

Winnipeg
1965
Nov. 24, 25

BETWEEN :

IDEAL INVESTMENTS LTD. APPELLANT;

Ottawa
Dec. 8

AND

MINISTER OF NATIONAL REVENUE . . RESPONDENT.

*Income tax—Profit on sale of land—Company formed to deal in land—
Series of purchases and sales—Whether trading transactions—Intention
—Whether properties purchased as investment or for sale.*

Appellant company was incorporated in Manitoba in 1956 with the stated objects, *inter alia*, of leasing and dealing in real property. Between 1956 and 1962 appellant purchased 11 properties in Winnipeg in close proximity to commercial districts which were rapidly being encroached upon by commerce, and in addition a 219 acre farm a short distance from Winnipeg. In 1956 and 1957 the appellant sold two city properties, which were virgin land, at a profit, and paid income tax thereon. In 1959 it sold at a profit three residential properties which

were under lease to rooming-house keepers and paid income tax thereon. In 1959 it also sold at a profit 85 acres of its farm which was under lease and paid tax thereon. In 1962 it sold at a profit three properties. One of these had originally been acquired in a run-down condition and been repaired and leased to a grocer. The second property, which adjoined the first, had been acquired by appellant with the intention of providing sufficient area for an apartment or commercial site, and it and the third property were both under lease. Appellant was assessed to tax on its profit from the sale of these properties and appealed, contending that the properties had been purchased as investments and not for sale.

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Held, dismissing the appeal, the whole of the evidence indicated that the properties were acquired with the over-all intention of turning them to account for profit.

APPEAL from a decision of the Tax Appeal Board.

C. V. McArthur, Q.C. for appellant.

R. A. Wedge and S. Hynes for respondent.

CATTANACH J.:—This is an appeal from a decision of the Tax Appeal Board¹, dated December 29, 1964 upholding an assessment by the Minister in respect of the appellant's income for its 1962 taxation year.

The appellant is a joint stock company incorporated pursuant to the laws of the Province of Manitoba by Letters Patent dated March 22, 1956 at the behest of David Levin, Q.C. and Ben Green, a retired electrical contractor for the following purposes and objects:

To carry on the business of a holding and investment company and in connection therewith to lease, exchange, hold, own, mortgage, dispose of, improve and deal in and with lands and real and personal property and any rights and interest therein.

The authorized capital of the appellant was \$50,000 divided into 495 preferred shares of par value of \$100 each and 50 common shares of the par value of \$10 each. None of the preferred shares have been issued.

Immediately prior to the incorporation of the appellant, Messrs. Levin and Green possessed, as joint owners, four properties in the City of Winnipeg municipally known as 196-198 Smith Street, 175 Harvard Avenue, 515 Sargent Avenue and lots 4 to 11 on Beaverbrook Street.

These four properties were transferred to the appellant on March 22, 1956 in consideration of \$55,135.86 being the cost thereof to Messrs. Levin and Green less the deprecia-

¹ (1964) 37 Tax A.B.C. 225.

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tion thereon. Messrs. Levin and Green were each issued 25 common shares of the par value of \$10 each, out of which issue of common shares each transferred one qualifying share to a daughter. The balance of the purchase price of the four properties, and the price of other assets also purchased by the appellant at the same time totalling \$3,397.51, was loaned to the appellant by Levin and Green on the security of demand notes, without interest, in the amounts of their respective interests therein.

Mr. Green became the president of the appellant and Mr. Levin its secretary.

In the year 1956 the appellant acquired two further properties in the city of Winnipeg, municipally described as 1275 Alexander Avenue and 56 Donald Street.

In 1958 the appellant purchased four further properties being 78 Hargrave Street, 635 Broadway Avenue, 207 Edmonton Street and a farm at Charleswood consisting of approximately 219 acres. The farm at Charleswood is located between eight and ten miles from the centre of the city of Winnipeg.

In 1960 the appellant purchased 190 Smith Street which abuts 196-198 Smith Street.

In 1962 the appellant purchased a further property municipally described as 488 and 492 Hargrave Street.

Between 1956 and 1962 the appellant purchased, in all, twelve separate properties.

In 1956 and 1957 lots 4 to 11 on Beaverbrook Street were sold by the appellant and a profit realized thereon, upon which income tax was paid. Mr. Green testified that those lots, which were virgin land, were purchased with the intention of building houses thereon for sale. However, mortgage money in the amounts expected was not forthcoming and the lots were sold in two transactions to a building contractor.

In 1959 the appellant sold the two properties known as 515 Sargent Avenue and 1275 Alexander Avenue, the first of which had been transferred to the appellant upon its incorporation and the second had been purchased by the appellant in 1956 subsequent to its incorporation. Profits were realized from both such sales upon which the appellant paid income tax. Both of these properties were residen-

tial houses which the appellant leased to tenants who in turn let rooms. The appellant experienced difficulty in leasing these premises to satisfactory tenants for which reason the properties were sold. It had been anticipated that 515 Sargent Avenue might be a suitable apartment site but the appellant took no steps to erect such a building. Approximately three years elapsed between the purchase of these two properties by the appellant and their ultimate sale by it.

Also in 1959 the appellant sold the property at 78 Hargrave Street which it had purchased in 1958. Difficulties similar to those experienced with respect to 515 Sargent Avenue and 1275 Alexander Avenue were also experienced with this property in addition to which the property was damaged by fire. Income tax was paid upon the profit realized from this sale. In this same year the appellant sold 85 acres of the 219 acre farm it had purchased at Charleswood. A profit was realized from this sale upon which income tax was paid. Mr. Levin and Mr. Green testified that the farm had been purchased by the appellant to achieve a diversification of investment. When first purchased the entire 219 acres was rented to a tenant on a crop sharing basis. After the sale of 85 acres in 1959, the remaining 134 acres continued to be operated on a crop sharing basis with a tenant.

In 1962, (which is the only taxation year under review in the present appeal,) the appellant sold the property at 196-198 Smith Street, which had been transferred to it by Messrs. Levin and Green on its incorporation on March 22, 1956 together with 190 Smith Street which the appellant had purchased in 1960. The property at 56 Donald Street which the appellant had purchased in 1956, shortly after its incorporation, was also sold by it in 1962. The dispute in the present appeal concerns the taxability of the profits realized upon these two particular sales.

The property at 207 Edmonton, which the appellant purchased in 1958, was sold in 1963, that is subsequent to the taxation year now under review.

From the foregoing it can be seen that of the twelve properties purchased by the appellant, seven were sold by it, as was a portion of an eighth property, being the farm at Charleswood. Of the twelve properties so owned by the

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appellant it still retains two, they being 635 Broadway Avenue and 488-492 Hargrave Street, both acquired in 1958 and the remaining 134 acres of the 219 acre Charleswood farm also purchased in 1958. Of the eight sales so made by the appellant, income tax was paid on the profits resulting from five of such sales. Of the three remaining sales, that of 207 Edmonton Street occurred after the taxation year under appeal and it is the profits from the sales of 190, 196-198 Smith Street and 56 Donald Street which are in issue now.

It is fair to say that, with the exception of lots 4 to 11 on Beaverbrook Street and the Charleswood farm, none of the properties owned by the appellant were in a choice residential area. The property at 196-198 Smith Street was leased to a tenant who carried on a corner grocery store. When this property was acquired by Messrs. Levin and Green it was in a generally run-down condition. They carried out repairs thereto. In 1960 the premises at 190 Smith Street were acquired by the appellant for the avowed purpose of improving the holdings on Smith Street by increasing the frontage so that it would be more desirable for an apartment or commercial site. While the appellant, at one point, contemplated the erection of a car wash, no steps were taken to implement that project nor any other similar project. However, additional rental income was received from 190 Smith Street. Subsequent to the sale of this combined property in 1962 the property has been allowed to deteriorate by the purchaser to the extent that the buildings have been condemned by the municipal authority for residential use.

The property at 56 Donald Street was also in an area subject to development for apartment sites. The appellant attempted to purchase the property adjoining 56 Donald Street, again for the avowed purpose of improving this particular holding, this time as a potential apartment site, but the appellant considered the prospective vendor's asking price to be exorbitant. Instead the appellant accepted an offer to purchase 56 Donald Street from an owner of property in the immediate area who was engaged in assembling of a parcel of real property. The premises at 56 Donald Street had been leased by the appellant to a tenant who had sublet space therein.

Incidentally the appellant had no office space of its own. It had no telephone and consequently no telephone directory listing. None of the appellant's properties were advertised for sale, nor were any of them listed for sale with a real estate agent. The appellant refused several unsolicited offers to purchase properties owned by it for the obvious reason that it considered the offered prices too low. However, the appellant did pay a portion of the real estate agent's commission on the sale of 190, 196-198 Smith Street, but did so to ensure consummation of that sale at an attractive profit. I do not attach any significance to the fact that neither of the subject properties were advertised or listed for sale. The appellant did not have to do so since offers were made to it without solicitation.

Neither do I attach any significance to the precise terms of the objects and purposes for which the appellant was incorporated as set out in the Letters Patent. The question to be determined is not what the appellant might have been authorized to do, but what in fact it did.

By the Notice of Appeal from the Tax Appeal Board (*supra*) the appellant sets out its case as follows:

1. That the properties known as 196-198 Smith Street, and 56 Donald Street, were purchased as an investment but the income from the said properties when sold in 1962, did not warrant their retention for investment purposes on the basis of the price realized from the sale thereof and the proceeds of the sale or sales were used for the purpose of purchasing other property for investment.
2. The sale of the said properties did not constitute an adventure or concern in the nature of trade on the part of the Appellant.
3. The profits realized from the sale of the said property were capital gain and should not have been included as taxable income.

The Minister's reply insofar as it is relevant, reads as follows:

5. In assessing the Appellant he assumed:
 - (a) that the Appellant acquired the 196-198 Smith Street, 190 Smith Street, and 56 Donald Street with a view to trading in, dealing with, or otherwise turning to account a profit;
 - (b) that the Appellant realized during 1962 a profit of \$71,214 25 from the purchase and subsequent resale of the 196-198 Smith Street, 190 Smith Street and 56 Donald Street;
 - (c) that the profit realized from the sales year constituted part of his income for the 1962 taxation year since they were profits from a business or adventures in the nature of trade.

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6. In making the assessment referred to in paragraph 6 hereof, he allowed as a deduction the sum of \$44,757.41, pursuant to para (d) of ss. (1) of sec. 85B of the Income Tax Act, in computing the Appellant's income.

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9. The Respondent states that the profit realized from the sale of 196-198 Smith Street, 190 Smith Street and 56 Donald Street is income from a business within the meaning of para (e) of ss. (1) of sec. 139 of the Income Tax Act and was properly included in computing the Appellant's income for its 1962 taxation year in accordance with the provisions of sections 3 and 4 of the said Act.

The narrow issue is, therefore, whether the appellant purchased the properties at 196-198 Smith Street, and subsequently 190 Smith Street, and 56 Donald Street, with a view to trading in, dealing with, or otherwise turning them to account at a profit. If it was not the appellant's sole and exclusive purpose at the time of acquiring 196-198 Smith Street, 190 Smith Street and 56 Donald Street to derive rental income therefrom, but that it also entertained the possibility of their disposition at a profit, then the resulting profits are taxable. If, however, as the appellant alleges, these purchases were made as an investment for the sole and exclusive purpose of receiving rental income and that the properties were sold only because the price realized from the sale thereof did not warrant the retention of the properties as an investment, then the profits from the disposition thereof would not be taxable.

The onus of showing that the assumptions made by the Minister that the former was the case, were unfounded, falls on the appellant.

The question of fact as to what the appellant's purpose was in acquiring these properties must be decided after considering all the evidence. The evidence of Mr. Green and Mr. Levin at the trial, that the properties were acquired for the purpose of deriving rental income therefrom, is only part of the evidence. The interest and intentions of Mr. Levin and Mr. Green are identical with those of the appellant from the beginning of its existence. While their evidence may have been given in all sincerity, nevertheless, it still may not reflect the true purpose at the time of acquisition. Statements now made as to intention at the time of acquisition must be considered along with the objective facts.

In my opinion the whole of the evidence points to the conclusion that these particular properties were acquired with the overall intention of turning them to account for profit. None of the twelve properties with exception of the two properties before mentioned purchased by the appellant were in desirable residential areas. While the buildings were in a reasonable state of repair or were put in such state by the appellant to realize rental income, nevertheless, all such properties, with the exception of the Charleswood farm and the lots on Beaverbrook Street, were in areas that were in close proximity to commercial districts and were rapidly being encroached upon by commerce, if that encroachment had not already occurred.

A review of the income statements attached to income tax returns for the years previous to 1962, discloses that most of the properties sold at a profit upon which income tax was paid, did not yield returns which would characterize them as sound investments. In some instances, when depreciation was deducted, losses were incurred. I cannot differentiate between those transactions upon which income tax was paid on the resulting profits, apparently without question, from the sales of the Smith and Donald Street properties. Furthermore, it seems obvious that the acquisition of 190 Smith Street and the attempt by the appellant to acquire additional property adjoining 56 Donald Street to increase the frontage of those respective properties and thereby improve them, could only have been with the ultimate objective of rendering the properties more attractive and saleable as commercial or apartment sites despite the fact that additional rental income was received from 190 Smith Street during the interval it was owned by the appellant.

After giving careful consideration to all the evidence, I am not satisfied that there was a balance of probability that the appellant acquired the Smith Street and Donald Street properties for the purpose of deriving rental income from them to the exclusion of any purpose of disposition at a profit.

Accordingly it cannot be said that the assumptions of the Minister in assessing the appellant as he did were not warranted.

The appeal is, therefore, dismissed with costs.

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