BETWEEN:

MANSFIELD HOLDINGS INC. .....APPELLANT;

AND

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

Montreal 1964 Apr. 21, 24

Ottawa 1965 July 9

Revenue—Income—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(e)—Profit from a re-sale of laneway property not a capital gain—Taxable income derived from a venture in the nature of trade—Intention at the time of acquisition of land—Appeal allowed—Reassessment is referred back to the Minister.

The appellant is a company engaged in the real estate business. It had, for many years, derived income by leasing the property, a 4-storey hotel known as the Laurier Hotel, on a profit-sharing basis, to one or more hotel operators and had been regarded as a personal holding company.

It had also acquired lots concerning a scheme for erecting a high-rise hotel. This project never materialized and neither did a later one to build an

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apartment hotel and an office building. In each instance failure occurred.

On March 17, 1957 appellant sold its hotel property for $461,000 and realized a profit of $150,000.

The Minister assessed the appellant for income tax whereby a sum of $142,583 22 was added to the appellant's otherwise taxable income for its taxation year 1957, on the ground that it was income from a business.

An appeal to the Tax Appeal Board was allowed and from that decision the appellant company appeals to this Court.

Held, that the profit realized by the appellant is income and subject to tax.

2. That the profit of $150,000 realized was not a capital gain but a taxable income derived from a venture in the nature of trade, within the meaning of the *Income Tax Act,* R.S.C. 1952, c. 148, ss. 3, 4 and 139(1)(*e*).

3. That the profit made by the appellant is a profit from a business within the statutory definition of the word in the *Income Tax Act.* These principles are enunciated in the decision of the Supreme Court of Canada in *Regal Heights Ltd. v. Minister of National Revenue* [1960] S.C.R. 902.

4. The primary aim of the appellant company in acquiring the laneway property was to consolidate it with the adjoining parcels of land, to be held as an investment. The intention was to re-sell the consolidated block at a profit. So it happened.

5. That the appeal is allowed and the assessment is referred back to the Minister for reconsideration and re-assessment.

APPEAL from a decision of the Tax Appeal Board.

Philip F. Vineberg, Q.C. for appellant.

Paul Boivin, Q.C. and *Paul Ollivier, Q.C.* for respondent.

KEARNEY J.:—This is an appeal from a decision of the Income Tax Appeal Board[1] of March 11, 1963, which dismissed the appellant's appeal from a reassessment made by the Minister on April 21, 1961, whereby a sum of $142,583.22 was added to the appellant's otherwise taxable income for its taxation year 1957 on the ground that it was income from a business.

The alleged profit in question resulted from the re-sale of a parcel of land acquired by the appellant, consisting of an east-west and north-south strip of an L-shaped lane which had been regarded as public property but which turned out to be privately owned and over which neighbouring properties enjoyed rights of ingress and egress. The lane provided a rear entrance to the Laurier Hotel, which was located in the city of Montreal, on the south side of and fronting on Dorchester St. W. near Drummond Street.

[1] 31 Tax A.B.C. 349.

The Board held that the aforesaid profit was not a capital gain, as submitted by the appellant, but taxable income derived from a venture in the nature of trade within the meaning of the *Income Tax Act*, R.S.C. 1952, c. 148, ss. 3, 4 and 139 (1)(*e*).

The events, both prior and subsequent to the transaction in issue, may broadly be described as follows.

In 1954, the city of Montreal expropriated 95′ x 40′ of the property belonging to the aforesaid hotel, which was fully licensed and contained 70 rooms. As a result of the expropriation one third of the building was demolished. The compensation paid by the City to Laurier Hotel was $229,500, which amount was arrived at by mutual consent. The shares of the hotel company, for all practical purposes, were held exclusively by Moses Feldman. The company had, for many years, derived income by leasing the property, on a profit-sharing basis, to one or more hotel operators, and had been regarded as a personal holding company.

Moses Feldman, for many years, had been engaged in the operation in another part of Montreal of a departmental store known as St. Henry Syndicate, located on a property owned by his wife. Two sons of Moses Feldman—Isidore and Max—gradually took over from their father the management of the store. In 1946 the Feldman brothers incorporated a company called I. & M. Holdings Inc. which acquired the above-mentioned property owned by their mother. Except perhaps for one qualifying share issued to Moses Feldman, the stock was held in equal proportions by Isidore and Max Feldman.

Apart from some adjacent property acquired for the extension of the departmental store, the appellant company, for a period of nearly ten years, did not own any other property and did not enter into any sort of real estate transaction until 1955, when it purchased the lane property already referred to. In the same year, Max Feldman became the sole owner of I. & M. Holdings Inc. through the purchase of his brother's share-holdings therein and shortly thereafter the name of the company was changed to Mansfield Holdings Inc.

Moses Feldman was concerned as to what should be done with the unexpropriated portion of the Laurier Hotel

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property, which was 95′ wide by 70′ deep. After consultation with his sons, it was decided to purchase lot 606, located immediately south of the east-west lane strip, in order to recover approximately as much land as had been expropriated. Moses Feldman was only interested in repairing and restoring the original 4-storey Laurier Hotel but the cost of doing so was estimated at $400,000 and, on expert advice, it was decided that such a course was inadvisable.

Isidore and Max Feldman thought it would be a good idea to acquire enough additional property to build a high-rise hotel. Their father agreed if they decided to go ahead with the project he would sell them the residuary property at a very reasonable price. Pursuant to the proposed scheme, Isidore and Max caused to be incorporated two companies called 1126 Drummond Inc. and 1220 Dorchester Inc., in which they each had a 50 per cent interest, and in July 1954 the first named company acquired lot 606 and in August next the other purchased the residue of lot 607-2, being the next one east of the Laurier property and situated at the corner of Dorchester and Drummond Streets. A tavern was located on the said property which was expropriated to the extent of 30′ x 40′ and later demolished. It was while effecting the purchase of the two above-mentioned lots that it was discovered that the lane property was owned by the heirs of the late Lydia Hoyle and it was decided to acquire it if possible. The said heirs were widely scattered but with the aid of legal counsel they were located. The Feldman brothers thereupon decided to have the appellant company—which was still known as I. & M. Holdings Inc.—acquire the said lane property. The purchase was effected by four notarial deeds of sale which were signed in February and March 1955.

In the above complex, the only piece of land owned by the appellant was the lane property for which it paid $2,500 to about 23 heirs and, in addition, about $7,000 representing legal, notarial and investigation costs, or in all approximately $10,000, and concerning which counsel for the parties declared there was no dispute.

The scheme of erecting a high-rise hotel never materialized, neither did a later one to build an apartment hotel, and the same is true of a still later one envisaging an office

building; in each instance the failure was allegedly due to the inability of the interested parties to obtain the necessary mortgage money from insurance companies.

Early in 1957, the appellant received an offer, through a real estate agent, on behalf of parties who had acquired contiguous properties with the intention of constructing a very large scale office building and required the four properties with which we are here concerned for the purpose of rounding out their own holdings.

By pre-arrangement, on March 17, 1957, Laurier Hotel—which acted as a Clearing-House—bought 1) the lane property from Mansfield Holdings Inc.; 2) lot 606 from 1126 Drummond Inc.; 3) lot 607-2 from 1220 Dorchester Inc., in each case for $1 and other valuable consideration. Two weeks later, at the end of March 1957, Laurier Hotel Limited sold, together with its own residual property, the three above-mentioned parcels of land to Dorchester-Drummond Corporation Ltd. for $461,000.

On distribution by Laurier Hotel Limited of the proceeds from this last-mentioned sale, the appellant company admittedly received $150,000 as the sale price of the lane property, and as the Court is not called upon to adjudicate on the taxability of the proceeds realized on this sale by Laurier Hotel Limited, 1126 Drummond Inc. or 1220 Dorchester Inc., the only issue before it is whether the profit realized by the appellant on the aforesaid $150,000—the amount of which is not in dispute—constitutes a capital gain or taxable income.

On these facts, the only question to be determined on this appeal is whether the profit made by the appellant on the re-sale of the laneway property is a profit from a "business" within the statutory definition of the word in the *Income Tax Act*. In my opinion that question can be answered by application of the decision of the Supreme Court of Canada in *Regal Heights Limited v. The Minister of National Revenue*[1].

There is no doubt that the primary aim of the appellant company in acquiring the laneway property was to consolidate it with the adjoining parcels of land that were owned by other companies controlled by the Feldman family and to erect on that consolidated property a hotel or other

[1] [1960] S.C.R. 902.

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building to be held as an investment. There can be equally no doubt that the intention was to resell the consolidated block at a profit if it were not found possible to carry out the primary aim.

This is not a case where, at the time of acquisition, the taxpayer's building plans had proceeded to such a point that it could be said that it intended to use the land for building to the exclusion of any other intended use for it. At the time of acquisition in this case none of the problems involved in a decision to build had been solved. For example, no arrangements had been made for the financing of a building.

The almost irresistible inference in these circumstances of a secondary intention to sell at a profit is supported by the evidence of the principal shareholder of the appellant, which reads in part:

> Q. Did you then discuss with Mr. Rudberg or with any of your other advisers about the necessity of acquiring rights to this lane?
>
> A. Mr. Rudberg pointed out to us very strongly that no matter what happened in the future we must acquire this in order to get the full value of this piece of land He insisted whether we went ahead with him or not it was ridiculous to leave this lane as it was and we must acquire it no matter what the cost, and the same also applied to the property at the corner of Drummond street.

In my opinion the amount in question was income within the meaning of the *Income Tax Act* and taxable accordingly and I so find.

In view of the agreement arrived at between counsel during the hearing that the cost to the appellant of acquiring the instant property instead of being $7,416.78—as assessed by the Minister—was in fact approximately $10,000, the appeal is allowed and the assessment is referred back to the Minister for reconsideration and reassessment accordingly.

As the Minister has been successful in the main matter in controversy, he shall be entitled to his costs.

Appeal allowed.