BETWEEN:

WILLIAM SLATER, SAM ROSS, DAVID ROSS, BETTY SLATER, IDA ROSS, HELEN ROSS, AND GERALD ROSS ..... APPELLANTS;

AND

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

Toronto 1965 Dec. 1, 2

Ottawa Dec. 31

Income tax—Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 26(1)(a), (b), (2), 139(1)(e)—Capital gain—Real estate transaction—Apartment house built by private company—Sale of company's shares—Income from business.

William Slater and Sam Ross were the principal and active members and shareholders, together with the other appellants (wives and relatives) of Slater Ross Investments Ltd., which was formed for the purpose of constructing a 60-suite apartment building.

By consent, all appeals were heard together.

A few months after completion of the apartment building, a deal was consummated for the sale by the shareholders of all of the corporation's shares

In the Minister's view the profits derived by the shareholders on disposing of their shares constituted income from a business, whereas in the appellant's view they represented capital gains from the sale of property intended to be held as an investment.

William Slater appealed to the Tax Appeal Board which dismissed his appeal

All of the appellants appealed before this Court, on the ground that the group intended to retain the building for rental income and that they had only agreed to accept the offer to purchase the shares of the company because William Slater was in desperate financial straits.

Held: That the sale of the shares and the profits realized thereby resulted from the carrying on of a business.

1965

SLATER et al. v. MINISTER OF NATIONAL REVENUE

2. That the building background of William Slater and Sam Ross, the approach and offer to purchase, made by K. during the construction of the building in 1958, the continued negotiations up until the purchase date upon completion of construction and the vendors' insistence upon the sale of the shares rather than of the building, all indicated a business venture and the transactions were therefore taxable.

3. That the profits realized by the non-active shareholders could not be different in nature from those derived by the more active members, the profits derived by all were taxable.

4. Appeals dismissed.

APPEAL from a decision of the Tax Appeal Board.

John A. Gamble for appellants.

W. J. Memmerich, Q.C. and *Bruce Verchère* for respondent.

NOËL J.:—This is an appeal from a decision of the Tax Appeal Board[1] rejecting the appeal from an assessment against one of the appellants herein, William Slater, for the year 1959 whereby the sum of $13,227.80 was added to his income for the said year as a result of the sale at a profit of 1,000 common shares he held in a corporation called Slater Ross Investments Limited incorporated by Mr. Slater and the other appellants, on the basis that the profit so realized had the character of income. The appeal of each of the other appellants was also dismissed by the Tax Appeal Board for the same reasons, and the following assessments made against them as a result of the profit realized by the sale of the following number of shares of Slater Ross Investments Limited for each of them, were maintained: Sam Ross, $11,610.94 on the sale of 1,000 shares; David Ross, $12,327.91 on the sale of 1,000 shares; Betty Slater, $1,565.92 on the sale of 333 shares; Ida Ross, $1,572.76 on the sale of 334 shares and Helen Ross, $1,618.42 on the sale of 333 shares.

The first question for determination is whether these gains were realizations of an enhancement in the value of investments by the appellants, and therefore, not subject to income tax as claimed by them or income from a business within the meaning of sections 3 and 4 and the definition of section 139(1)(*e*) of the *Income Tax Act*, R.S.C. 1952, c. 148 and, therefore, taxable as submitted on behalf of the Minister.

[1] 36 Tax A.B.C. 85.

Sections 3 and 4 of the Act read as follows:

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.

Section 139(1)(*e*) defines "business" as follows:

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;

The appellant Gerald Ross (the husband of Helen Ross, another appellant) who held no shares in Slater Ross Investments Limited is only concerned with a claim for the statutory marital deduction under section 26(2) of the Act and counsel for both parties at the opening of this appeal agreed that in the event the appeal of Helen Ross was allowed, the appeal of Gerald Ross shall automatically be allowed. In the event, however, that Helen Ross's appeal was disallowed, then it follows that Gerald Ross's appeal will also be disallowed.

It also follows that if the assessments of Ida Ross, wife of Sam Ross, and Betty Slater, wife of William Slater, are upheld, their income for the 1959 taxation year will have exceeded $1250 and because of section 26(2) of the Act, their respective husbands will then be entitled only to the deduction of the $1,000 permitted by paragraph (*b*) of subsection (1) of section 26 of the *Income Tax Act* and not the $2,000 permitted by paragraph (*a*) thereof.

The position taken by the appellants herein is that Slater Ross Investments Limited was formed for the purpose of building (which it did at a cost of $412,830.20) a 60 suite apartment building, retaining it for rental revenue and thereby deriving investment income from it. The Minister, on the other hand, submits that the sale of the shares and the profits realized thereby resulted from the carrying on of a business within the meaning of sections 3 and 4 and 139(1) (*e*) of the *Income Tax Act*.

1965

SLATER *et al.* v. MINISTER OF NATIONAL REVENUE

Noël J.

While the transaction here involved the sale of corporate shares rather than real property, the parties, by their counsel, agree that the manner of proceeding cannot affect the character of the transaction which falls to be determined on the sole question of whether it resulted from the operation of a business or not. I might also add that the parties prior to the hearing of this appeal consented to the trial of all appeals being heard together.

W. Slater and S. Ross are the active members of the Slater Ross project. The other appellants are their wives and relatives.

Sam Ross and his father, David Ross, as well as William Slater, hold at the present time many investment properties in Toronto but have also been builders since the end of the war and have, even at times, dealt in real estate. These gentlemen had not, however, dealt in shares of a corporation before selling their shares in Slater Ross Investments Limited but they had, prior thereto, sold apartment buildings and houses which they had built for resale.

A brief background of Sam Ross and W. Slater, the two active members of the group who built the 60 suite apartment building by means of Slater Ross Investments Limited would, I believe, be of some use in determining the nature of the transactions involved in these appeals.

Sam Ross was a carpenter by trade who, for some time, with his father and a brother, bought serviced lots in Toronto and built thereon single family dwellings for resale. One of the last operations of this partnership, however, was to build in 1952 or 1953 seven eight-suite apartment buildings, two of which were sold upon completion and the profit thereon reported as income. Another building was sold some two or three years later, in 1956, and this was also held to be part of the partners' income. The remaining four apartment buildings are still held by the partners from which they are deriving substantial rental income.

Sam Ross, with his wife, was also the main shareholder in a corporation called D. Ross & Sons Limited, which came

into existence when the partnership was dissolved and which in the years 1956, 1957 and 1959 was active in the building of houses for resale.

William Slater's building background, although not as impressive as that of Sam Ross, is still substantial in that until sometime in the year 1958 he was the president of Slater Construction Company Limited, a corporation which had been engaged in the construction and sale of single and detached dwelling houses. It had, however, never built an apartment. At the trial Slater stated that he had not been in the house building business for the past four years.

On the other hand, both of these gentlemen, together with others, and in some cases with the other appellants herein, had interests in a number of companies which had built apartment buildings for the rental revenue they could get therefrom and are still held by them today.

Sam Ross in his evidence listed the following companies of which he was a manager, a director and a shareholder, as owning and operating apartment buildings:

Name of company	No. of suites	Year built
Gaylong Apts. Ltd.	76	1960–1961
Deepwood Industries Ltd.	70	1957
Cap Ross Investments Ltd.	32	1955–1956
Nouville Apts. Limited	64	1962–1963
Deanwood Apts. Limited	57	1963
Norphil Properties Ltd.	174	1964–1965

William Slater stated that he also held shares in the capital stock of Cap Ross Investments, Deepwood Investments Limited and a 10% interest in a partnership called Arbour-Glen, which had all built apartment buildings and operated them for the rental revenue derived therefrom.

They both together with the other appellants herein, also held shares in the capital stock of Slater Ross Investments Ltd., the corporation involved in these appeals, which began the construction of a 60 suite apartment building at 17 Ecclestone Drive in the municipality of Metropolitan Toronto on land acquired by Sam Ross and W. Slater in September 1957. The construction started sometime in May of 1958 and was completed in the spring of 1959. The actual

1965

SLATER *et al.* v. MINISTER OF NATIONAL REVENUE

Noël J.

realization of the project in the case of Slater Ross Investment Ltd. was carried on in the same way as all the other apartment buildings in which Mr. Ross or Mr. Slater were interested. A company was formed, a small amount of money was invested in its shares and in the case of Slater Ross, 4,000 shares at $1 a share were purchased, loans without interest were made by some of the shareholders and in the present case, Sam Ross loaned the company $24,100, David Ross loaned it $19,100, W. Ross loaned it $1,100 and W. Slater loaned it $19,900 and the major part of the cost of the building, up to 80% of its value, was then obtained by means of a first mortgage on the property with some interim financing at the bank between the mortgage advances. The actual construction of the building was in the case of Slater Ross (and the same would apply to all the other apartment buildings in which both S. Ross and W. Slater were interested) carried out as follows. Plans would be supplied by an architect. A construction superintendent would be appointed, and in the present case this man was John Caroll, who, for a salary, co-ordinated all the individual tradesmen and sub-contractors of masonry, plumbing and heating under the skilled supervision of S. Ross and in some cases of W. Slater. The construction superintendent would order the materials after consultation with Sam Ross on the matter of where the various items should be bought and their price. Sam Ross, however, or W. Slater, were not paid for any of the services rendered in the construction of the building. The latter, at p. 84 of the transcript, stated that he did not take too great a part in the construction of the Slater Ross building that he merely talked to certain trades and kept an eye on things in general, admitting, however, that the trades were dealt with in an office situated at 2828 Bathurst Street, Toronto, where the business of his company, Slater Construction, was also conducted.

The Slater Ross Investments Ltd. apartment building, although some of the suites had been rented and were occupied in the beginning of the year 1959, was completed in the spring of that year. The shares of the company were

then sold to a South American group of investors through a Mr. George Kalmar, a Toronto real estate agent, on July 29, 1959, at a time when the suites were nearly all occupied or rented as the building was almost entirely leased except for three suites with offers to lease on two of them.

Sam Ross stated that although the group intended to retain the Slater Ross apartment building for its rental revenue, when one of its shareholders, W. Slater, became involved in some financial difficulties in connection with another apartment building project, the Arbour Glen apartments in which he held a 10% interest, the group finally gave in and accepted to consider an offer from Mr. Kalmar for the purchase of the shares of Slater Ross Investments Limited. It was according to Sam Ross, because Mr. Slater was, as he put it "in such desperate straits" that the shares were sold and also in order to supply Mr. Slater with substantial amounts of cash to meet the calls made upon him as a partner in the Arbour Glen project which had gone far beyond the estimated cost and also to prevent Slater from becoming bankrupt, as he was involved in other projects with the Ross family and the latter were fearful of what might happen if his financial difficulties were not solved.

There was no question at the time of merely purchasing Slater's shares and reimbursing him his loan which would have solved Mr. Slater's problems because, according to Sam Ross, the purchase of Slater's interest, shares and loans at the time would have required investing an additional $45,000 more in the company and this would have been a poor investment.

The assertion that Slater was in dire need of funds to contribute his portion of the monies required to terminate the Arbour Glen project and S. Ross's intent to assist his partner, loses some of its strength when the evidence discloses that at the time the Slater Ross project was entered into in May of 1958, the major part of the increased cost of the Arbour Glen project was already well known. Indeed, the reasons given for the sale of the shares would have been

1965

SLATER *et al.* v. MINISTER OF NATIONAL REVENUE

Noël J.

more persuasive had not Mr. Slater admitted that (1) at the time he entered into the Slater Ross project in May 1958, the total cost of the Arbour Glen project had already attained, according to a statement from their auditors which he had at the time, the sum of between $2,200,000 to $2,300,000 which was already way beyond the original estimate of the building of $1,300,000 and (2) as the building eventually cost in the neighbourhood of $2,500,000, the difference to be made up between May 1958 and its termination in 1959 was, therefore $300,000 and the amount Mr. Slater was called upon to contribute as his share was 10% of this amount, i.e., $30,000.

It also appears that Slater's evidence prior thereto had been that the payment of such a sum would not have been a problem because in May 1958 he was not in serious financial trouble and at the time there was no reason for him to consider a possible sale of his interests in the Slater Ross building because he would have had no difficulty in getting up to $60,000 elsewhere.

A considerable part of the evidence dealt with the circumstances in which Kalmar's offer to purchase the shares of the Slater Ross company was made and the manner in which the offer was accepted for the purpose of establishing that it was unsolicited and I must say that the evidence in this regard supports this assertion. The fact, however, that the offer was unsolicited and that the company did not advertise the building for sale does not exclude the possibility that the transaction which took place in this manner is a business transaction. As a matter of fact, the manner in which the principals herein were approached by Kalmar in the fall of 1958 when these experienced and skilled builders with a prior history of building activities were in the process of constructing the building did not require them to put up a sign to sell their asset as the potential buyer was already there; the further approaches made by him to both W. Slater and S. Ross during its construction, the fact that the shares were sold shortly after completion and at a time when there was nearly complete occupancy and before the company had started to depreciate its assets which was,

therefore, at a time when the asset had attained its highest value, is precisely the way a trader builder would have proceeded and does, in my view, stamp this as a business transaction.

There is no doubt evidence of some reluctance on the part of Sam Ross to sell the Slater Ross building, and this appears from Mr. Kalmar's evidence at p. 160 of the transcript, as well as from the protracted negotiations over several months, some of which were caused by the requirement that the shares be purchased which S. Ross insisted upon and also by the procedure to establish the value of the shares. This reluctance and these lengthy negotiations, however, in my view, appear to have been due more to the appellant's concern with the danger of incurring taxation in this transaction and the taking of means to avoid same than with an unwillingness to part with an investment. The building background of the principals herein, the approach and offer to purchase made by Kalmar during the construction of the building in the fall of 1958 under the skilled supervision of both S. Ross and W. Slater, Kalmar's persistant and protracted negotiations during the year 1959 (which surely must have been given some encouragement) while the building was still in the process of construction, up to the actual purchase date, and S. Ross's insistance upon the shares of the company being purchased instead of the building itself, all indicate, and I must from the evidence come to this conclusion, a business venture and the transactions are therefore taxable.

Now although it is possible for a former builder in a proper case to dispose of a building without incurring taxation, the evidence that he has removed himself from that trade must be substantial to overcome the history of his former activities and I must say that the appellants have not been successful in doing this here.

When both S. Ross and his father, as well as Mr. Slater, relinquished the single house construction business to build apartment buildings, the evidence shows that the trend in Toronto at the time was changing from the former

1965

SLATER *et al.* v. NATIONAL REVENUE

Noël J.

to the latter. The fact that the appellants have, on other projects, retained the apartment buildings so built, which would indicate a certain course of conduct of building for investment, does not necessarily eliminate the strong inferences which flow from the evidence in these appeals that as far as the Slater Ross project is concerned, it was dealt with by these experienced builders and dealers, S. Ross and W. Slater, as a trading asset and that, therefore, the profits derived therefrom are income and should be taxed. Indeed, whether S. Ross and W. Slater built by means of a construction company or as individuals or by means of an apartment company, they are still in the business of constructing buildings for sale if they build and sell upon completion as they have done in the case of and in the circumstances of the Slater Ross building even if, in respect to other projects, they have retained the buildings for rental revenue.

The profits realized by the other appellants, David Ross, Betty Slater, Ida Ross, Helen Ross, the non-active shareholders, who left the handling of the company's activities to Sam Ross and, in some measure, to W. Slater, and were guided by their judgment in this matter, are also income receipts. They can be in no different position than the more active members of this group. Indeed, if the transactions are business transactions, any profits derived therefrom by any of the members are taxable. It follows that as the appeal of Helen Ross is disallowed, the appeal of Gerald Ross is also disallowed.

The appeals are, therefore, dismissed with costs and the assessments maintained. As all these appeals were heard together, counsel for the respondent will be entitled to one set of counsel fee at trial only to be apportioned between the seven appellants in accordance with the amounts of their respective assessments.