ISADORE WEINSTEIN ....APPELLANT;

Toronto 1968 June 11-12

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Income tax—Receivables—Reserves—Sale of land—Profit portion of price payable in future—Minister's right to set up reserve for profit—Income Tax Act, s. 85B(1)(b), (d) and (e).

In June 1959 *W* purchased an interest in a parcel of land in Ontario for $23,750 and sold it in October 1959 for $53,750, of which $23,750 was paid forthwith. The balance was to be paid in 25 months and was in fact paid $15,000 in 1961 and $15,000 in 1962. In his income tax return for 1959 *W* (who had taxable income from other sources) did not report his profit from the above transaction in the mistaken belief that it was a capital gain but the Minister in assessing *W* for 1959 added to his reported income the $30,000 profit from the land sale (as being a business profit) and deducted the same amount as a reserve under s. 85B of the *Income Tax Act*. For 1960 *W* was assessed to tax on his income as reported, but for 1961 and 1962 the Minister in each year reduced the $30,000 reserve allowed in 1959 by $15,000, thereby increasing *W's* income for tax purposes by the equivalent amount.

Held (affirming the Tax Appeal Board), notwithstanding that *W* had in no way indicated that he had adopted any method for computing his income, the Minister was entitled to assess him as he had done for 1961 and 1962.

APPEAL from decision of Tax Appeal Board[1] dismissing appellant's appeal from 1961 and 1962 income tax assessments.

[1] 41 T.A B C. 253.

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Hubert J. Stitt and *Schuyler M. Sigel* for appellant.

M. A. Mogan and *M. J. Bonner* for respondent.

GIBSON J. (*orally*):—For the purpose of deciding the issue in this appeal the parties agree that a $30,000 profit made by the appellant in a real estate transaction is income and not a capital gain.

The transaction took place in the taxation year 1959. In June of that year the appellant paid the sum of $23,750 as part of the purchase price of an interest in a parcel of land referred to in these proceedings as the McCord property[2]. On October 6, 1959 the appellant sold all his interest in the said parcel of land for a total consideration of $53,750. The sale price of $53,750 was payable and was in fact paid as follows, namely: (i) $23,750 payable and paid in October, 1959; (ii) $30,000 payable 25 months after October, 1959, and the appellant received $15,000 in 1961 and received the remaining $15,000 in 1962.

The appellant originally took the position that this $30,000 profit was a capital gain. The respondent by re-assessment dated March 30, 1962, categorized this profit as income and purported to assess the profit from this "business" (see section 139(1)(*e*) of the *Income Tax Act*) on an accrual basis under section 85B(1)(*b*) of the Act and pursuant to section 85B(1)(*d*)[3] of the Act set up a reserve for the full amount of it. No appeal was taken from this re-assessment[4].

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[2] The land was situate in Forest Hill Village, Ontario.

[3] Section 85B(1) of the *Income Tax Act* is as follows:

. . .

(*b*) every amount receivable in respect of property sold or services rendered in the course of the business in the year shall be included notwithstanding that the amount is not receivable until a subsequent year unless the method adopted by the taxpayer for computing income from the business and accepted for the purpose of this Part does not require him to include any amount receivable in computing his income for a taxation year unless it has been received in the year;

. . .

(*d*) where an amount has been concluded in computing the taxpayer's income from the business for the year or for a previous year in respect of property sold in the course of the business and that amount or a part thereof is not receivable,

As a result in respect to this re-assessment for 1959 income, the appellant, because of the only position taken, namely, that this $30,000 profit was not income but instead a capital gain, did not adopt either the cash or accrual method of computing this "income from the business" within the meaning of section 85B(1)(*b*) of the *Income Tax Act* unless his failure to challenge the method chosen by the respondent, namely, the accrual method, was an adoption of that method within the meaning of those words in that subsection.

The appellant did not make any reference to this $30,000 profit or reserve in his 1960 income tax return and the respondent assessed the return on the basis that it was filed.

For the 1961 income tax year of the appellant, the respondent by re-assessment dated April 2, 1964, purported to treat this $30,000 reserve as follows, after the receipt by the appellant in that year of $15,000 of this $30,000 profit:

Add: Reserve deducted under section 85B in computing T/P's 1960 income	$30,000	
Less: Reserve allowable under section 85B in computing T/P's 1961 income ...	15,000	15,000.00

For the 1962 income tax year of the appellant the respondent by re-assessment dated April 2, 1964, purported to treat the $15,000 balance of this original $30,000 reserve, following the receipt by the appellant in that year of the balance of the $15,000 profit, as follows:

Add: Reserve deducted under section 85B in computing your 1961 income	15,000.00

(i) where the property sold is property other than land, until a day that is
 (A) more than 2 years after the day on which the property was sold, and
 (B) after the end of the taxation year, or
(ii) where the property sold is land, until a day that is after the end of the taxation year.

there may be deducted a reasonable amount as a reserve in respect of that part of the amount so included in computing the income that can reasonably be regarded as a portion of the profit from the sale; and

(*e*) there shall be included the amounts deducted under paragraphs (*c*) and (*d*) in computing the income of the taxpayer for the immediately preceding year.

[4] The appellant had income from other sources in 1959, and was assessed to income tax thereon in the amount of $1,395.03.—ED.

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On an accrual basis the respondent was consistent in applying the provisions of section 85B of the *Income Tax Act* in his respective assessments of the income of the appellant for each of the taxation years 1959, 1960, 1961 and 1962.

The amounts of tax actually assessed against the appellant in the taxation years 1959, 1960, 1961 and 1962 are identical with the amounts that would have been assessed if the respondent had in fact assessed the appellant on the basis that the appellant had adopted pursuant to section 85B of the *Income Tax Act* a cash basis for computing this profit from this "business".

The issue for decision is whether the amount of $15,000 which the appellant received in 1961 and the further amount which the appellant received in 1962 are subject to income tax in those respective years.

The determination of this issue is dependent (i) on the true interpretation of the provisions of section 85B(1)(*b*) of the *Income Tax Act* in relation to the question of whether the respondent may set up and employ a reserve under section 85B(1)(*d*), that is, assess the appellant on the basis that the appellant adopted an accrual basis for computing profit from this "business" when the appellant has taken no position either in any written document delivered to the respondent or verbally as to how he wished to compute the profit from this "business", that is, neither the position that he wished it computed by the cash method nor by the accrual method; and (ii) whether on the facts of this case this reserve of $30,000 was again deducted in 1960 by the appellant pursuant to section 85B(1)(*d*) of the *Income Tax Act* in computing his income for the taxation year so as to avoid including it in his 1960 income pursuant to section 85B(1)(*e*)[5] of the Act.

The conclusion I reach firstly, is that on a true interpretation of section 85B(1)(*b*) of the *Income Tax Act* the adoption of a method for computing income from a business and the acceptance of it by the respondent for the purpose of that subsection of the Act does not have to follow that chronology, that is, adoption first by the taxpayer and acceptance by the Minister. The reverse may obtain.

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[5] ante, p —.

In this case the re-assessment by the respondent of the 1959 income of the appellant categorized this profit from this "business" as on income account and not on capital account and also used an accrual method of computing this income; and in the circumstances of this case, the appellant's failure to challenge this was in my view an "adoption" of this method for the purpose of this subsection of the Act.

Secondly, I am of the opinion, again having regard to all the facts and surrounding circumstances of this case, that what was done here constituted in the taxation year 1960 a deduction by the appellant again of this $30,000 reserve pursuant to section 85B(1)(*d*) of the *Income Tax Act* in computing income for the 1960 taxation year so that it was not necessary for him to do so, and therefore he did not include this $30,000 profit as part of his income in computing his income for taxation purposes for that year.

It follows in the result therefore that the amount of $15,000 received by the appellant in the taxation year 1961 and the similar amount received in the taxation year 1962 are respectively subject to income tax in those years.

The appeal is dismissed with costs.