 1953 he considered the value of the equity in the 28.173 acres to be about $8,000.

On Mitchell's instructions, Geneva was incorporated on June 9, 1953 as a private company under the provisions of the *Ontario Companies Act*. No shares in the capital stock can be transferred without the express consent of a majority of the board of directors, to be signified by resolution of the board. The authorized capital consists of 30,000 preference shares having a par value of $10 each and 40,000 common shares of no par value, the aggregate consideration for the issue of which must not exceed in amount or value the sum of $40,000. The preference shares are non-voting and carry a non-cumulative preferential dividend of 3% per annum. They are redeemable by the company on payment for each share to be redeemed of the amount paid up thereon.

On June 10, 1953 the Geneva board of directors allotted 39,997 common shares in its capital stock to William Mitchell for a consideration of five cents per share, an aggregate consideration of $1,999.85. As the $1,999.85 was paid and the applicants for incorporation had paid the same consideration for the three common shares they had subscribed for, the total amount paid up on the issued common shares of Geneva was $2,000. On the same date the board accepted an offer from Edwin D. Hickey, as trustee for the appellant and Grisenthwaite, to sell the 28.173 acres to Geneva for the consideration determined through their discussions with Mitchell. The board then enacted by-law #4 providing for the purchase by the company of the 28.173 acres for a consideration to consist of the allotment and issue of 16,345 fully paid preference shares in the capital stock of Geneva and the assumption by the company of a $41,550 balance of original purchase price liability, secured by a mortgage on the land. After approval of by-law #4 by the shareholders and pursuant thereto, the directors, also on June 10, 1953, allotted 8,173 fully paid preference shares to William H. Grisenthwaite and 8,172 fully paid preference shares to the appellant. On the same date the 28.173 acres of land were conveyed to Geneva. As of the date of the hearing of the appeal, the appellant and Mr. Grisenthwaite still held all the preference shares so allotted and issued to them respectively.

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At the time of completing the transfer of the 28.173 acres to Geneva, the appellant and Grisenthwaite were aware it, apart from the $2,000 paid up on the 40,000 issued common shares in its capital stock, had no asset other than the 28.173 acres of Nihan land. They also were aware that immediately after the sale it had no other asset.

Neither the appellant nor Mr. Grisenthwaite have, at any time, owned any of the common shares in the capital stock of Geneva and neither of them bears any blood, marriage or adoption relationship to any of the common shareholders of the company. Neither has any right to acquire any direct or indirect interest in the common shares. During the 1953 taxation year, the appellant engaged in the purchase of corporate shares or bonds only to a minor extent, not in excess of $1,500.

Pursuant to the provisions of the *Land Transfer Act*, there was submitted to the Comptroller of Revenue of the Treasury Department of the Province of Ontario an affidavit by Edwin D. Hickey who had held title to the 28.173 acres as trustee for the appellant and Grisenthwaite. In this affidavit he deposed the true amount of the monies in cash and the value of any property or security included in the consideration for the conveyance of the 28.173 acres to Geneva was:

Monies paid in cash	nil
Securities transferred to the value of	$ 163,450
Balances of existing encumbrances	41,550
Total consideration	$ 205,000

The land transfer tax payable to the Province of Ontario in respect of the sale to Geneva was computed on the "total consideration" of $205,000 set out in this affidavit. Mr. Hickey, who throughout the transaction which culminated in the conveyance to Geneva acted as solicitor for the appellant, Mr. Grisenthwaite, Mr. Mitchell and Geneva, says that, in drafting the affidavit, he set the value of the preference shares at $163,450 because he knew departmental practice required any shares forming part of the consideration for a land transfer and having a par value to be valued at such par value. Unfortunately, departmental practices rigidly adhered to often result in compliance with requirements for which there may be no justification. Whether the requirement in respect of the Ontario land transfer tax is

justified does not concern us. Mr. Hickey accepted it. He, apparently, did not argue.

The *Land Transfer Act* affidavit was regarded by the income tax assessing officers as supplying a foundation on which to rest the "Sale to Geneva $205,000" item in the re-assessment.

Following the sale to Geneva, the appellant did not lose all connection with the property. On the same day that the Geneva directors authorized the purchase of the 28.173 acres, they retained him to represent the company in negotiations with the Township of Grantham, the City of St. Catharines and the Department of Planning and Development of the Province of Ontario for the obtaining of all necessary consents to, and approval of, the registration of a plan of survey of the land. The fee for these services was fixed at $1,000 payable on the sub-division plan being accepted for registration.

Under date of July 29, 1953, only seven weeks after Geneva had acquired the 28.173 acres, one Mervin D. Hallman of Toronto agreed to purchase, for the sum of $150,000, an 11.98 acres tract near the northern boundary of the land and extending to its western limit. That price works out to about $12,252 per acre for serviced land. The offer was accepted. It later developed Mr. Hallman was an agent for Principal Investments Limited, a well known developer of shopping centres. The terms of offer provided that:

(*a*) Geneva should obtain approval from all relevant municipal and provincial authorities of a proposed plan of subdivision, amended to show the land as one parcel for commercial purposes, and cause the plan so amended, consented to and approved to be registered in the proper Registry Office by, or before, November 30, 1953;

(*b*) Geneva, at its own expense, would install water lines and sanitary sewers under the full length of the roadway adjoining the northerly limit of the land and complete same on or before the closing date;

(*c*) Geneva would install storm sewers under the land along the approximate route indicated on the sketch attached to the offer and grant the purchaser an easement to make connections with same; and

(*d*) the sale should be completed on or before September 1, 1953 or upon registration of the plan of subdivision whichever should be the later.

The subdivision plan was not registered until February 5, 1954 under the name of "The Nihan Park Plan". It was not until February 26, 1954 that the 11.98 acres were conveyed

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to Principal Investments Limited. Notwithstanding the identity of the purchaser, the Nihan Park Plan provided for development of the property as a housing subdivision.

While, in my opinion, it has no relation to the value of the 28.173 acres as of June 1953, it is interesting to note that on January 31, 1957, almost four years later, Geneva sold to Principal Investments Limited whatever part of 28.173 acres it still owned as of that date. Immediately before this sale was completed a county court judge had ordered amendments to the Nihan Park Plan. The expressed consideration for this sale to Principal Investments Limited was $210,000, of which $5,000 was paid in cash and the balance of $205,000 was secured by a mortgage. The significance I find in this second sale to Principal Investments Limited is that the shopping centre project conceived by the appellant and his partner in 1952 was still very much in the promotion stage in 1957.

On July 9, 1957, Mitchell sold all his Geneva common shares to Howard Clifton Poole, a professional accountant employed by both Grisenthwaite Construction Company Limited and Grisenthwaite Holdings Limited. Mr. Poole was subpoenaed to give evidence on behalf of the Minister. He testified he was a director of Geneva and, apart from two shares to qualify directors, held all the issued common shares in the capital stock of the company; that he acquired the Geneva common shares from William Mitchell for the price of $5,000; that he owned such common shares outright; that he had not entered into any agreements either as to the conduct of Geneva's affairs or in respect of the common shares in its capital stock; that his common share certificates had not been endorsed for transfer; and that no Geneva preference shares had been redeemed.

Clare Edward Amy, the manager of the main office of the Royal Bank of Canada in Hamilton, testified he had had some experience in realizing on shares in the capital stock of private companies held as collateral security for loans. He said his usual practice when endeavouring to effect such a realization was to seek someone in an allied line who might be interested in acquiring the company. As to the value of the Geneva preference shares, he expressed the opinion they would be practically worthless as collateral security for a loan but qualified his opinion by saying that if the same owners also held the common shares he might place a higher

value on the preference shares. Mr. Amy's evidence satisfies me that, as of June 10, 1953, there was no ready market for the Geneva preference shares. Their only value was a break up value.

George X. Walker testified as an expert witness on behalf of the appellant. He is a licensed real estate broker, has been engaged in that line of endeavour since 1946 and is the president and managing director of H. E. Rose & Co., Limited which has been making real estate appraisals in St. Catharines since 1910. His own appraisal experience dates from 1950 when he commenced making appraisals in the Niagara Peninsula. On March 1, 1957 he was instructed by the appellant's solicitors to make valuations of the 28.173 acres as of October 21, 1952, the date on which the appellant and Grisenthwaite obligated themselves to purchase the 32.6 acres then owned by the Nihan Estate, and also as of June 10, 1953, the date on which the 28.173 acres were sold to Geneva. The instructions addressed to Mr. Walker stressed he should endeavour to make his valuations as though they were being made in 1952 and 1953 and without the certain knowledge of what had happened in subsequent years. The market values estimated by Mr. Walker were $1,600 per acre, or a total value of $45,076, as of October 21, 1952 and $2,000 per acre, or a total of $56,346 as of June 10, 1953. In his opinion the value of the land increased by $11,270 during the intervening eight months. The appraisal report states the definition of market value he applied was:

> The highest price estimated in the terms of money which a property will bring when exposed for sale in the open market, allowing a reasonable time to find a purchaser who buys with knowledge of all the uses to which the property is adapted and for which it is capable of being used.

Prior to 1953 there was little or no development in the general area of Grantham Township. The Nihan land was flat, poorly drained and adjacent to what was formerly the old Welland Ship Canal, since refilled and reclaimed. Proper sewers and drainage were available only if installed by a developer. The condition of Geneva Street was poor and almost impassable in the winter months.

Mr. Walker's report states thirty serviced lots in the Township of Grantham had been sold through his office in 1952 at an average price of $1,475 per acre; that subdividers in the Township were paying up to $1,500 per acre for

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unserviced land in 1952 while the City of St. Catharines was receiving $2,500 per acre for serviced land within the city limits; and that enquiries for vacant land for shopping centre purposes, industrial use and housing developments began to increase in 1952.

In March 1947, when Mr. Walker made his appraisal, there was no service road on the south side of the property. As the Queen Elizabeth Way was a limited access highway, the only access to the Nihan land was from Geneva Street.

The second expert witness called by the appellant was Louis B. Tripp, a retired real estate broker and appraiser with at least twenty-five years appraising experience in St. Catharines. He still makes mortgage appraisals for the Imperial Life Assurance Company. Mr. Tripp, who had known the property for twenty-five years, also was instructed by the appellant's solicitors on March 1, 1957, in the same terms as the instructions given Mr. Walker, to make valuations of the 28.173 acres as of October 21, 1952 and June 10, 1953. The Tripp appraisal report, dated March 8, 1957, ascribes a value to the land of $1,800 per acre or $50,711, as of October 21, 1952 and $2,100 per acre, or $59,163, as of June 10, 1953. In Mr. Tripp's opinion, the valuation increased $8,452 during the intervening eight months.

For the most part Mr. Tripp's report was based on information obtained respecting sales of comparable properties. It states that as of October 1952 the highest and best use of the land was as a housing subdivision. As of June 1953 a large area to the north, extending nearly to Lake Ontario, had been subdivided and many homes constructed thereon. That was the principal reason for Mr. Tripp concluding the land value had increased by $300 per acre. He refers to 1948 and 1953 aerial photographs appended to his report as evidencing no great physical changes had occurred in the area during that five year period. Factors in favour of the property are listed as proximity to the city limits; proximity to the Queen Elizabeth Way; the proximity, immediately to the east, of a good class of newer type residential properties; rapid development of numerous subdivisions towards the north to Lake Ontario; and improved transportation facilities. Unfavourable factors listed are rather low lying ground with no drainage facilities; several poor class buildings and properties facing the land on Geneva Street; an

old established piggery about 1,000 feet north of the property; railway tracks parallel to and a short distance from the western boundary; doubtful use of old abandoned Welland Canal grounds immediately to the north of the property; dangerous intersection of the Queen Elizabeth Way and Geneva Street where many fatal automobile accidents had occurred during last few years; and the lack of a service road from the Queen Elizabeth Way.

There is no explanation of the reasons which motivated the appellant's solicitors, on March 1, 1957, to request valuations of the 28.173 acres as of October 21, 1952 and June 10, 1953.

Frederick John Shankland was called as an expert witness on behalf of the Minister. He is an accredited appraiser of The Appraisal Institute of Canada, a member of the American Institute of Real Estate Appraisers and holds membership in an imposing list of Appraisal Institutes and Real Estate Boards. His initial training was in England and Scotland. It was not until September 1954, more than a year after the sale of the subject land to Geneva, that Mr. Shankland came to Canada in order to accept employment as an appraiser with Central Mortgage and Housing Corporation. One year later he joined the appraisal staff of Credit Foncier Corporation where he remained for three years. His next employer was J. A. Willoughby & Sons Limited, engaged in the business of realtors since 1900. He was with the Toronto office of that company in 1961 when he made his appraisal of the 28.173 acres. At the time of the hearing, Mr. Shankland was the manager of the appraisal department of British Canadian and American Real Estate Consultants, a company he became associated with on May 1, 1961. The instructions for Mr. Shankland to appraise the value of the 28.173 acres were addressed to him by counsel for the Minister under date of March 9, 1961. The Shankland valuations for the acreage are $47,800, or $1,697 an acre, as of October 21, 1952 and $197,000, or about $7,000 per acre, as of June 10, 1953, for then unserviced land. The definition of market value he applied was:

> The price which the property will bring in a competitive market under all conditions requisite to a fair sale, which would result from negotiations between a buyer and a seller, each acting prudently, with knowledge, and without undue stimulus.

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Before embarking on his appraisal, Mr. Shankland was furnished with the transcript of the proceedings before the Tax Appeal Board, the appraisals made by Mr. Walker and departmental memoranda giving factual information about the property and the financial statements of Geneva. He was aware the Minister had ruled the land had been sold to Geneva for a total consideration of $205,000.

Following the title page of the Shankland report is an aerial photograph showing a view of the property facing northwest as of September 1960, more than seven years after the sale to Geneva. This photograph shows the Dominion Supermarket at the southeast corner of the property and shopping centre buildings near and parallel to the western boundary.

In his area analysis, Mr. Shankland states the rate of growth in Grantham Township tended to increase until 1952 and thereafter steadily declined. He also states:

> At present the $3,000,000 Fairview Shopping Centre is being erected on the subject property.

I take "at present" to mean as of the date of Mr. Shankland's report, which is June 23, 1961. It would seem the shopping centre buildings shown in the September 1960 photograph were then under construction.

In his neighborhood analysis, Mr. Shankland states the property adjoins what was formerly the Welland Ship Canal, since refilled and reclaimed; that north of the property there is a piggery consisting of a group of very poor buildings; that the site is mainly level but in 1952-53 was poorly drained; that there were no sewers north of the Queen Elizabeth Way in 1952-53; that in 1952-53 there was no by-law to control land use in Grantham Township; that, despite the considerable amount of residential development in the Township of Grantham as a whole, little development had occurred in the immediate neighborhood of the property by 1953; and that, while as of the date of the report the Queen Elizabeth Way was carried over Geneva Street by means of an overpass, there was a grade level intersection there in 1952-53.

In respect of his October 21, 1952 valuation, Mr. Shankland's report states he "tried to visualize what was in the minds of the vendors and the purchasers on October 21, 1952". Such visualization enabled him to form the opinion

that the 4,427 acres corner lot sold to Dominion Stores was the most desirable part of the Nihan land and, because he "was unable to find any evidence to the contrary", he accepted $50,000 as its value. The simple process of subtraction determined $47,800 to be the value of the 28.173 acres as of October 21, 1952.

Included in that portion of the report dealing with the history of the property reference is made to the following four items:

1. On December 7, 1953, more than four months subsequent to the date of the Hallman agreement, Geneva conveyed to Dominion Stores Limited a strip of land about 0.43 acre in area at a price representing about $2,300 per acre.
2. On the same date, December 7, 1953, Geneva, on a land exchange, conveyed 1.795 acres to the City of St. Catharines. Mr. Shankland estimates the consideration received by Geneva was equivalent to $3,000 per acre.
3. On December 14, 1953 Dominion Stores Limited reconveyed to Geneva a portion of the strip above mentioned. The reconveyance covered 0.34 acre. Mr. Shankland works out the consideration as about $6,000 per acre.
4. On February 2, 1954 Geneva registered a plan to be known as "The Nihan Park Plan". This plan divided the remaining property owned by Geneva into 101 building lots.

All four items are related to the Hallman agreement.

In that section of his report which deals with the methods followed in determining his June 10, 1953 valuation, Mr. Shankland states that, in order to obtain an indication of the value of the property as of that date, he investigated details of four sales relating to three other shopping centre sites north of the Queen Elizabeth Way and west of the Welland Ship Canal and also endeavoured to find transactions involving comparable land. The shopping centre site sales examined were one of 7.85 acres on April 19, 1956 for $20,000 ($2,535 per acre), a second of 8 acres on April 10, 1958 for $36,000 ($4,500 per acre), a third of 2.19 acres on May 28, 1958 for $5,476 ($2,500 per acre) and a fourth of 4 acres on November 2, 1959 for $36,000 ($9,000 per acre). All four transactions were rejected because of the length of time which had elapsed after the sale to Geneva. Having found no transactions relating to what he considered comparable land and because he was valuing a shopping centre site, Mr. Shankland decided to concentrate on transactions

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relating to the subject property. In the course of his testimony he said:

> I have relied wholly on a sale which occurred only one month after the conveyance to Geneva. This is the sale of 11.98 acres of serviced land, all shown on the Nihan Park Plan at lot 10 which sold to a nominee of Principal Investments Limited for $150,000 in July 1953.

In explaining how the valuation as of June 10, 1953 was computed, the Shankland report says:

> In October 1952, the subject property was raw land with a potential as a future shopping centre site. By June 10, 1953 contractual arrangements had been made with Dominion Stores Limited and thus the nucleus of a shopping centre had been formed. Thus, in my opinion, the status of the subject property changed between October 1952 and June 1953. In order to obtain an indication of the value of the subject property in June 1953, I have relied on the sale of 11.98 acres of serviced land to a nominee of Principal Investments for $150,000 in July 1953. I have deducted from this amount the cost of the roads, sewers et cetera attributable to this land, leaving a residual value to unserviced land.

The amount which Mr. Shankland took as the total cost of installing services was $85,640. He apportioned 70% of that amount, $59,948, to the 11.98 acres and 30%, $25,692 to the remaining 16.193 acres. On the basis of the sale price of the 11.98 acres as serviced land, he computed the value of the tract as unserviced land to be $7,516 per acre. As the 28.173 acres contained land less desirable than the 11.98 acres, Mr. Shankland scaled down his per acre value to $7,000 and decided the total value for the 28.173 acres as of June 10, 1953 to be $197,000.

Firstly because he felt it might not be a transaction at arm's length, secondly because it was the subject of this appeal and thirdly because it was not a good indication of market value, Mr. Shankland, in preparing his June 10, 1953 valuation, gave no consideration to the transaction by which Geneva acquired title to the property.

On cross-examination Mr. Shankland testified the shopping centre was developed by Fairview Investments, not by Principal Investments Limited; that, in March 1961 when he inspected the property, the shopping centre was still under construction; that the Nihan Park Plan for subdivision housing was abandoned in January 1957; that had he visited the site between 1953 and 1957 he would have found it prepared for residential development; that he had included the 1960 photograph in his report because it showed the ultimate use of the property and Principal

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Investments, as a sophisticated buyer, would have the ultimate use in mind when purchasing it; that because of the railroad preventing access to the land from the west, the old Welland Canal preventing access from the north and the controlled access provisions applicable to the Queen Elizabeth Way preventing access from the south, the only entrance to the property was from Geneva Street; that as one must give regard to the fact a shopping centre can be easily seen from a much travelled highway and as he could see no difficulty attributable to any lack of access, his valuations did not reflect any access handicap; that the proximity of the piggery would not have any great influence on the value of the land; that the Nihan land could be regarded as a shopping centre property in June 1953; that in making his valuations he had disregarded sales of land made for shopping centre use in 1956, 1958 and 1959; that although he was valuing a shopping centre site as of 1953 he gave no weight to the fact that in 1956 and 1958 lands were being acquired for shopping centre use at $2,500 per acre because that was the normal acreage price and the vendors, although fully aware of the use the lands were to be put, were content to sell at that price; that the normal acreage price in 1953 was from $1,600 to $1,800 per acre but as the appellant and Grisenthwaite were aware of the future use to which the land was to be put the price on the sale to Geneva should have been $7,000 per acre; that as an involved agreement, such as Geneva entered into with Hallman, does not happen over night, there must have been a prior period of negotiation; that he looked at the land, noted it had excellent shopping centre site potential and, knowing the Hallman agreement was made in July 1953, assumed negotiations had been going on which culminated in that agreement; that Principal Investments Limited normally have protracted negotiations before entering into any agreement to purchase land; that he would expect such negotiations would take "perhaps two months, something like that"; that in making his June 10, 1953 valuation he took into account the knowledge which *probably* was in the minds of the vendors at that time; that information obtained from counsel for the Minister was the foundation on which he included in his report the statement that the appellant and Grisenthwaite had negotiated the sale to Dominion Stores on the understanding they would repurchase the 4.427 acres at the same price

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when financing had been arranged for the shopping centre; that without the figures used as the cost of installing services, including one 1957 figure, he could not have made his valuation of $197,000 as of June 10, 1953; that he made his appraisal solely on the basis of value as a potential shopping centre site; that, while in July 1953 it was planned to use only 11.98 acres for shopping centre purposes, all of the 28.173 acres were being used as a shopping centre in June 1961 and he felt such use would be in the minds of prudent vendors in 1953; that he ignored the housing subdivision plan, filed in 1953 and abandoned in 1957, because of the subsequent use of the land and what he saw in 1961; and that he knew of no shopping centre site in the St. Catharines area that had been acquired in 1953 at a cost of $7,000 per acre.

In support of the re-assessment the Minister makes six submissions, all alternatively:

(1) the purchase of the land by the appellant and Grisenthwaite and the subsequent sale of a parcel thereof to Geneva at a profit of $120,481 is income from a business within the meaning of that word as defined by the Income Tax Act;

(2) that if the preference shares are to be regarded as fully paid up, the market value of the land must be the equivalent of $10 per share;

(3) that if the market value of the land is such as to give a value of zero to the preference shares it means the preference shares are wholly unpaid;

(4) that if the market value of the land gives the preference shares a value somewhere between zero and $10, the preference shares are partly paid up;

(5) that to the extent the fair market value of the land, as of June 10, 1953, was less than $205,000 the 16,345 preference shares were issued at a discount and such discount was a benefit or advantage conferred upon the appellant and Grisenthwaite, as shareholders of Geneva, and the amount or value thereof should be included in computing the appellant's 1953 income; and

(6) that issuing the preference shares to the appellant for a consideration less than their par value conferred on the appellant, as a shareholder of Geneva, a benefit or advantage equivalent to the amount of payment for the shares which he was not required to make.

In support of the first submission it was contended shares in the capital stock of an Ontario company can be allotted only

(*a*) for a cash consideration at least equal to the product of the number of shares allotted and issued multiplied by the par value thereof; or

(b) for a consideration payable in property or past services which the directors, in good faith and by express resolution, determine to be, in all the circumstances of the transaction, the fair equivalent of a specified cash consideration.

No such resolution in respect of the property forming the consideration for the allotment of the preference shares to the appellant was adopted by the Geneva directors.

There can be no doubt that, as of the date of the allotment, the appellant regarded the Geneva preference shares as being worth much less than their par value. There also is no doubt he had the possibility of future appreciation in value very much in mind.

If the allotment and issue of the preference shares to the appellant is invalid under the provisions of the *Ontario Companies Act* or if, by reason of the preference shares not being fully paid, the appellant is indebted to Geneva for any unpaid balance, a disadvantage not an advantage was conferred upon him by the Geneva directors. Any such disadvantage, if one does exist, detracts from the extent of any advantage the appellant has derived from the preference shares having been allotted to him as part consideration for the land the company was purchasing.

I attach no importance to the par value of the Geneva preference shares or to the manner in which the outstanding capital of the company is dealt with in its books of account or on its balance sheets or in the annual returns filed with the Provincial Secretary. A bookkeeping entry is not conclusive evidence of the existence of a profit. See *Doughty v. C.I.R.*[1] In my view, it is not necessary to determine whether the allotment of the preference shares to the appellant is valid or invalid or whether the preference shares are or are not fully paid. Those are questions between Geneva and the appellant. The company is not a party to this appeal.

I can understand why the officers charged with responsibility for the administration of the *Income Tax Act* would subject the transaction between the appellant, Grisenthwaite and Geneva to close and prolonged scrutiny. Five aspects of the transaction justifying suspicion are:

(1) the 28.173 acres were sold to Geneva, a company in which all the common shares were owned by a senior employee of a company of which the appellant is the general manager and which bears the name of his partner in acquiring the acreage;

[1] (1927) 96 L J. (P.C.) 45.

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(2) the preference shares issued to the appellant were obviously accepted with the hope they would increase in value over a period of time and so confer on him a capital gain;

(3) the first increase in the value of the preference shares came on July 29, 1953, only seven weeks after the sale to Geneva, when that company agreed to sell 11 98 acres of the land to Hallman for a price of $150,000, about $12,500 per acre;

(4) on January 31, 1957 the remaining acreage then owned by Geneva was conveyed to Principal Investments Limited for an expressed consideration of $205,000;

(5) on July 9, 1957, less than six months after the last sale to Principal Investments Limited, all the Geneva common shares were, for a consideration of only $5,000, sold by Mitchell to Poole, an employee of a company of which the appellant is the general manager; and

(6) the same solicitor acted for the appellant, Grisenthwaite, Mitchell and Geneva.

There must, however, be something more than suspicion to support the re-assessment made by the Minister. While not devoid of sophistication in respect of methods adopted to evade or reduce income tax, I also am aware the day is not yet past when friends deal with each other in good faith, particularly in those cases where an employer is making it possible for an employee to set himself up in business.

Nothing in the record establishes the agreement negotiated between the appellant and Grisenthwaite on the one part and Mitchell on the other part was not an arm's length transaction. The appellant testified he, on June 10, 1953, was not aware of any possibility of any part of the 28.173 acres being sold by Mitchell or by Geneva. He denied Mitchell was, and Poole is, either his trustee or agent. Both the appellant and Poole, a witness called by the Minister, denied the existence of any agreement relating to the common shares of Geneva or the management of the company. The following question and answer were included in the appellant's examination in chief:

Q. Mr. Fraser, did you have any knowledge before June 10, 1953 of any specific possibility of resale of any part of this land by Mr. Mitchell or Geneva Investments Limited?
A. None whatever.

In the face of such uncontradicted testimony, I am not prepared to draw any inference leading to the conclusion the sale to Geneva was a colourable transaction.

The sole question for my determination is the market value of the 28.173 acres as of June 10, 1953. The potential market value of the land at some future date is not relevant.

Conveyance of the 28.173 acres of land to it was the actual consideration Geneva received for the allotment and issue of the preference shares and the assumption by it of liability for the mortgage debt. The net value of the land as of June 10, 1953 was no more and no less than the value of the preference shares as of the same date. (*Falconer v. M.N.R.*[1]) The value of the preference shares or of the land as of the end of the 1953 taxation year does not affect the profit, if any, realized by the appellant on June 10, 1953. The appellant accepted his preference shares with all the advantages and disadvantages pertaining to them, including the disadvantage of the non-voting provision.

Mr. Shankland conceded his valuations were based not on market values but on arithmetical computations plus his personal knowledge of shopping centre site valuations made in recent years. He made full use of the certain knowledge of what had occurred in the 1953-61 period. On the other hand, Messrs. Walker and Tripp were instructed to ignore that certain knowledge.

To justify his June 10, 1953 valuation, Mr. Shankland asserts positively:

> By June 10, 1953 contractual araringements had been made with Dominion Stores Limited and thus the nucleus of a shopping centre had been formed.

No such contract was produced. No other witness referred to such a contract. Support also is lacking for the very definite assertion contained in the Shankland analysis of the subject property:

> The evidence shows that prior to this date the purchasers had concluded negotiations for the sale to Dominion Stores Limited of 4.427 acres of land (forming part of the 32 6 acres referred to above) for a cash consideration of $50,000 (or about $11,300 per acre) on the understanding that they would repurchase this portion of the land at the same price when financing had been arranged for the development of the shopping centre. The $50,000 paid by Dominion Stores Limited was to be used for temporary financing and, when permanent financing was available, the repurchase was to be completed and a store erected and leased to Dominion Stores Limited.

Under cross-examination, Mr. Shankland admitted he based that assertion on information he had obtained from counsel for the Minister. No other witness referred to any understanding respecting the appellant and Grisenthwaite repur-

[1] [1962] S.C.R. 664 at 672.

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chasing the corner lot from Dominion Stores Limited nor to any plans for financing the shopping centre project which the appellant and his partner were thinking of in 1952. It is only right I should mention that counsel for the Minister stated he furnished Mr. Shankland with no information that was not contained in the proceedings before the Tax Appeal Board.

An assumption on which Mr. Shankland relied heavily in making his June 10, 1953 valuation was that the sale of the 11.98 acres to Hallman, on behalf of Principal Investments Limited, was in the minds of the appellant, Grisenthwaite and Mitchell on that date. He based that assumption on what he said was his knowledge that Principal Investments Limited acquired shopping centre sites only after the most thorough investigation and prolonged negotiation. His estimate of the time that would be consumed by such investigation and negotiation was two months. The time lapse between the date of the agreement under which Geneva agreed to purchase the 28.173 acres and the date of the agreement under which it agreed to sell the acreage to Principal Investments Limited was seven weeks.

I cannot accord any weight to the Shankland valuation. It is based on what he saw in 1961, what he was told had occurred between 1953 and 1963 and assumptions for which there is no firm foundation. The appraisal reports, as of 1953, made by Messrs. Walker and Tripp were compiled on a far more realistic viewpoint. The Tripp appraisal is concise and to the point.

There is a difference of only $2,817 between the Walker valuation of $56,346 as of June 10, 1953 and the Tripp valuation of $59,163 as of the same date. I accept the latter figure. Deducting the mortgage liability of $41,550 leaves $17,613 as the net value of the equity of redemption in the 28.173 acres as of the date of the conveyance to Geneva. That was the worth in money of the 16,345 preference shares in the capital stock of Geneva which formed part of the consideration for the sale of the land to that company. On a per share basis the worth was $1.08 per preference share. The 8,172 preference shares which the appellant received on June 10, 1953 had, as of that date, a value of $8,825.76. On that basis of computation the total consideration which the

appellant and Grisenthwaite received on the June 10, 1953 sale to Geneva was $59,163 made up of:

Value of 16,345 preference shares	$ 17,613.00
Assumption of mortgage liability	41,550.00
	$ 59,163.00

Counsel have agreed it will be sufficient for me to determine the amount of the consideration received on the sale to Geneva. It is not necessary for me to determine what portion of the cost of the 32.6 acres should be ascribed to the 28.173 acres sold to Geneva.

The appeal is allowed and the cross-appeal dismissed. The re-assessment will be remitted to the Minister for further consideration.

The appellant is entitled to his costs, to be taxed, on both the appeal and the cross-appeal.

Judgment accordingly.